

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE AUGUST 2015

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Baker Act/Marchman Act 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.

Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

E.H. v. State, __ So. 3d __, 2015 WL 4732706 (Fla. 1st DCA 2015). **THE STATE'S EVIDENCE WAS SUFFICIENT TO WITHSTAND A MOTION FOR JUDGMENT OF DISMISSAL.** The First District Court of Appeal held that the State's evidence was sufficient to withstand the juvenile's motion for judgment of dismissal (JOD). The First District wrote to reaffirm and emphasize the long-standing principle that a juvenile defendant is not required to renew a motion for JOD after presenting evidence. See Morris v. State, 721 So. 2d 725 (Fla. 1998); In re: T.M.M., 560 So. 2d 805 (Fla. 4th DCA 1990). The First District rejected the State's argument to the contrary and held that a defense motion at the close of the State's case-in-chief was sufficient to preserve any specific argument made therein. Renewal is not necessary for preservation purposes. Accordingly, the First District affirmed.

https://edca.1dca.org/DCADocs/2015/1492/151492_DC05_08112015_114155_i.pdf (August 11, 2015)

Second District Court of Appeal

R.R.R. v. State, __ So. 3d __, 2015 WL 4771948 (Fla. 2d DCA 2015). **DISPOSITION REMANDED FOR TRIAL COURT TO MAKE A PROPER COMMITMENT LEVEL DETERMINATION.** While on juvenile probation, the trial court found that the juvenile had committed two new aggravated assaults. The Department of Juvenile Justice (DJJ) recommended probation. The trial court rejected the DJJ's recommendation and committed the juvenile to a moderate risk residential program for the aggravated assaults until his nineteenth birthday and committed him to the same program for one year for the probation violation. The judge made specific findings in support of his commitment of the juvenile to a moderate risk program. After the appeal was filed, the public defender filed a motion to correct a sentencing error, pointing out that the trial court, after rejecting the DJJ's probation recommendation, had not obtained a commitment report containing the DJJ's position on the most appropriate restrictiveness level and treatment plan for the juvenile. The trial court granted the public defender's motion, whereupon the DJJ recommended that the juvenile be committed to a minimum-supervision facility. The trial court again rejected the DJJ's recommendation based on the trial court's findings in support of a moderate risk program made at the earlier disposition hearing. On appeal, the Second District Court of Appeals held that the juvenile was entitled to a new hearing to establish the appropriate level of commitment for his offenses. When a juvenile court concludes that a child has committed a crime, it begins a two-pronged disposition process. First, it determines whether the child should

be adjudicated delinquent and committed to the DJJ. See s. 985.433(6), F.S. (2013). Section 985.433(7), F.S., lists criteria for assessing the advisability of committing the child, and the court must make specific findings outlining factors that support an adjudication and commitment. In the instant case, the trial court's stated reasons were sufficient to support its decision to adjudicate and commit the juvenile to the DJJ. But those findings did not pertain to the second prong of the disposition process, in which the trial court must determine the appropriate level of commitment. If a court disagrees with the DJJ's recommendation in this regard, it must state on the record reasons that establish, by a preponderance of the evidence, why a different commitment level is appropriate. In E.A.R. v. State, 4 So. 3d 614 (Fla. 2009), the Florida Supreme Court set forth the guidelines for making this determination. In the instant case, the trial court did not address the differences between the minimum commitment level recommended by DJJ and the moderate commitment level that was imposed. Nor did it explain why a moderate commitment would better meet the juvenile's needs and the needs of the public and was the most appropriate, least restrictive setting. Accordingly, the disposition was reversed and remanded for the trial court to make a proper determination employing the E.A.R. guidelines. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/August/August%2014,%202015/2D13-6065.pdf (August 14, 2015)

