

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

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

C.A.D. v. State, __ So.3d __, 2009 WL 2959667 (Fla. 1st DCA 2009). [DISPOSITION ORDER UNDER APPEAL SATISFIED THE REQUIREMENTS OF E.A.R. V. STATE, 4 So.3d 614 \(FLA.2009\)](#). The juvenile appealed his commitment a high-risk facility where the Department of Juvenile Justice (DJJ) recommended commitment to a moderate-risk facility. The juvenile argued that the trial court failed to comply with the requirements set forth in E.A.R. v. State, 4 So.3d 614 (Fla.2009) when it deviated from the DJJ's recommendation. The First District Court of Appeal held that the order under review satisfied the requirements of E.A.R. because the trial court utilized the proper legal standard and because its stated reasons are supported by competent, substantial evidence in the record. Accordingly, the First District affirmed the trial court's disposition which deviated from the DJJ's recommendation.

<http://opinions.1dca.org/written/opinions2009/09-17-2009/09-1186.pdf>

(September 17, 2009).

C.B v. State, __ So.3d __, 2009 WL 2914189 (Fla. 1st DCA 2009). [DISPOSITION ORDER WAS REVERSED AND REMANDED TO PROVIDE THE TRIAL COURT AN OPPORTUNITY TO ENTER AN ORDER IN COMPLIANCE WITH E.A.R. V. STATE, 4 So.3d 614 \(FLA.2009\)](#). The juvenile appealed from an order of the trial court, which departed from the recommendation of the Department of Juvenile Justice (DJJ). The DJJ recommended probation. The trial court committed the juvenile to a moderate-risk residential program. The First District Court of Appeal found that the Florida Supreme Court announced a new, more rigorous analysis that a trial court must conduct before departing from DJJ's recommendation in E.A.R. v. State, 4 So.3d 614 (Fla.2009). The First District held that the trial court did not engage in the appropriate analysis of determining why a moderate risk residential program, rather than probation, was better suited to serving the rehabilitative needs of the juvenile, in the least restrictive setting, and protecting the public from further acts of delinquency as required by E.A.R. Accordingly, the disposition was reversed and remanded to provide the trial court an opportunity to enter an order in compliance with E.A.R., or else impose the probation recommended by the DJJ.

<http://opinions.1dca.org/written/opinions2009/07-31-2009/09-0772.pdf>

(September 14, 2009).

Second District Court of Appeal

S.N.J. and S.F. v. State, __ So.3d __, 2009 WL 2972476 (Fla. 2d DCA 2009). [JUVENILES' REFUSAL TO IDENTIFY THEMSELVES TO POLICE OFFICER WAS FOUND TO NOT SUPPORT THEIR ADJUDICATION AND DISPOSITION FOR RESISTING AN OFFICER WITHOUT VIOLENCE](#). In a consolidated appeal, two juveniles appealed their adjudications and dispositions for resisting an

officer without violence. A private security guard saw the juveniles in the parking lot of an apartment complex. The apartment leases contained a no-loitering policy. However, the complex had no posted no-loitering or no-trespassing signs. The juveniles were engaged in no criminal or otherwise suspicious activities. Upon questioning, the juveniles refused to give their names and addresses to the guard. The police were called. The responding police officer asked the juveniles for their names and addresses, intending only to issue them a trespass warning. The juveniles refused and were arrested. The Second District Court of Appeals found that to secure a conviction for resisting an officer without violence, the State must show that: (1) the officer was engaged in the lawful execution of a legal duty and (2) the defendant's action constituted obstruction or resistance of the lawful duty. The juveniles could be legally detained for trespassing only if they were first warned to leave the property. Any person authorized by the property owner may give the requisite warning. When attempting to issue a trespass warning to the juveniles, the officer acted as the property owner's agent, not in an official capacity. The officer could have asked the juveniles to leave the property without knowing their names. In the instant case, the officer did not warn the juveniles to leave the property. Thus, neither juvenile was guilty of trespassing and no sufficient cause existed to detain them. The apartment complex's no-loitering policy in its leases did not validate the juveniles' detention. The record does not indicate that either juvenile knew of the policy. At most, the officer's encounter with the juveniles was consensual. An individual may refuse to identify themselves to a police officer when not lawfully detained. Until the officer asked the juveniles to leave and they refused, they were entitled to refuse to identify themselves. The trial court should have granted their motions for judgment of dismissal. Accordingly, the Second District reversed the adjudications and dispositions.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/September/September%2018,%202009/2D08-3672.pdf (September 18, 2009).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

