

**OSCA/OCI'S FAMILY COURT CASE LAW UPDATE**  
**September 2008**

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## **Delinquency Case Law**

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

No new opinions for this reporting period.

### ***Second District Court of Appeal***

J.L.H. v. State, \_\_ So.2d \_\_, 2008 WL 4277143 (Fla. 2d DCA 2008). The juvenile appealed his adjudication for resisting an officer without violence. An officer received a call to investigate a burglary to a vehicle at a motel. The call stated that a next door neighbor was trying to steal the complainant's Xbox out of his car. When the officer arrived, he saw the juvenile run quickly inside an apartment upon seeing the officers. The officer investigated the burglary and determined that there had not been a burglary to the vehicle. The officer asked the complainant who the juvenile was, and the complainant, who was related to the juvenile, gave the officer an incorrect name for the juvenile. The juvenile gave the officer an incorrect date of birth. It took some time, but the officer was finally able to determine the juvenile's true name. When the officer showed the juvenile the computer screen with his true identity, the juvenile ran. The officer and a fellow officer quickly apprehended the juvenile and arrested him for giving false information and resisting without violence. Defense counsel argued that in order to be convicted of giving a false name, one must be under arrest or lawful detention and that the officer had given no testimony showing that the juvenile was under either type of restraint. The State responded by not pressing that count. Defense counsel argued that since there was no basis for an arrest for giving a false name, there was no basis for an arrest for resisting arrest without violence because one may resist an unlawful arrest without violence. The juvenile filed a motion to dismiss pursuant to Florida Rules of Juvenile Procedure 8.110(k). The trial court denied the motion, ruling that the officer had every right to detain the juvenile because he was investigating a burglary. The State argued that a reasonable inference could be made that the officer was still engaged in the execution of a lawful duty when the juvenile fled. The State asserted that this inference can be made from the fact that the officer never testified that his burglary investigation had concluded prior to his inquiry into the juvenile's identity. The Second District Court of Appeal found that the officer testified in pertinent part as follows: "I investigated the burglary, but there was no burglary to the vehicle. After that, I asked the complainant ... who he [the juvenile] was." The Second District held that this testimony clearly indicates that the officer investigated the juvenile's identity only after he determined that no burglary had occurred. More significantly, the officer provided no testimony to indicate that he had a reasonable suspicion that the juvenile was committing, had committed, or was about to commit a crime. Thus, the officer had no legal basis for detaining the juvenile. While the juvenile knew that the officer wanted to detain him, the officer had no legal basis to detain him. Thus, the officer was not lawfully executing a legal duty when the juvenile ran from him, and therefore, the juvenile could not be guilty of resisting. Accordingly, the Second District reversed

and remanded for discharge.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/September/September%2019,%202008/2D08-543.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/September/September%2019,%202008/2D08-543.pdf) (September 19, 2008).

J.D.O. v. State, \_\_ So.2d \_\_, 2008 WL 4277142 (Fla. 2d DCA 2008). The State appealed an order finding the juvenile incompetent to stand trial for thirteen offenses dating back to 2005, when he was eight years of age. The Second District Court of Appeal found that the test for whether a defendant is competent to stand trial is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. The two experts who testified at the competency hearing stated that the juvenile was competent to stand trial. Most significantly, the trial court found that the juvenile was competent now. However, the trial court found the juvenile was incompetent to stand trial based on its further finding that he was not competent as to the 13 pending cases which began when he was 8 years of age, some two years ago. The trial court found there was insufficient evidence that he could recall the facts of his 13 cases so that he could discuss and separate the facts of these cases with his attorney and adequately prepare a defense. The Second District found that a trial court's finding regarding a defendant's competency is subject to the abuse of discretion standard of review. The Second District held that the trial court abused its discretion in finding the juvenile incompetent to stand trial when it specifically found that he is competent to stand trial now, which finding is supported by the experts' testimony. The fact that the juvenile may not be able to recall all of the facts of his cases is not the test for competency. Accordingly, the Second District reversed and remanded for further proceedings.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/September/September%2019,%202008/2D07-5209.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/September/September%2019,%202008/2D07-5209.pdf) (September 19, 2008).

S.G. v. State, \_\_ So.2d \_\_, 2008 WL 4225769 (Fla. 2d DCA 2008). The juvenile 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. 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. Therefore, these 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/September/September%2017,%202008/2D07-523.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/September/September%2017,%202008/2D07-523.pdf) (September 17, 2008).

C.E.L. v. State, \_\_ So.2d \_\_, 2008 WL 4092820 (Fla. 2d DCA 2008). The Second District Court of Appeal addressed whether a person who knowingly fails to heed a police order to stop is guilty of resisting, obstructing, or opposing a law enforcement officer without violence under s. 843.02, F.S. (2007) when the order to stop is justified by Illinois v. Wardlow, 528 U.S. 119 (2000). The juvenile ran from two approaching officers in a high-crime area and then failed to