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

R.C.R. v. State, __ So. 3d __, 2015 WL 4747191 (Fla. 4th DCA 2015). **THE STATE'S EVIDENCE FAILED TO SHOW ACTUAL OR CONSTRUCTIVE POSSESSION OF COCAINE.** The juvenile appealed his adjudication for possession of cocaine and criminal mischief. The juvenile argued that the trial court erred in denying his motion for a judgement of dismissal. The juvenile was arrested on an unrelated charge. During the arrest, an officer searched inside his pockets, removing only a cell phone. The deputy conducted a pat-down search for weapons and placed the juvenile in the back of a patrol car. The juvenile kicked and thrashed around in the back of the car causing physical damage to the police vehicle. The juvenile was placed in handcuffs and a hobble restraint and then transported to a hospital where he was examined and medically cleared. The juvenile was then taken to a juvenile assessment center. During the drive, the deputy observed the juvenile moving around from side to side or ducking down. The deputy drove the patrol car back to the station to review the damage. At the station, the deputy opened the back driver's side door and saw a plastic baggie with a white substance in between the seat and the doorframe. The deputy testified that she did not see it earlier because of the angle at which she was standing when she opened the door and because it was dark outside. The deputy photographed the baggie and then

field-tested the substance in the bag, which tested positive for cocaine. She did not test it for fingerprints or DNA. The deputy never saw the juvenile with a baggie of cocaine, but she testified that the baggie was not there when she checked her vehicle at the beginning of her shift and the juvenile was the only person in her patrol car that day. No one had been in the back of the car for five days prior. The juvenile was charged with possession of cocaine and criminal mischief. The juvenile moved for a judgment of dismissal for the possession of cocaine, arguing that the evidence was circumstantial and his reasonable hypothesis that someone else could have left the baggie in the vehicle was not rebutted. The juvenile also argued that, because the baggie was not in plain view, the State did not get the benefit of the presumption that the juvenile had knowledge of the cocaine in the vehicle to establish constructive possession. On appeal, the Fourth District Court of Appeals held that evidence failed to show the juvenile's actual or constructive possession of cocaine. The deputy testified that she never saw the juvenile with the cocaine and the baggie was not found when the juvenile's pockets were searched or when he was patted down. Additionally, the facts did not support that the cocaine was within the juvenile's "ready reach" and was under his control. The juvenile was handcuffed and hobbled in the back of the patrol car. As to constructive possession, the evidence indicated that the juvenile did not have exclusive control over the area where the contraband was found. There was no testimony that the juvenile ever possessed any cocaine or that he had seen the baggie in the door jam or that his statements otherwise indicated that he knew of its presence. The testimony and the photographic evidence did not support that the contraband was in plain view to establish knowledge. The photograph of the baggie showed that the baggie was found between the end of the backseat and the door, making it only visible when the door was open. The deputy testified that it could only be seen from certain angles when the door was open. Lastly, the State did not present any fingerprint evidence, admissions, eyewitness testimony, or other evidence tending to establish dominion and control. Because the evidence failed to show the juvenile's actual or constructive possession of cocaine, the trial court erred in denying the motion for judgment of dismissal. Accordingly, the Fourth District reversed and remanded for resentencing on the charge of criminal mischief alone.

<http://www.4dca.org/opinions/Aug%202015/8-12-15/4D13-4627.op.pdf> (August 12, 2015)

G.M. v. State, ___ So. 3d ___, 2015 WL 4747407 (Fla. 4th DCA 2015). **TRIAL COURT ERRED IN DENYING MOTION TO SUPPRESS MARIJUANA EVIDENCE.** The juvenile appealed his adjudication for possession of marijuana, arguing that the trial court erred in denying his motion to suppress the marijuana recovered from his pocket. The juvenile was found sitting in the passenger seat of a stolen vehicle. Both the juvenile and the driver were ordered out of the car by police. Because the juvenile was in a stolen vehicle, the officers handcuffed him and performed a weapons pat-down for officer safety before placing him in the back of a patrol car. The officer who performed