J.J.V. v. State, __ So.3d __, 2009 WL 2949303 (Fla. 4th DCA 2009). **THE JUVENILE'S ACTIONS SHOULD HAVE BEEN OBJECTIVELY SEEN AS AN AFFIRMATIVE ATTEMPT TO NARROW THE SCOPE OF HIS GENERAL CONSENT TO SEARCH HIS VEHICLE.** The juvenile appealed his delinquency adjudication and commitment on drug charges. The juvenile argued that the trial court erred in denying his motion to suppress physical evidence and statements because the deputy exceeded the scope of his consent to search his car. The juvenile was stopped by the police after being observed driving without his headlights on. The juvenile appeared nervous to the deputy. The deputy asked the juvenile if he had anything illegal in the car. The juvenile responded, "No, I don't have anything illegal in the car. You're welcome to search it if you like." The deputy searched the car. A center console compartment was locked. The deputy asked the juvenile if he had a key to it. The juvenile replied that the car belonged to his mother and that she had the

only key. Without asking the juvenile's permission, the deputy then removed the key from the ignition and used it to open the center console lock. The center console contained illegal drugs and paraphernalia. The juvenile told the deputy that all of the "stuff" was his. At the suppression motion hearing, the deputy testified that he reasonably believed that the juvenile's consent to search the vehicle included a search of the center console. The Fourth District Court of Appeal found that the juvenile's consent to search the car did not extend to a search of the locked console inside the car. The standard for measuring the scope of a person's consent under the Fourth Amendment is that of objective reasonableness: what an ordinary reasonable person would have understood to be the scope of consent by the exchange between the officer and the consenting person. In this case, the juvenile's actions should have been objectively seen as an affirmative attempt to narrow the scope of his general consent and prevent a search inside the console. The deputy should have reasonably understood that the juvenile was setting limits on his consent to search when he told the deputy that only his mother had a key to the console. If the juvenile had wanted the officer to search the console, he would have given the key, instead of denying that he had one. This clearly showed that the juvenile was "at least reluctant, if not unwilling" to open the console for the deputy's inspection. Accordingly, the Fourth District held that the trial court erred in denying the motion to suppress and reversed and remanded.

<http://www.4dca.org/opinions/Aug2009/08-05-09/4D08-3650.op.pdf> (September 16, 2009)

Fifth District Court of Appeal

C.R.J. v. State, __ So.3d __, 2009 WL 2900494 (Fla. 5th DCA 2009). [NEW RESTITUTION HEARING ORDERED WHERE THE STATE ONLY PRESENTED HEARSAY EVIDENCE AS TO REPAIR ESTIMATE.](#) The juvenile appealed his restitution order requiring him to pay \$1,378.00 for damage he caused to the victim's automobile. The Fifth District Court of Appeal found that the State only presented hearsay evidence (a written repair estimate) and did not establish any hearsay exception that would allow admission to prove the projected repair cost. The juvenile preserved the issue with appropriate objections. Accordingly, the Fifth District reversed for a new restitution hearing.

<http://www.5dca.org/Opinions/Opin2009/080309/5D08-2920.op.pdf> (September 11, 2009).