obey the police command to stop. The juvenile was apprehended and it was determined that there was an outstanding warrant for his arrest. Pursuant to Florida Rule of Juvenile Procedure 8.110(k), the juvenile moved for a judgment of dismissal. The trial court denied the motion and adjudicated him delinquent. The juvenile appealed the denial and argued that the State failed to prove that his flight obstructed the officers in the performance of their legal duties. The Second District found the issue raised on appeal was not specifically presented to the trial court. However, the issue was one of fundamental error and the court proceeded to the merits of the issue raised on appeal. The Second District found that in order to establish the offense under s. 843.02, F.S. (2007), the state must establish that the defendant fled with knowledge of the officer's intent to detain him and that the officer was justified in making the detention due to a founded suspicion that the defendant was engaged in criminal activity. Accordingly, a defendant who flees from the police is culpable under s. 843.02, F.S. (2007), if a law enforcement officer issues a lawful order to the defendant to stop; the defendant has knowledge of the order and that it is issued by a law enforcement officer; and the defendant refuses to obey the order. There was no suggestion either that the order to stop was unlawful or that the juvenile did not act in knowing defiance of the order. The question presented was whether an exception should be made from the general rule that knowing defiance of a lawful order to stop constitutes a violation of s. 843.02, F.S. (2007). The juvenile argued that the general rule is inapplicable when the order to stop is justified under Wardlow which held that unprovoked flight upon noticing the police in a high-crime area was suggestive of wrongdoing and therefore provided reasonable suspicion justifying an investigatory detention. The Second District held that once the police obtained justification based on Wardlow to stop the juvenile and acted pursuant to that justification, the juvenile was required to comply. Although the mere act of running from the police was not an offense under s. 843.02, F.S. (2007), once a lawful command to stop had been issued by an officer, knowing defiance of that command was such an offense. An officer unquestionably is in the lawful execution of a legal duty when he acts to detain a person based on reasonable suspicion pursuant to Wardlow. There is no reason that a person who knowingly defies an officer's lawful command to stop in such circumstances should be absolved from responsibility under s. 843.02, F.S. (2007). Lawful police action based on Wardlow should not be treated differently than lawful police action based on other grounds. The Second District receded from its decision in J.D.H. v. State, 967 So.2d 1128 (Fla. 2DCA 2007) to the extent that it is inconsistent with this decision. The Second District affirmed the trial court's denial of the juvenile's motion.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/September/September%2005,%202008/2D07-4515.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/September/September%2005,%202008/2D07-4515.pdf) (September 5, 2008).

### ***Third District Court of Appeal***

T.G. v. State, \_\_\_ So.2d \_\_\_, 2008 WL 4224343 (Fla. 2d DCA 2008). The State appealed an order discharging the juvenile under Florida Rules of Juvenile Procedure 8.090, the juvenile version of the speedy trial rule. After trial had been set within the window period, the State provided late discovery to the defense, immediately prior to the trial date. Finding material prejudice to the juvenile, the trial court granted the defendant's motion for a continuance to be charged to the State, and subsequently discharged the defendant. The State appealed. The Third District Court

of Appeal affirmed the discharge. The Third District found that in speedy trial matters, there is a general rule (defense continuance waives benefit of speedy trial rule) and an exception (no waiver where there has been inexcusable delay in providing discovery, or other violation of defense discovery rights). In appropriate circumstances a defense continuance does not waive the speedy trial rule where there has been an inexcusable delay in providing discovery, or other violation of defense discovery rights. In the instant case, the defense filed a motion for a continuance to be charged to the State. After a hearing, the motion was granted and the trial was continued to a date outside of the recapture period. Thereafter, the trial court granted the defense motion for discharge. The trial court's factual determinations are reviewable for abuse of discretion. The Third District held that no abuse of discretion was shown. The trial court found that the discovery was inexcusably late, substantial, and prejudicial to the defense. Further, exclusion of evidence was not an effective remedy where the late-disclosed discovery pointed toward evidence and witnesses which tended to exculpate the respondent, but which counsel could not reasonably develop on the eve of trial-which was during the window period. The Third District held that the trial court's findings and rulings conformed to the requirements of the case law and the exception to the general rule was applicable. The order discharging the juvenile was affirmed.

<http://www.3dca.flcourts.org/Opinions/3D07-2633.pdf> (September 17, 2008).

### ***Fourth District Court of Appeal***

*C.Y. v. State*, \_\_ So.2d \_\_, 2008 WL 4146850 (Fla. 4th DCA 2008). The Fourth District Court of Appeal denied the State's motion for rehearing, but withdrew their previous opinion filed July 9, 2008. The juvenile had appealed a restitution order. The Fourth District found that a juvenile has a constitutional right to be present at hearings to determine the imposition and amount of restitution absent a voluntary and intelligent waiver of that right. The record reflected that the juvenile did not knowingly and intelligently waive his right to be present at his restitution hearing. In order for a defendant to voluntarily absent himself from a hearing, a defendant must have had notice of the hearing and intentionally avoided it or left the court during the proceeding. In the instant case, the trial court had concluded that the juvenile had absconded because the sheriff tried to serve the juvenile with the date of the restitution hearing at the last address the juvenile had given, which turned out to be a "bad address." The State argued that the juvenile's failure to inform the court of his correct address while he was on probation and while a restitution hearing was pending constitutes substantial competent evidence that the juvenile waived his presence at the restitution hearing. There was no sworn evidence about the juvenile's absence or of an intent to flee the jurisdiction. The Fourth District held that there was no basis in the record for concluding that the juvenile's absence from the restitution hearing constituted a waiver of his right to be present. The Fourth District reversed and remanded for a new restitution hearing. The Fourth District also noted the absence of findings concerning the juvenile's ability to earn and to pay. Section 985.437(2), F.S. provides that the amount of restitution in a juvenile case may not exceed an amount the child and the parent or guardian could reasonably be expected to pay or make.

<http://www.4dca.org/opinions/Sept%202008/09-10-08/4D07-3608.mr.pdf> (September 10, 2008).