the pat-down testified he felt a baggie in the juvenile's pocket and that he could feel that there was like a plant-like material inside of it. Based on his training and experience he thought it was marijuana and he pulled it out of the pocket. The officer testified on cross-examination that he did not notice any bulges in the juvenile's clothes, there was no threatening behavior by the juvenile and the juvenile did not say anything that made the officer think that was armed or dangerous. On appeal, the Fourth District Court of Appeals held that the officers were entitled to remove the juvenile from the stolen car, and even though he was not under arrest, initially place him in handcuffs in a patrol car during the course of investigating his participation, and to conduct a limited pat-down for weapons. However, the removal and seizure of the baggie containing marijuana was improper under the plain feel doctrine. Under Florida law, a protective frisk or pat-down must be limited to that which is necessary for the discovery of weapons. It may not extend beyond a pat-down of the suspect's outer clothing unless the pat-down or other circumstances lead the officer to believe that the suspect has a weapon. Additionally, under the "plain feel doctrine," a police officer may retrieve an item felt during a pat-down search if the officer has probable cause to believe that the item is actually contraband. In the instant case, the officer stated that he felt a baggie with a "plantlike material" inside the juvenile's pocket during his pat-down search for weapons. He admitted that he had "no clue what type of plant it was at the time," and, only claimed that he thought it was marijuana based on his "training and experience." There was no testimony that by plain feel the officer was able to develop anything more than an inkling that the bag he felt in the juvenile's pocket, which did not create a bulge in the clothing, would contain contraband. In other words, the officer's perception that the material in the plastic bag was contraband did not come as a result of his tactile perception, but from an educated hunch based upon the plain feel of the object. Accordingly, the trial court's denial of the motion to suppress and the juvenile's conviction for possession of marijuana was reversed and remanded.

<http://www.4dca.org/opinions/Aug%202015/8-12-15/4D14-969.op.pdf> (August 12, 2015)

State v. D.A., __ So. 3d __, 2015 WL 4747200 (Fla. 4th DCA 2015). **TRIAL COURT'S SUA SPONTE DISMISSAL OF THE STATE'S DELINQUENCY PETITION WAS REVERSED AND REMANDED BECAUSE THE TRIAL COURT IMPROPERLY ENCROACHED UPON THE STATE'S DISCRETION TO PROSECUTE.** The State challenged the trial court's final order sua sponte dismissing its petition for delinquency against the juvenile. The State filed a delinquency petition against the juvenile in January, 2012, based on allegations that he trespassed on school grounds. The juvenile was scheduled for intake into a juvenile diversion program, but failed to appear on the scheduled date. The juvenile then was issued a *capias* in April, 2012, for failure to appear. At the hearing on the petition more than two years later, the State informed the trial court that the juvenile was on a pickup order status. After noting it appeared that the State had declined to extradite the juvenile after he was

arrested in Colorado, the trial court sua sponte dismissed the petition for delinquency. On appeal, the Fourth District Court of Appeals held that the trial court impermissibly relied on s. 985.0301(6), F.S. (2014), to sua sponte dismiss the petition before the initial adjudicatory hearing. In State v. W.D., 112 So. 3d 702 (Fla. 4th DCA 2013), the Fourth District held that s. 985.0301(6) “is fairly viewed as authorizing the court to elect to end its jurisdiction over a child at any time following the initial adjudicatory hearing—not as permitting the trial court to use its discretion to terminate jurisdiction to put an end to the prosecution before the case ever reaches adjudication on the merits.” Furthermore, a trial court is without authority to sua sponte dismiss a criminal prosecution where no motion to dismiss has been filed. By sua sponte dismissing the delinquency petition, the trial court improperly encroached upon the State’s discretion to prosecute the juvenile. Accordingly, the trial court’s dismissal of the delinquency petition was reversed and remanded.