Dependency Case Law

Florida Supreme Court

In re Amendments to the Florida Family Law Rules, --- So.3d ----, 2009 WL 2778209 (Fla. 2009). [FAMILY LAW RULES AMENDED.](#) In September 2008, the Family Law Rules Committee filed a "fast track report" proposing amendments to several family law rules and forms in response to chapter 2008-61, Laws of Florida which amended various sections of chapter 61 and related statutes. The legislation removed the concepts of "custody," "primary residential parent," "visitation," and similar terms from the statutes and instead requires the court to approve or establish a "parenting plan" delineating how the parents will share decision-making and

responsibilities for a child and setting forth a “timesharing” schedule. The Court adopted the proposed amendments and then published the amended rules and forms for comment. After considering the comments and response, the court further amended the rules and forms in this decision, including: the language of rule 12.363 (Evaluation of Minor Child) is amended to include the term “timesharing” and, instead of referring to a “parenting plan for a minor child,” refer to “ultimate decision-making” for the child. The committee note to rule 12.650 (Override of Family Violence Indicator) is amended to clarify that the court must adopt or establish a parenting plan. Paragraph 2.a. of form 12.900(b) (Notice of Limited Appearance) and paragraph 2.a. of form 12.900(c) (Consent to Limited Appearance by Attorney) are amended to refer to “Parental responsibility and timesharing,” rather than “Parental responsibility, including establishing a parenting plan,” in order to better reflect the issue upon which limited representation is being provided. Paragraph 6.e. of form 12.930(b) (Standard Family Law Interrogatories for Original or Enforcement Proceedings) is amended to remove the word “contact” in favor of the current term of art “timesharing” and add the words “supervised or otherwise restricted” to clarify that the paragraph is seeking not only limitations in time, but also in how the timesharing is to be conducted. Finally, paragraphs 6.c. and 6.d. of form 12.930(c) (Standard Family Law Interrogatories for Modification Proceedings) are amended to clarify the information being sought by the interrogatory.

<http://www.floridasupremecourt.org/decisions/2009/sc08-1660.pdf> (September 3, 2009).

First District Court of Appeal

J.S. v. Florida Department of Children and Families, --- So.3d ----, 2009 WL 3078150 (Fla. 1st DCA 2009). **ONE PARENT TPR REVERSED, ABUSE OF DISCRETION NOTED.** In this consolidated appeal, the mother appealed her termination of parental rights, and DCF and the GAL office appealed the order declining to terminate the parental rights of the father and placing the child in permanent guardianship. The appellate court reversed the order terminating the mother's parental rights based upon the trial court's finding that a single-parent termination was authorized in this case under §39.811(6). Based on the evidence presented, the findings contained in the orders, and the ultimate disposition of the case, the appellate court held that the trial court abused its discretion in effectuating a single-parent termination.

The appellate court also reversed the order denying the petition to terminate the father's parental rights. The appellate court found that the trial court abused its discretion in finding that the Department did not establish grounds for termination of parental rights under section 39.806(1)(e). Additionally, when a trial court's failure to make adequate factual findings interferes with an appellate court's ability to determine whether an abuse of discretion has occurred, reversal is necessary. In this case, the trial court's findings under §39.810 were insufficient to facilitate meaningful appellate review. Some of the factors were addressed only in part or only superficially, and still other factors were not mentioned at all. The court also noted that many of the manifest best interest findings in the order terminating the mother's rights were based on evidence that was equally applicable to both parents. Without at least some explanation of the trial court's view of such evidence, the appellate court could not say that the trial court did not abuse its discretion in finding that termination of the father's rights

was not in the manifest best interests of the child. The court noted that it did not intend to create a rule that in every termination of parental rights case a trial court must include express written findings as to each of the §39.810 factors. The court also stated that it did not intend to abrogate the longstanding rule that a trial court is entitled to reject testimony, in all or in part. However, in this case, without more specific and complete findings, it appeared that the trial court ignored evidence that was equally applicable to both parties and possibly overlooked specific evidence that the child would not be harmed by severing her bond with her father.

The court remanded both cases and stated that the trial court may implement any disposition permitted under section 39.811, provided that it supports the decision with specific and complete findings. The court also noted that the evidence in this case would not permit the trial court to terminate the rights of only the mother if it decides to place the child in permanent guardianship. <http://opinions.1dca.org/written/opinions2009/09-29-2009/09-1046.pdf> (September 29, 2009).