T.B. v. State, \_\_ So.2d \_\_, 2008 WL 4147113 (Fla. 4th DCA 2008). The juvenile was found guilty of misdemeanor stalking. The offense took place at a mall where the victim worked at a skin care kiosk. The juvenile initially walked past and uttered the words “faggot, queer” while looking at the victim. Fifteen to twenty minutes later, the juvenile yelled “faggots,” loudly, from the second floor, directly above the victim. Some shoppers laughed and smirked; others looked sympathetically at him. The victim was very upset and he closed the kiosk. The victim told a security guard what had happened and then returned to the kiosk to re-open. An hour later, the juvenile approached the kiosk with a group of kids and again taunted the victim with the words “faggot, queer.” The victim testified that he was deeply embarrassed and emotionally upset by these incidents. The security guard confirmed that the victim was very upset. Although he did not hear the words, he did observe the juvenile staring at the victim. At the close of the State's case, the juvenile moved unsuccessfully for a judgment of dismissal. Juvenile appealed the denial. The juvenile did not argue that his conduct is constitutionally protected or served a legitimate purpose. Section 784.048, F.S. (Supp.1992) proscribes a particular type of criminal conduct defined at length in the statute. The conduct must be willful, malicious and repeated, and form a course of conduct which would cause substantial emotional distress in a reasonable person in the same position as the victim. As for the juvenile's argument that there was insufficient evidence of substantial emotional distress to the victim, the juvenile is correct that the standard is that of a reasonable person in the same position as the victim. Here, the juvenile's conduct took place at a crowded shopping mall and the victim's place of work a place the victim had to be and could not avoid. On three separate occasions, within a ninety minute period, the juvenile taunted the victim with the words “faggot, queer.” Two of the incidents were in earshot of others, and one was yelled from the second floor of the crowded mall. Viewing the testimony in the light most favorable to the state, the Fourth District concluded that, under the facts, the juvenile's conduct would likely substantially emotionally upset a normal person in the same position as the victim. The court without further comment on the evidence, found it sufficient to prove that the juvenile acted willfully and maliciously. Thus, in this case, a rational trier of fact could find that the elements of misdemeanor stalking: willfulness, malice, repeated harassment, and emotional distress, have been established beyond a reasonable doubt. Guilt, therefore, fell within the province of the trier of fact. Judgment affirmed.

<http://www.4dca.org/opinions/Sept%202008/09-10-08/4D07-3854.op.pdf> (September 10, 2008).

### ***Fifth District Court of Appeal***

No new opinions for this reporting period.

## Dependency Case Law

### ***Florida Supreme Court***

In Re: Amendments To Florida Rules Of Juvenile Procedure, --- So.2d ----, 2008 WL 4346502 (Fla. 2008). Rule 8.225 is amended to require notice to foster or pre-adoptive parents of a proceeding or hearing in a chapter 39 dependency case. Forms 8.962 and 8.963 are amended to incorporate changes made to the injunction motion and order forms set forth in §39.504, Florida Statutes, concerning injunctions entered pending disposition in dependency cases. Changes to §39.503(6), Florida Statutes, required form 8.968 to be amended to state that when the Department of Children and Family Services made its diligent search to determine the residence of a parent or prospective parent, it conducted a thorough search of at least one electronic database specifically designed for location of persons. Form 8.977 is amended in response to newly created §743.046, Florida Statutes, which removes the disability of nonage for certain minors to ensure they can secure utility services. <http://www.floridasupremecourt.org/decisions/2008/sc08-1612.pdf> (September 25, 2008).

### ***First District Court of Appeal***

No new opinions for this reporting period.

### ***Second District Court of Appeal***

L.S. v. Department of Children and Family Services,--- So.2d ----, 2008 WL 4182740 (Fla. 2d DCA 2008). A mother and father appeal their child's adjudication of dependency based upon the mother's failure to protect and the father's alleged sexual abuse of the child. Following non-evidentiary hearings, over the parents' objections, the trial court ruled that the seven-year-old child would be examined at the adjudicatory hearing in camera by a trained forensic examiner. Both the father and the mother objected and claimed that the child's competency had never been determined. Section 90.605(2), Florida Statutes (2007), provides that, as a matter of trial court discretion, "a child may testify without taking the oath if the court determines the child understands the duty to tell the truth or the duty not to lie." In determining whether a child is competent to testify, "the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a moral sense of the obligation to tell the truth." In this case, the interviewer did make it clear that the child knew the difference between the truth and a lie, however, the interviewer did not question the child regarding her understanding of the duty to tell the truth, and they had no discussion regarding the consequences of lying. Factors for an appellate court to consider in reviewing a competency determination include the entire context of the child's testimony and whether other evidence corroborates the child's testimony. Here, the child was not questioned regarding her understanding of the moral sense of duty to tell the truth. Coupled with the fantastic nature of her later testimony and the lack of corroborating evidence of the actual abuse, the court found this particularly troubling. Because the competency inquiry of the child as a child witness was inadequate and the trial court's findings regarding competency were not supported by

competent, substantial evidence, the appellate court reversed and remanded for further proceedings.