<http://www.4dca.org/opinions/Aug%202015/8-12-15/4D14-2564.op.pdf> (August 12, 2015)

D.D. v. State, __ So. 3d __, 2015 WL 4926998 (Fla. 4th DCA 2015). **RESTITUTION ORDER REVERSED AND REMANDED BECAUSE RESTITUTION AWARD WAS BASED ON SPECULATION AND AN ARBITRARY DEPRECIATION VALUE ACROSS-THE-BOARD.** The juvenile appealed the trial court’s \$2500 restitution order. The victim testified that multiple items that were taken from his home, including two laptops and multiple pieces of jewelry, and that there had been some damage inflicted upon his home during the taking. The State argued that it had proved a value of \$3,229.87, including the estimate for repairs. The juvenile argued that the amounts testified to by the victim were speculative, and that there was no evidence of a depreciation value for the laptops. The trial court announced, “factoring in depreciation,” that it would order \$2500 in restitution. On appeal, the Fourth District Court of Appeals found that restitution award was based upon speculation and an arbitrary depreciation value applied across-the-board. Adequate testimony was provided to establish a fair market value for the Toshiba laptop, the Seiko watch, and two gold necklaces. However, as to the remaining items, the testimony was insufficient. Additionally, the testimony regarding the repairs to the victim’s home was inadequate. The victim testified that he thought the repairs would total \$400, but did not base this on any estimate. The victim also did not describe what repairs needed to be made. The Fourth District found that the trial court also erred in decreasing the restitution award based on an arbitrary, across-the-board cut to the amount that the State argued it proved in restitution. Accordingly, the Fourth District reversed and remanded for a new restitution hearing.

<http://www.4dca.org/opinions/Aug%202015/8-19-15/4D14-1495.op.pdf> (August 19, 2015)

State v. M.A., __ So. 3d __, 2015 WL 5026221 (Fla. 4th DCA 2015). **TRIAL COURT’S SUA SPONTE DISMISSAL OF THE STATE’S DELINQUENCY PETITION WAS REVERSED AND REMANDED BECAUSE**

THE DISMISSAL WAS NOT AUTHORIZED AND THE COURT IMPROPERLY ENCROACHED UPON THE STATE'S DISCRETION TO PROSECUTE. The State appealed the trial court's sua sponte dismissal of its delinquency petition. The Fourth District Court of Appeals held that the trial court erred in dismissing the delinquency petition sua sponte. In August, 2012, the juvenile was charged by petition for delinquency with possession of cannabis and possession of drug paraphernalia. During an April, 2014, status hearing, counsel for the juvenile proffered that the juvenile was picked up in South Carolina and subsequently released. The trial court stated that the defense's proffer indicated that Florida officials told the South Carolina officials that Florida would not be extraditing the juvenile. The State told the trial court that nothing in its records reflected whether the State did or did not want to extradite the juvenile. The trial court noted that there was a pickup order as to the juvenile issued on November 15, 2012, and that there had been a take custody order for over a year. The trial court then sua sponte dismissed the pending petition for delinquency. On appeal, the Fourth District found that the trial court lacked the authority to sua sponte dismiss the petition. The trial court impermissibly dismissed the delinquency petition, where the trial court had acquired jurisdiction over the juvenile, before the trial court had reached the phase of the proceedings where there was an adjudication on the merits of the case. See State v. J.C., 141 So. 3d 756 (Fla. 4th DCA 2014) and State v. W.D., 112 So. 3d 702 (Fla. 4th DCA 2013). Further, the trial court erred when it sua sponte dismissed the petition because the trial court improperly ruled on an issue that was not before it and interfered with the State's discretion to bring charges against the juvenile. By dismissing the delinquency petition, the trial court violated the separation of powers doctrine by encroaching on the state attorney's absolute authority to decide where and how to prosecute. Accordingly, the trial court's dismissal of the delinquency petition was reversed and remanded.

<http://www.4dca.org/opinions/Aug%202015/8-26-15/4D14-1407.op.pdf> (August 26, 2015)

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

J.C. v. Department of Children and Families, 172 So. 3d 515, 40 Fla.L.Weekly D1835, 2015 WL 4640846 (Fla. 3rd DCA 2015). [TERMINATION OF PARENTAL RIGHTS AFFIRMED](#). The Third District Court of Appeal affirmed termination of a mother's parental rights. The court held that notwithstanding an imprecise order entered by the trial court, the record evidence and trial court's consideration of the mother's conduct supported a finding of material breach of the mother's case plan. The appellate court likewise found support for the trial court's finding by clear and convincing evidence that the mother would not substantially comply with her case within twelve months.