S.P. v. Florida Department of Children and Family Services, --- So.3d ----, 2009 WL 2948459 (Fla. 1st DCA 2009). **PETITION FOR WRIT OF CERTIORARI DENIED.** The father sought review of a non-final, post-dependency order denying his motion for reunification with his minor child. The appellate court treated his notice of appeal and amended initial brief as together comprising a petition for writ of certiorari, and noted that there appeared to be some uncertainty about the appealability of non-final orders entered after orders adjudicating dependency. In fact, confusion concerning the appealability of non-final orders in juvenile dependency and related cases was a factor leading to a proposal to amend Florida Rule of Appellate Procedure 9.146, which is now pending in the Supreme Court.

On the merits, the father made no showing that the trial court's decision to deny immediate reunification was an abuse of discretion. The trial court did order additional visitation, and did not rule out eventual reunification. Since there was no transcript submitted, the appellate court was unable to determine whether the father offered any new evidence that would require additional findings in support of his reunification with the child. In these circumstances, the father failed to demonstrate entitlement to certiorari relief. He did not show that the trial court's findings of fact were materially inadequate or incomplete, much less that they were a departure from the essential requirements of law. Therefore, the court denied the petition for writ of certiorari. <http://opinions.1dca.org/written/opinions2009/09-16-2009/09-1453.pdf> (September 16, 2009).

J. A.v. Department of Children and Families, --- So.3d ----, 2009 WL 2876864 (Fla. 1st DCA 2009). **APPEAL OF NONFINAL ORDER DISMISSED.** The appellant sought review of an Order Granting Petition for Termination of Parental Rights. Although the lower tribunal determined that the petition demonstrated sufficient grounds to terminate the appellant's parental rights, the order on appeal only granted the petition and failed to actually terminate parental rights, so the court concluded that the order was not a final order and appeal was premature. The court therefore dismissed the appeal for lack of jurisdiction. <http://opinions.1dca.org/written/opinions2009/09-09-2009/09-3124.pdf> (September 9, 2009).

Second District Court of Appeal

In the Interest of R.R., --- So.3d ----, 2009 WL 2767215 (Fla. 2d DCA 2009). [TPR CANNOT BE BASED UPON ADOPTABILITY OF CHILD](#). The father appealed the order terminating his parental rights. The father was given two identical case plans as to all four of his children because different mothers were involved in the two cases. The father's actions toward each of his four children were identical, but the father was reunified with his three older children, who did not want to be adopted, and his parental rights to his youngest child were terminated. The Department conceded that it was error to treat the children differently and that the Department did not show that termination was the least restrictive means of protecting the youngest child from harm. The appellate court reversed and remanded the case, but noted that the opinion should not be read to mean that the Department may never treat siblings differently from each other in termination proceedings. The court further stated that there are situations in which valid reasons might exist for treating children of different ages differently from each other; and, in this case, the holding means that when a parent has not fully complied with a case plan the Department may not make its decision as to whether to seek termination of parental rights solely on its assessment of the "adoptability" of each individual child with no reference to the least restrictive means of protecting that child from harm. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/August/August%2002,%202009/2D08-4467.pdf (September 2, 2009).

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

R.M. v. Department of Children and Families, --- So.3d ----, 2009 WL 2970412 (Fla. 5th DCA 2009). [ORDER OF DISPOSITION IS FINAL ORDER AND REVIEWABLE](#). Three years after a dependency case closed, the mother filed a Motion for Custody of the Children, which claimed that the previous placement was no longer in the best interests of the children and that she had substantially complied with her case plan. The trial court conducted an evidentiary hearing on the motion and denied it, leaving the mother's visitation to be supervised by the maternal grandmother at her discretion. The mother appealed this order and counsel motioned to withdraw from the case. The court noted that the question of what non-final orders are appealable in a dependency case has become something of a quagmire. However, the court stated that the order of disposition in this case, which was rendered pursuant to §39.521, Florida Statutes, is a final order under Rule 8.345 which authorizes the filing of a Motion for Modification of Placement. Accordingly, the court found that the order was reviewable under Florida Rule of Appellate Procedure 9.130. That being so, counsel's motion to withdraw was granted and the mother was given thirty days within which she could serve a pro se initial brief as provided in Florida Rule of Appellate Procedure 9.130(e). <http://www.5dca.org/Opinions/Opin2009/091409/5D09-2087.op.pdf> (September 15, 2009).

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Waters v. Waters, __ So.3rd __, 2009 WL 2913849 (Fla 1st DCA 2009).