Both parents also objected to the court's ruling that only the forensic interviewer would be allowed to question the child. The trial court based its ruling on Florida Rule of Juvenile Procedure 8.255(d)(2) which provides for the in camera examination of a child. However, this same rule requires the court, after motion and hearing, to make specific written findings of fact as to the basis for its ruling. In this case, no evidence was presented that supported the trial court's ruling that the parents' attorneys were prohibited from questioning the child and that the examination would be solely by a forensic examiner. Thus, the appellate court directed that on remand the trial court hold a hearing and allow the parties to present evidence regarding any limitations that the trial court may impose as to the manner of the child's testimony. The trial court must make factual findings supported by the evidence in ruling on this issue. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/September/September%2012,%202008/2D07-3938.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/September/September%2012,%202008/2D07-3938.pdf) (September 12, 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***

T.S. v. Department Of Children And Families, --- So.2d ----, 2008 WL 4361238 (Fla. 5<sup>th</sup> DCA 2008). The Department sheltered a child based upon the mother's abandonment. The father's location was at first unknown, but he was eventually located in Ohio, and a homestudy was conducted through the Interstate Compact on the Placement of children. The first homestudy of the father's home was not approved, but the father rectified the problems and the Department then attempted to place the child with the non-offending father with protective services supervision. After a hearing, the trial court entered an order rejecting the placement. The appellate court held that the trial court departed from the essential requirements of law by applying the best interest of the child standard under §39.522(1), Florida Statutes (2007), instead of the standard set forth in §39.521(3)(b) with regard to a non-offending parent who requests custody. The non-offending parent's presumptive right to custody is not subject to a separate determination of the child's best interests. <http://www.5dca.org/Opinions/Opin2008/092208/5D08-1064.op.pdf> (September 22, 2008).

T.R. v. Department of Children and Families, --- So.2d ----, 2008 WL 4095515 (Fla. 5<sup>th</sup> DCA 2008). The trial court adjudicated the child dependent based on the mother's failure to protect her from a friend's sexual abuse. The appeals court reversed, however, and ordered that the child be given back to the mother. The Department failed to show that the mother knew or should have known that the friend was abusing the child. In fact, even viewing the evidence in the light most favorable to the Department, there was no evidence that the mother knew or should

have known of the friend's alleged abuse, or that the sexual abuse could not have occurred without the mother's knowledge. <http://www.5dca.org/Opinions/Opin2008/090108/5D07-4028.op.pdf> (September 5, 2008).

## **Dissolution of Marriage Case Law**

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

Sellers v. Sellers, --- So.2d ----, 2008 WL 4363462 (Fla. 1st DCA 2008).

(NO. 1D08-3152) PER CURIAM. The appellate court granted the Petition for Writ of Prohibition-Original Jurisdiction and remanded with directions to the Circuit Chief Judge to reassign this case to another trial judge. The trial court will withhold formal issuance of the writ in reliance upon the trial court abiding by the appellate court's decision.

<http://opinions.1dca.org/written/opinions2008/09-26-08/08-3152.pdf> (September 26, 2008).

Sylvester v. Sylvester, ---So.2d ----, 2008 WL 2008 WL 4287173 (Fla. 1st DCA 2008).

(NO. 2D08-0195) Former husband appealed trial court order granting the relocation request of the former wife but requiring the relocation not occur until the child reaches 5 years of age and/or starts kindergarten. Former husband asserted that no competent substantial evidence supported the former wife's request for relocation and the trial court erred in allowing for the relocation nearly two years in the future. The appellate court determined that the trial court erred in allowing for relocation two years in the future and, because the relocation provision was an integral part of the trial court's order, reversed and remanded the entire order for reconsideration by the trial court. The court held that the proper cause of action is to determine whether relocation is appropriate at the time of trial and future relocation should be considered and based on circumstances existing at that time.

<http://opinions.1dca.org/written/opinions2008/09-22-08/08-0195.pdf> (September 22, 2008).

### ***Second District Court of Appeal***

Gigantelli v. Gigantelli, --- So.2d ----, 2008 WL 4330024 (Fla.2d DCA 2008).

(NO. 2D07-3450) The wife challenged a Final Judgment of Dissolution of Marriage, raising six issues. The appellate court reversed the provisions of the final judgment pertaining to the marital home and child support. In all other respects, the appellate court affirmed the trial court's final judgment. In their pleadings, the wife sought exclusive use and possession of the marital home and the husband sought partition. However, at trial both parties requested the trial court to order that the house be sold and the proceeds divided equally between the parties. Because the parties assumed that a sale would be ordered, neither presented any testimony directed toward an award of exclusive use and possession. Nevertheless, the trial

court awarded exclusive use and possession of the marital home to the wife conditioned on the minority of the children or the death or remarriage of the wife. The trial court also ordered that \$600, representing one-half of the rental value of the home, would be added to the gross income of the wife for the purpose of calculating child support, notwithstanding the fact that no evidence was presented as to rental value. In making this award, the trial court stated: Since both parties anticipated that the Court would approve their agreement to sell the marital home and divide the proceeds, there was no evidence submitted as to the reasonable rental value. The wife did testify that she anticipated renting an adequate apartment at the cost of \$1,200 per month. As that is the amount of savings the wife will realize by not incurring a rental expense, the court would conservatively estimate that amount reasonably corresponds to a rental value of the home.