UNEQUAL DISTRIBUTION BY THE TRIAL COURT MUST BE SUPPORTED BY SUFFICIENT FACTUAL FINDINGS.

Former wife appealed final judgment of dissolution of marriage, arguing that the trial court had unequally distributed the marital assets without having made sufficient factual findings to support such distribution. Agreeing with her, appellate court reversed and directed the trial court to enter an order equally distributing the assets.

<http://opinions.1dca.org/written/opinions2009/09-14-2009/08-4260.pdf> (September 14, 2009).

Grunzke v. Mason, __ So.3rd __, 2009 WL 2777158 (Fla 1st DCA 2009).

TRIAL COURT NOT REQUIRED TO OFFER PARTY AN OPPORTUNITY TO OBJECT TO A PROPOSED ORDER PRIOR TO COURT'S ADOPTION IF IT MERELY MEMORIALIZES RULINGS COURT HAS ALREADY MADE

Appellate court, citing Plichta v. Plichta, 899 So.2nd 1283 (Fla. 2nd DCA 2005), and Perlow v. Berg-Perlow, 875 So.2nd 383 (Fla. 2004), held that a trial court is not required to offer a party the opportunity to object to a proposed order prior to the court's adoption of it if the proposed order merely memorializes rulings the trial court has already made.

<http://opinions.1dca.org/written/opinions2009/09-01-2009/09-1422.pdf> (September 1, 2009).

Second District Court of Appeal

Fast v. Nelson, __ So.3rd __, 2009 WL 3013767, (Fla. 2d DCA 2009).

TRIAL COURT ERRED WHEN IT NEITHER ORALLY PRONOUNCED FINDINGS SUPPORTING A CHANGE IN VENUE AT THE HEARING NOR INCLUDED THEM IN ITS WRITTEN ORDER.

In an appeal by former husband to a nonfinal order transferring a child custody modification proceeding, appellate court reversed due to any indication in the record that the trial court made the requisite findings for a change in venue. It was undisputed that the trial court did not orally pronounce the findings at the hearing, but had instead reserved ruling on the motion to change venue. Because the trial court neither orally pronounced the findings nor included them in its written order, the appellate court reversed and remanded for the trial court to make such findings if supported by the evidence.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/September/September%2023,%202009/2D09-71.pdf (September 23, 2009).

Reilly v. Reilly, __ So.3rd __, 2009 WL 287140 (Fla. 2d DCA 2009).

AWARDS OF TEMPORARY SUPPORT UNSUPPORTED BY THE EVIDENCE ARE SUBJECT TO REVERSAL

Former husband appealed a nonfinal order awarding former wife temporary support and attorney's fees. Appellate court held that the trial court had erred by ordering him to pay various household expenses in addition to a weekly support payment because the award was not supported by the evidence. The appellate court reiterated that while temporary awards of support and alimony are discretionary, they must be supported by evidence which demonstrates the need of one spouse for support and the ability of the other to pay. Awards unsupported by the evidence are subject to reversal.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/September/September%2009,%202009/2D08-6226.pdf (September 9, 2009).

Resmondo v. Resmondo, __ So.3rd __, 2009 WL 2871143 (Fla. 2d DCA 2009).

INEQUITABLE OR IMPROPERLY CALCULATED TEMPORARY SUPPORT ORDERS CAN BE RESOLVED IN FINAL JUDGMENTS AFTER OPPORTUNITY TO BE HEARD.

Temporary support orders which are either inequitable or based upon improper calculations can be resolved via the final judgment after a full and fair opportunity to be heard.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/September/September%2009,%202009/2D09-1878.pdf (September 9, 2009).

Third District Court of Appeal

Guobaitis v. Sherrer, __ So.3rd __, 2009 WL 2766653 (Fla. 3d DCA 2009).

UNEQUAL DISTRIBUTION OF MARITAL ASSETS REQUIRES JUSTIFICATION; MISCONDUCT INSUFFICIENT TO SUPPORT AWARD OF GREATER SHARE TO OTHER SPOUSE, MUST SHOW DEPLETION OF MARITAL ASSETS.