The trial court also made a finding that “it is in the best interest of the children that they remain in the former marital home to minimize the disruption resulting from the parents' marital dissolution.” Neither party presented any evidence directed to the issue of whether it is in the best interest of the children to remain in the marital home. In fact, in a motion for rehearing the Wife explained that she did not address the issue at trial because the parties were in agreement that the house would be sold. The wife requested the opportunity to present evidence to demonstrate that remaining in the marital home was not in the best interest of the children for a variety of reasons. The trial court denied her request. However, the appellate court held that if the passage of time has changed the parties' agreement that the home should be sold, the trial court must conduct an evidentiary hearing to address the equitable distribution of the marital home, thus, because the trial court failed to enforce the parties' agreement to sell the marital home, the appellate court reversed and remanded for the trial court to reconsider the equitable distribution of the marital home. The appellate court also reversed the child support award because of several errors. First, the trial court failed to set forth factual findings to support and explain the income imputed to the wife. The trial court had a range of numbers to work with in determining the wife's net monthly income, and the number selected did fall within the possible high and low numbers in the range. The appellate court pointed out that the deficiency in the final judgment was that there was no explanation for how the trial court arrived at the number it used as imputed income. The trial court failed to set forth findings to explain the number of hours per week that were being imputed and the amount of tips, if any, that was included or whether some other basis was used to calculate the imputed income. The next error in the child support calculation was the fact that the trial court applied a child care credit in its determination of the husband's child support obligation. Because no child care expenses were being incurred at the time of trial and no plan was in place to commence child care at a specified time, the evidence did not support the trial court's application of a child care credit. The last error in the child support provisions pertains to the allocation of IRS income-tax exemptions. The final judgment provides that the husband “shall have the benefit of any tax exemptions for the minor children,” notwithstanding the fact that the Husband requested only one exemption for the youngest child. By allocating the exemptions directly to the husband, the trial court failed to comply with the waiver requirement of section 61.30(11)(a)(8), Florida Statutes (2007). Further, the trial court failed to condition the exemptions on the Husband's being current with support payments, as required

by section 61.30(11)(a)(8). *Id.* Thus the appellate court affirmed in part, reversed in part, and remanded with instructions that the trial court shall make a new determination of child support with sufficient findings to demonstrate consistency with the child support guidelines or sufficient findings to justify departure.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/September/September%2024,%202008/2D07-3450.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/September/September%2024,%202008/2D07-3450.pdf) (September 24, 2008).

Worthen v. Worthen, --- So.2d ----, 2008 WL 4225804 (Fla. 2d DCA 2008).

(NO. 2D06-4695) Former husband, challenged the distribution of assets, award of alimony, and partition and sale of the marital residence ordered in the trial court's final judgment of dissolution of marriage arguing that the final judgment must be reversed because it does not contain statutorily required findings of fact regarding the award of alimony and the equitable distribution of assets. Further, he argued that because neither party requested a partition and sale of the marital residence, the trial court erred by ordering such. The appellate court held that the trial court erred by ordering the partition and sale of the marital residence when neither party requested such relief; however, the absence of specific findings regarding the award of alimony or the basis of the equitable distribution in a final judgment does not necessarily amount to reversible error. Consequently, the appellate court reversed the portion of the trial court's final judgment that ordered partition and sale of the marital residence, and remanded for reconsideration of the disposition of the marital home; and affirmed the final judgment in all other respects.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/September/September%2017,%202008/2D06-4695.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/September/September%2017,%202008/2D06-4695.pdf) (September 17, 2008).

### ***Third District Court of Appeal***

Ruiz v. Han, --- So.2d ----, 2008 WL 4225780 (Fla.3d DCA 2008)

(NO. 3D07-1793) Father appeals the trial court's final judgment on modification of child support. At oral argument, counsel for the mother conceded that the 2004 arrearage figure was incorrect. Accordingly, the appellate court affirmed and remand with instructions to the trial court to recalculate the 2004 portion of arrearages, using a \$600 deduction for the afterborn child. <http://www.3dca.flcourts.org/Opinions/3D07-1793.pdf> (September 17, 2008).

### ***Fourth District Court of Appeal***

Juliano v. Juliano, --- So.2d ----, 2008 WL 4223759 (Fla. 4th DCA 2008).

(NO. 4D07-1271) Former wife appealed the Final Judgment of Dissolution of Marriage Including Judgment of Conveyance of Real Property. The first issue raised was that the trial court erred in awarding a non-party creditor, the August B. Juliano Family Trust, a judgment interest against the sale proceeds of the former wife's homestead property. The appellate court agreed and reversed in part and remanded for entry of an amended final judgment.

<http://www.4dca.org/opinions/Sept%202008/09-17-08/4D07-1271.op.pdf> (September 17, 2008).

Brown v. Brown, --- So.2d ----, 2008 WL 4224295 (Fla. 4th DCA 2008).

(NO. 4D07-2770) The appellate court reversed the final judgment of dissolution of marriage and remanded to the circuit court for a new hearing on the issue of the valuation of the stock in Brown Distributing Company, Inc. The trial court rejected the testimony of the parties' experts and came up with its own methodology to value the stock, which was inconsistent with the trial court's own findings and had no basis in the evidence. The appellate court indicated that the former husband put forth a yeoman's effort to support the trial court's finding with a convoluted methodology relying on figures expressly rejected by the trial court; but, ultimately determined that the trial court may reconsider its alimony award, revaluing the stock, and reconsidering equitable distribution and found no error with respect to the third point raised on appeal.

<http://www.4dca.org/opinions/Sept%202008/09-17-08/4D07-2770.op.pdf> (September 17, 2008).

Alcenat v. Alcenat, --- So.2d ----, 2008 WL 4146668 (Fla. 4th DCA 2008).

(NO. 4D07-998) Dissolution of marriage action was brought. The trial judge entered a final judgment of dissolution of marriage, but left the bench before ruling on post-judgment motions, which were assigned to a successor judge. The husband appealed the successor judge's order and amended order on his motion for clarification, wherein the successor judge ruled that the wife was entitled to credit for one-half of the expenses she paid to maintain the marital home from the date the husband moved out of the home until the date of sale. The wife cross-appeals, challenging *inter alia* the initial trial judge's ruling that the wife was not entitled to set-offs or credits from the husband. On the main appeal, the appellate court agreed with the husband that the pivotal issues concerning the wife's entitlement to set-offs or credits for her expenditures on the marital home had been resolved in the final judgment and that the successor judge's clarification orders were not clarifications at all, but were substantive changes to the final judgment. As she had not presided over the trial, the successor judge had no authority to amend the final judgment without holding a new evidentiary hearing. As to the cross-appeal, the appellate court held that the initial trial judge's ruling that the wife was not entitled to any set-offs from the husband for her expenses pertaining to the marital home was not an abuse of discretion. Accordingly, the appellate court reversed the order and amended order granting the husband's motion for clarification and affirmed the final judgment of dissolution and the denial of the wife's motion for rehearing thereon.

<http://www.4dca.org/opinions/Sept%202008/09-10-08/4D07-998.op.pdf> (September 10, 2008).

Thompson v. Thompson, --- So.2d ----, 2008 WL 4148945 (Fla. 4th DCA 2008).

(NO. 4D07-4522) Divorced mother filed post-dissolution of marriage motion for civil contempt/enforcement alleging father's failure to pay alimony and child support. The trial court adopted a magistrate's report that, among other things, ordered father to pay his \$18,005.25 rehabilitative alimony arrearage in monthly installments of \$94.75. Mother appealed asserting that the amount of repayment of the arrearage was an abuse of discretion because it would take sixteen years to pay off the arrearages for rehabilitative alimony. Because rehabilitative alimony is designed to aid a person to regain the ability for self-support similar to that which

previously existed or would have existed except for the marriage of the parties, former wife needs the alimony now to accomplish her rehabilitation, not years from now; and the payment plan set by the trial court postpones repayment of rehabilitative alimony well beyond the period of rehabilitation, the appellate court reversed and remanded for the trial court to set a more reasonable arrearage payment, which will provide to the former wife the payments necessary to complete her rehabilitation within a reasonable time, and reduce the alimony arrearages to a judgment.

<http://www.4dca.org/opinions/Sept%202008/09-10-08/4D07-4522.op.pdf> (September 10, 2008).

Flood v. Stumm, --- So.2d ----, 2008 WL 4148980 (Fla. 4th DCA 2008).

(NO. 4D08-1924) Father filed petition for writ of certiorari challenging an order that compelled disclosure of his psychological records, as to which he claimed a psychotherapist-patient privilege, in his suit for a petition for modification of a paternity judgment. The appellate court granted the petition, concluding that the father showed irreparable injury not remediable upon appeal and a departure from the essential requirements of law. In response to the father's claims, the mother outlined prior claims she had brought against the father, including allegations of domestic violence and abuse of the child. The mother then served a request to produce, which included a request for "all psychological records, notes and reports relating to the parties' minor child and/or the parties." The father filed an objection to the mother's request to produce based on the psychotherapist-patient privilege. The trial court found that the privilege did not protect the father's psychological records from disclosure and overruled the father's objections. The District Court of Appeal held that father's mental health was not at issue, and thus records were covered by the psychotherapist-patient privilege. Father's mental health was not at issue in child custody proceeding, and thus father's psychological records were covered by the psychotherapist-patient privilege, despite mother's contentions that psychological evaluation of both parties was appropriate to determine the best interests of the child, and that her prior allegations of child abuse against father waived the privilege; earlier child abuse allegations were determined to be unfounded, there was no ongoing child abuse issue, and suggested procedure for determining the parties' mental health was to order a new psychiatric or psychological examination, rather than the disclosure of existing records. Therefore, the appellate court granted the petition, quashed the portion of the order overruling the father's objection to the production of psychological records, notes, and reports relating to the father's mental health treatment, and remanded for further proceedings.

<http://www.4dca.org/opinions/Sept%202008/09-10-08/4D08-1924.op.pdf> (September 10, 2008).

Heidisch v. Heidisch --- So.2d ----, 2008 WL 4330228 (Fla. 4th DCA 2008).

(NO. 4D07-2021) The wife appealed the Final Judgment and Amended Final Judgment entered in the dissolution action filed by the husband, and raised five issues on appeal. The appellate court affirmed without discussion the denial of an award of permanent alimony and the denial of attorney's fees and reversed and remanded as to the remaining issues discussed below.

The parties were married for almost eleven years and have two children, ages ten and eight. The husband is thirty-seven and the wife is thirty-three. The husband is a licensed general contractor and is employed as the Director of Construction for a large developer. The wife is a stay-at-home mother who has not worked outside the home during the marriage. Prior to the marriage, the wife attended Florida Atlantic University and completed her junior year as a sociology major. She has home schooled their children since they began their education. Prior to trial the parties entered into a Partial Settlement Agreement (PSA) in which they agreed to have shared parental responsibility with rotating custody of the children. It also contained provisions for the listing and sale of the marital residence. The PSA was adopted by the trial court and incorporated into the final judgment.