Former husband appealed final judgment of dissolution entered in a long-term (21 years) marriage; appellate court affirmed in part, reversed in part, and remanded for further proceedings consistent with its opinion. The appellate court held that the trial court had abused its discretion in having made an unequal distribution of marital assets and liabilities without having made specific findings justifying its distribution and by failing to address the former couple's federal tax liability resulting from unpaid taxes in the year former wife petitioned for dissolution. The appellate court instructed the trial court that if it made an unequal distribution on remand, it must make findings of fact justifying its distribution. The appellate court also held that a spouse's misconduct is not a valid reason to award a greater share of marital assets to the other spouse absent a showing of depleted marital assets; however, dissipation of marital funds by former husband for drugs and an extramarital affair could be considered by the trial court on remand. The appellate court held that the trial court had not abused its discretion in awarding permanent periodic alimony to former wife based on the facts of this case.

<http://www.3dca.flcourts.org/Opinions/3D07-1270.pdf> (September 2, 2009).

Pita v. Pita, __So.3rd__, 2009 WL 2762753 (Fla. 3d DCA 2009).

APPELLATE COURT'S STANDARD OF REVIEW FOR MARITAL SETTLEMENT AGREEMENTS IS DE NOVO.

Former husband appealed a final order compelling his compliance with a mediated marital settlement agreement (msa) obligating him to pay former wife lump sum alimony and an additional \$575,000.00 as consideration for quitclaiming her ½ interest in his commercial property. The former spouses had agreed that payment for the former wife's interest was contingent upon former husband securing either new financing or a second mortgage on the property after having made a good faith effort to obtain it; however, no dollar amount was attached to the refinancing. When former husband refused available financing because it was below the amount he believed he owed former wife, she moved to enforce the msa. Following an evidentiary hearing, the trial court found the clause in question to be ambiguous and concluded that although no amount was specified, that former husband had violated the good-faith requirement of the msa. Noting that its standard of review in interpreting a msa is de novo, the appellate court held that trial court was correct in having concluded that: the msa was not invalid because it failed to specify a certain amount for refinancing; that former husband had the ability to comply with the terms of the msa; and that he did not act in good faith when he refused available financing. <http://www.3dca.flcourts.org/Opinions/3D08-1703.pdf> (September 2, 2009).

Fourth District Court of Appeal

Cooper v. Cooper, __So.3rd__, 2009 WL 3018127 (Fla. 4th DCA 2009).

AWARD OF PORTION OF ATTORNEY'S FEES TO FORMER WIFE WAS NOT AN ABUSE OF DISCRETION; UNDISTRIBUTED INCOME RETAINED BY A CORPORATION NOT INCOME UNDER CHAPTER 61, F.S.

Former husband appealed final judgment of dissolution of marriage which obligated him to pay child support and a portion of former wife's attorney's fees. The appellate court concluded that the trial court did not abuse its discretion in awarding former wife a portion of her attorney's fees in light of the parties' respective financial conditions; however, it found that the trial court had abused its discretion in calculating child support. The appellate court held that because undistributed income that has been retained by a corporation for corporate purposes is not income under Chapter 61, Florida Statutes, that the trial court erred by attributing annual corporate profit as additional income to former husband. <http://www.4dca.org/opinions/Sept%202009/09-23-09/4D08-2209.op.pdf> (September 23, 2009).

Mathers v. Brown, __So.3rd__, 2009 WL 2871594 (Fla. 4th DCA 2009).

ENHANCEMENT IN VALUE AND APPRECIATION OF A NONMARITAL ASSET RESULTING FROM EFFORTS OF EITHER PARTY DURING THE MARRIAGE IS MARITAL; FOR APPRECIATION IN NONMARITAL STOCK ACCOUNT TO REMAIN NONMARITAL, IT MUST BE PASSIVE AND DEPENDENT ON MARKET CONDITIONS; BURDEN OF PROOF IS ON SPOUSE WISHING TO CLAIM INCREASE IN VALUE OF ASSET IS NONMARITAL.