At trial, the wife requested rehabilitative alimony in order to pursue a degree necessary to become a secondary education English teacher. The trial court concluded from the evidence presented that it would take four years to complete her education and awarded her rehabilitative alimony payable at \$4,227.12 per year totaling \$16,908.48. As a means of support for the wife during this period, the trial court also awarded her bridge-the-gap alimony in the amount of \$2,500 per month for four years. When calculating the child support to be paid during this four-year period, the trial court imputed a gross annual income to the wife of \$16,500 which would be the equivalent of a 30-hour work week earning \$11.00 per hour as a substitute teacher or tutor based on a 50-week year. The wife argued on appeal that the trial court abused its discretion in imputing this income because the wife is also expected to attend college full-time and be the caretaker of her two children fifty percent of the time. "The standard of review for a trial court's imputation of income is whether competent substantial evidence supports it." *Hinton v. Smith*, 725 So.2d 1154, 1156 (Fla. 2d DCA 1998). Although the trial court was presented with evidence of and found that a tutor or a substitute teacher earned \$11.00 per hour and could work as much as thirty hours per week, the trial court did not make any findings as to the wife's voluntary unemployment, her work history or circumstances not under her control. For example, by imputing income for thirty hours of work per week, the trial court ignored the wife's full-time college schedule which will change from semester to semester and possibly conflict with the schedule of a substitute teacher. "[T]here must be some realistic basis in the evidence to support the concept that the former spouse can earn the sums imputed." *Greene v. Greene*, 895 So.2d 503, 512 (Fla. 5th DCA 2005). Accordingly, the appellate court reversed the imputation of \$16,500 in income and remand for reconsideration.

Prior to the final judgment, the wife was making the monthly mortgage payment of over \$2,400, including taxes and insurance, with a portion of the temporary alimony she was receiving from the husband. After the final judgment, the wife's alimony was substantially reduced. In the PSA, the parties agreed to list and sell the marital residence. However, neither the PSA nor the Amended Final Judgment provided who was to make the mortgage payments prior to the sale of the marital residence, while the wife had exclusive possession of the home. The wife argues that the trial court erred as a matter of law by not determining that the mortgage was a marital liability and who was responsible for making the payments until the residence was sold. The appellate court agreed and held the trial court erred in not identifying the mortgage as a marital liability and determining who was responsible for the payments.

The wife further argues that, as a result of this error, she should be reimbursed for any payments she has made since the final judgment to which the husband has not contributed. After considering Kelly v. Kelly, 583 So.2d 667 (Fla.1991), and the appellate court's prior decision in Brandt v. Brandt, 525 So.2d 1017 (Fla. 4th DCA 1988), which supported her argument, the appellate court determined that on remand the trial court must determine the amount of reimbursement to the wife, if any, to which she is entitled.

From the evidence presented at trial, the trial court determined the exact amount needed to cover the wife's tuition for four years and awarded her rehabilitative alimony in that amount. The trial court then specifically held that "[t]he rehabilitative alimony award shall be taxable to the wife and deductible to the husband." The wife argues that the trial court erred in its holding because as a result of the ruling she will not receive the amount needed to pay her tuition as the trial court intended. When alimony is granted, in whatever form (rehabilitative or permanent), by definition under the Internal Revenue Code, it is taxable to the payee and deductible to the payor under the divorce decree unless the decree designates it is not includible in the gross income of the payee. See I.R.C. § 71 (2000); see also Rykiel v. Rykiel, 838 So.2d 508 (Fla.2003). In the final judgment at issue, the trial court intended that the wife receive the amount needed to pay her tuition. By specifically designating the alimony taxable to the wife, the trial court contradicted its intent to award the wife rehabilitative alimony in the amount needed for her tuition. Thus, the appellate court held its award to be in error and remand for the trial court to enter an amended final judgment reflecting that the husband shall not deduct the rehabilitative alimony payment and the wife may then exclude the payment from her gross income for tax purposes.

<http://www.4dca.org/opinions/Sept%202008/09-24-08/4D07-2021.op.pdf> (September 24, 2008).

Mayer v. Kaye, --- So.2d ----, 2008 WL 4330244 (Fla. 4th DCA 2008).

(NO. 4D07-3846) The appellant father moved to modify child support, based on the fact that two of the parties' three children had reached the age of majority, and because he had suffered a substantial reduction in income. The trial court concluded that he had contracted away reductions when some of the children reached majority and had not demonstrated a change in circumstances as to his income. The appellate court affirmed.

The marriage of the parties was dissolved in 1997, and the marital settlement agreement was later amended to provide, in regard to future child support, as follows:

The Father shall pay child support to the Mother in the amount of \$2,200.00 per month commencing September 25, 2001, and continuing each month until such time as the parties' minor child, ZIVA, turns 18 years of age. Therefore, the Father's last child support payment of \$2,200.00 per month shall be on November 25, 2008. This sum shall continue to be paid even through the parties' other minor children will have reached the age of majority prior to ZIVA. It is the intention of the parties that this amount be non-modifiable and it be continuous so that there is not a further need for the parties to have to seek modification of child support. Both parties are aware that the Mother believes she is entitled to support in excess of \$2,200.00 per

month, and that the Father believes the Mother is entitled to support in a lesser amount. The Father shall not request a reduction in his child support obligation for any reason whatsoever including but not limited to loss or reduction of income. The Mother shall not request an increase in the Father's child support obligation for any reason whatsoever including but not limited to an increase in the Father's income.

The trial court interpreted this child support provision to be an agreement that the emancipation of the two older children would not be a change in circumstances on which modification could be based, and that the entire \$2,200 a month was intended to be child support for the youngest child, once the others reached majority. The appellate court agreed with the trial court's construction of the agreement, and without further discussion, found no error in the denial of modification based on the father's reduced income.

<http://www.4dca.org/opinions/Sept%202008/09-24-08/4D07-3846.op.pdf> (September 24, 2008).

### ***Fifth District Court of Appeal***

Guard v. Guard, --- So.2d ----, 2008 WL 4265312 (Fla. 5th DCA 2008).