At issue in this appeal by former husband was the trial court's distribution of assets in the final judgment of dissolution of marriage, specifically, its method for having calculated the marital appreciation of former husband's stock portfolio. The appellate court noted that pursuant to section 61.075(6)(a)1.b., Florida Statutes, enhancement in the value and appreciation of a nonmarital asset resulting from the efforts of either party during the marriage becomes a marital asset. The appellate court then stated that the burden of proof is on the spouse wishing to claim that the increase in the value of the assets during the marriage is nonmarital; such nonmarital appreciation must be passive and the result of time and market conditions. After considering the efforts former husband expended with regard to his stock portfolio accompanied by his failure to meet his burden of establishing that any portion of its appreciation was due to passive market conditions, the trial court concluded that the entire appreciation in the stock was marital. The trial court then detailed the reasons justifying its unequal distribution of marital assets. Noting that the standard for reviewing a trial court's equitable distribution is generally abuse of discretion, the appellate court pointed out that in this case, it was de novo because it concerned a pure issue of law. The appellate court agreed with the trial court that former husband failed to meet his burden of establishing that any of the increase in appreciation of the stock was due to passive conditions. The appellate court also concluded that the trial court had not abused its discretion in having awarded former wife prejudgment interest on her equitable distribution payment. The concurring opinion in this case questions the fairness of reaching the opposite result—the appreciation in a nonmarital stock account remaining nonmarital—when a spouse's account is traded by an outside management company as opposed to being actively managed by that spouse. <http://www.4dca.org/opinions/Sept%202009/09-09-09/4D08-1470.op.pdf> (September 9, 2009).

Rodriguez v. Medero, __ So.3rd __, 2009 WL 2971593 (Fla. 4th DCA 2009).

IMPUTATION OF INCOME REQUIRES FINDING THAT TERMINATION WAS VOLUNTARY AND ANY SUBSEQUENT UNEMPLOYMENT OR UNDEREMPLOYMENT IS DUE TO LESS THAN DILIGENT EFFORTS

Former wife appealed an amended final judgment of dissolution of marriage on several grounds, two of which were found by the appellate court to have merit. Imputation of income to former wife by the trial court was reversed for former husband having failed to meet his burden of proof that it was warranted. The appellate court reiterated that imputation requires a finding that termination was voluntary and that any subsequent unemployment or underemployment results from less than diligent efforts on the part of that spouse. The trial court was instructed on remand to reconsider alimony, child support, and attorney's fees based on the proper amount of income imputed to former wife. The time-sharing and child support ordered by the trial court were also reversed and remanded due to the ambiguity of the trial court's oral pronouncements regarding the percentage of overnights and the gross-up method. The trial court was requested on remand to clarify its oral rulings and recalculate the child support accordingly.

<http://www.4dca.org/opinions/Sept%202009/09-09-09/4D08-1676.op.pdf> (September 9, 2009).

Fifth District Court of Appeal

Foley v. Foley, __So.3rd __, 2009 WL 3046395 (Fla. 5th DCA 2009).

CONDO OWNED BY SPOUSE AT TIME OF MARRIAGE WHOSE MORTGAGE IS PAID OFF WITH FUNDS FROM JOINT ACCOUNT AND TITLE TO WHICH WAS TRANSFERRED INTO BOTH NAMES JOINTLY NOT APPROPRIATE EITHER FOR UNEQUAL DISTRIBUTION OR AS SPECIAL EQUITY.

Former husband appealed the trial court's decision to make an unequal distribution of a condominium owned by former wife at the time of the marriage. Former wife's pre-existing mortgage on the condo was paid off with funds from the former couple's joint account. The following year, the couple mortgaged the condo to obtain funds to start a business and make home improvements; at that time, former wife transferred title to the condo into both names jointly. The appellate court held that the condo had lost any nonmarital status early in the marriage and there were no facts in the record to justify either an unequal distribution or any special equity. <http://www.5dca.org/Opinions/Opin2009/092109/5D08-1059.op.pdf> (September 25, 2009).

Jaffe v. Jaffe, __So.3rd __, 2009 WL 2900447 (Fla. 5th DCA 2009).