(NO. 5D07-4280) The husband appealed the trial court's order on his exceptions to the findings and recommendation of the general magistrate concerning temporary support issues. The husband contends that the trial court abused its discretion by imputing income to him for purposes of calculating child support, failing to take child care costs into account when calculating child support, and imposing vague support requirements. The appellate court affirmed in part and reversed in part. After almost eight years of marriage, the wife filed for a dissolution of the marriage. The parties have two children, both were under the age of nine. The wife filed a motion for temporary alimony and child support pending the outcome of the dissolution action. At the hearing on the motion for temporary support, the wife asked the magistrate to impute an annual income of \$40,000 to the husband based on his salary for seven years prior to the parties' move to Florida. She also requested that income be imputed to the husband based on his mother's regular, ongoing support payments to the couple during their marriage. Finally, the wife requested that the court award her temporary alimony and require the husband to pay child care costs. Following the hearing, the general magistrate found that the husband was voluntarily underemployed, and imputed a monthly gross income of \$3,300 to the husband based on his prior employment in Georgia. However, the magistrate did not impute income based on his mother's support of the family. In addition, the magistrate elected not to impute income to the wife because of her child care responsibilities and lack of transportation. Based on the parties' financial affidavits and the husband's imputed income, the magistrate found that the husband had a temporary child support obligation of \$847 per month. The magistrate denied the wife's request for temporary alimony, concluding that such an award would exceed the husband's ability to pay. However, the magistrate determined that the husband should be responsible for the cost of child care and should provide the wife with a vehicle so that the wife could become gainfully employed. The magistrate also recommended that the husband maintain medical and dental insurance coverage for the children. The trial court confirmed the general magistrate's recommendations over the husband's exceptions,

concluding that the husband failed to show that the magistrate's recommendations were not supported by the record, were an abuse of discretion, or were a departure from the law. The appeal followed.

The appellate court made the determination that the magistrate and the trial court had not abused their discretion in concluding that the husband was voluntarily underemployed and deciding to impute income to him, and further stated that despite the family business's lack of success, the husband failed to seek profitable employment. Even though the husband was not initially voluntarily underemployed, in choosing to pursue his interest in the family business, he had become underemployed. The appellate court further provided that under Section 61.30(2)(b), Florida Statutes (2007), when the trial court finds that a parent is voluntarily unemployed or underemployed, it shall impute income to that parent based upon the employment potential and probable earnings level of the parent, taking into consideration his or her recent work history, occupational qualifications and prevailing earnings level in the community. Furthermore, in order to impute income when a party is willfully earning less than the party has the capability to earn through his or her best efforts, the trial court must determine: (1) that the termination of income was voluntary, and (2) whether any subsequent underemployment “ ‘resulted from the spouse's pursuit of his own interests or through less than diligent and bona fide efforts to find employment paying income at a level equal to or better than that formerly received.’ ” Schram v. Schram, 932 So.2d 245, 249-50 (Fla. 4th DCA 2005) (quoting Ensley v. Ensley, 578 So.2d 497, 499 (Fla. 5th DCA 1991)). Once the trial court has determined that a parent is voluntarily underemployed, the trial court may only impute a level of income supported by the evidence of employment potential and probable earnings based on history, qualifications, and prevailing wages. § 61.30(2)(b), Fla. Stat. (2007); Schram, 932 So.2d at 249-50 (holding that to impute income, trial court must make factual findings as to probable and potential earning level, source of imputed and actual income, and adjustments to income). In this case, imputing \$40,000 annually to the husband, the magistrate considered only the husband's past earnings and the fact that the husband has a commercial driver's license (“C.D.L.”). The wife failed to produce any evidence as to what a job similar to the husband's Georgia job would pay in Florida, what jobs the husband could get with his C.D.L., and whether there were any such jobs available in the community. There was no consideration of the husband's qualifications, other than that he held a C.D.L., or the prevailing earning level in the community for someone with his qualifications and work experience. As such, the trial court's determination that the husband could earn the same level of income as he had in Georgia was error.

Next, the husband contended that the trial court failed to use the appropriate method of calculating his child support obligations with respect to the children's child care costs. The appellate court agreed. The magistrate ordered the husband to provide child care for the children so that the wife could resume employment as soon as possible, but failed to include that obligation in its child support calculations. It did not appear to the appellate court that the magistrate decreased the amount of the support obligation by twenty-five percent, as required in section 61.30(7). Instead, it provided only that the husband must provide child care, without specifying any amount that he must pay. Since the child care costs are directly connected to the

wife's job search, section 61.30(7) applies. Thus, the appellate court pointed out that the general magistrate should have made a specific finding as to the amount of child care costs that the husband must pay and reduced the amount by twenty-five percent prior to adding it to the husband's total child support obligation.

Finally, the appellate court concluded that the requirement that the husband be responsible for child care and a vehicle for the wife is inconsistent with the magistrate's previous conclusion that the husband could not afford to pay for temporary alimony or other costs beyond his required child support obligations. For these reasons, the appellate court reversed the trial court's order on the husband's exceptions and remand for a new hearing to determine the husband's child support obligations, including child care expenses. The appellate court also chose to strike the obligations of the husband to provide a vehicle for his wife, absent a change in the husband's financial circumstances. In all other respects, the order was affirmed. <http://www.5dca.org/Opinions/Opin2008/091508/5D07-4280.op.pdf> (September 19, 2008).

## **Domestic Violence Case Law**

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

No new opinions for this reporting period.

### ***Second District Court of Appeal***

No new opinions for this reporting period.

### ***Third District Court of Appeal***

No new opinions for this reporting period.

### ***Fourth District Court of Appeal***

No new opinions for this reporting period.

### ***Fifth District Court of Appeal***

No new opinions for this reporting period.