IN CONSIDERING MOTION FOR CONTEMPT, TRIAL COURT MUST DETERMINE WHETHER A PRIOR ORDER RE SUPPORT WAS ENTERED AND THEN WHETHER THERE HAD BEEN A FAILURE TO PAY; APPELLATE COURT STANDS ON EQUAL FOOTING WITH TRIAL COURT IN INTERPRETING AN AGREEMENT; DENIAL OF ATTORNEY'S FEES NOT AN ABUSE OF DISCRETION IF BOTH SPOUSES HAVE SIMILAR RESOURCES TO RETAIN COMPETENT COUNSEL.

Former wife appealed denial of her motion for contempt and/or enforcement of the marital settlement agreement (msa), stemming from expenses incurred on behalf of the former couple's younger son. Pursuant to the msa, which was incorporated into the final judgment of dissolution of marriage, former husband would pay certain expenses for both sons in lieu of monthly child support. While responsibility for some of the expenses terminated when the younger son reached either 18 or 21, other expenses, such as the one in dispute, did not have a specific ending date. The appellate court noted that in considering a motion for contempt, the trial court needed to determine first, whether a prior order directing support was entered, and second, whether there had been a failure to pay; its responsibility was to review whether the trial court had abused its discretion. Concluding that the trial court had failed to find whether former husband had met his obligation for the expenses in question, the appellate court reversed and remanded. Commenting on the trial court's conclusion that it was unable to determine whether former husband was in willful contempt of the msa due to the ambiguity within the msa, the appellate court held that it was on an equal footing with the trial court with regard to interpreting a written agreement. Upon review, the appellate court agreed with former wife that because the younger son was a full-time student, the expenses were related to tuition costs, and no ending date was specified with regard to tuition expenses, that the trial court had erred by not having interpreted the msa to include payment of the expenses by former husband. Accordingly, it reversed and remanded to the trial court for it to reconsider its rulings re contempt and enforcement in light of the appellate court's interpretation of the msa. The appellate court held that the trial court had not abused its discretion in denying former wife's request for attorney's fees as her resources, while not equal to former husband's, were

more than sufficient to meet the requirements of section 61.16, Florida Statutes, that both spouses have similar financial resources to retain competent counsel.
<http://www.5dca.org/Opinions/Opin2009/090709/5D08-3719.op.pdf> (September 7, 2009).

Adoption Case Law

K.D. v. Gift of Life Adoptions, Inc. --- So.3d ----, 2009 WL 2901298 (Fla. 2d DCA 2009).

UNMARRIED BIOLOGICAL FATHER IS ENTITLED TO SPECIFIC NOTICE OF AN INTENDED ADOPTION.

An unmarried biological father sought review of the final summary judgment terminating his parental rights. The circuit court determined that because the father failed to file a claim of paternity form with the Office of Vital Statistics or a response containing a pledge of commitment to the child as required by s. 63.062(2), Florida Statutes, the adoption agency was not required to procure his consent to the termination of his parental rights. The appellate court reversed because the adoption agency did not provide the father with timely notice of and opportunity to preserve his parental rights before filing the petition to terminate his rights. Pursuant to section 63.062(3)(a), an unmarried biological father is entitled to notice of the intended adoption plan before his rights can be deemed waived and surrendered. The notice must specifically inform the unmarried biological father of his obligation to comply with the requirements of sections 63.054 and 63.062(2) and the consequences for failing to comply.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/September/September%2011,%202009/2D08-6403.pdf (September 11, 2009).

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

Reiss v. Reiss, --- So.3d ----, 2009 WL 2762784 (Fla. 3d DCA 2009).

DISMISSAL OF PETITION AFFIRMED. The petitioner filed a Petition for Injunction for Protection Against Domestic Violence against his brother. The petitioner alleged that he had reasonable cause to fear imminent domestic violence based on three specific incidents of violence or threats of violence that occurred within two years of the filing of the petition. During the

evidentiary hearing, the petitioner called several witnesses, including the respondent, and the testimony dramatically differed. The trial court then dismissed the action due to insufficient evidence, and the petitioner appealed. The appellate court upheld the dismissal because there was ample support for the trial court's conclusion in the record and the trial court did not abuse its discretion. <http://www.3dca.flcourts.org/Opinions/3D08-2847.pdf> (September 2, 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.