<http://www.3dca.flcourts.org/Opinions/3D15-0887.pdf> (August 5, 2015)

G.M. v. Department of Children and Families, 173 So. 3d 1111, 40 Fla.L.Weekly D1977, 2015 WL 5023387 (Fla. 3rd DCA 2015). [SUMMARY DISPOSITION OF MOTHER'S APPEAL](#). The Third District Court of Appeal summarily affirmed a trial court's order. The mother had sought to appeal after her attorney withdrew upon reviewing the record and determining in good faith that there were no meritorious legal ground for reversal.

<http://www.3dca.flcourts.org/Opinions/3D15-1310.pdf> (August 26, 2015)

Fourth District Court of Appeal

W.L. v. Department of Children and Families, 172 So. 3d 562, 40 Fla.L.Weekly D1909, 2015 WL 4931404 (Fla. 4th DCA 2015). [TERMINATION OF PARENTAL RIGHTS VACATED AND REMANDED](#). The Fourth District Court of Appeal vacated an order terminating a mother's parental rights and remanded the case back to the trial court. The appellate court declined to address the merits of the appeal but rather vacated the order because the trial court failed to make required findings of fact and conclusions of law. The trial court had not indicated in its final judgment the ground for termination upon which it relied. Moreover, the final judgment did not contain a required finding that any provision of services would be futile or that the child would be threatened with harm despite any services provided to the parent. Nor did the trial court make findings regarding the mother's noncompliance with the case plan. Finally, the trial court did not conclude that the Department had established abandonment or other grounds for termination by clear and convincing evidence. The District Court was left speculate as to which ground the trial court relied in terminating parental rights and was unable to undertake a meaningful review. The court

therefore vacated the judgment and remanded the case so that the trial court could enter a new final judgment complying with s. 39.809(5), F.S.

<http://www.4dca.org/opinions/Aug%202015/8-19-15/4D15-362.op.pdf> (August 19, 2015)

Fifth District Court of Appeal

No new opinions for this reporting period.

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Freiha v. Freiha, __So. 3d__, 2015 WL 4627559 (Fla. 1st DCA 2015). **APPEAL DISMISSED AS PREMATURE BECAUSE FINAL JUDGMENT WAS NOT A FINAL ORDER.** The appeal was dismissed as premature because the final judgment of dissolution was not a final order.

https://edca.1dca.org/DCADocs/2015/1695/151695_DA08_08042015_123801_i.pdf (August 4, 2015)

Kemp v. Kemp, __So. 3d__, 2015 WL 4774662 (Fla. 1st DCA 2015). **RELIEF NOT REQUESTED CANNOT BE GRANTED; INTERIM PARTIAL DISTRIBUTION CANNOT BE ORDERED IN ABSENCE OF VERIFIED PLEADING REQUESTING IT.** Former wife appealed the trial court's non-final order, issued on her motion for attorney's fees. The trial court found that former husband lacked the ability to pay fees and then directed each spouse to receive \$25,000 from marital bank accounts that were previously inaccessible due to a court order. The appellate court noted that not only did the trial court not award attorney's fees to former wife, it provided monetary support to former husband in absence of any request for such relief by him. Although the trial court "acknowledged that it lacked authority to order an interim partial equitable distribution," the appellate court concluded that the trial court had effectively done so. The appellate court held that an interim partial equitable distribution may not be ordered in the absence of a verified motion requesting such distribution.

https://edca.1dca.org/DCADocs/2015/0824/150824_DC13_08142015_123035_i.pdf (August 14, 2015).

Second District Court of Appeal

Stoltzfus v. Stoltzfus, __So. 3d__, 2015 WL 4747194 (Fla. 2d DCA 2015). **RETIREMENT ACCOUNTS DISTRIBUTED TO SPOUSES ARE INCOME SO LONG AS PRINCIPAL WILL NOT BE INVADDED FOR PURPOSES OF SUPPORT; THIS IS TRUE REGARDLESS OF WHETHER SPOUSE HAS REACHED AGE AT WHICH FUNDS MAY BE WITHDRAWN WITHOUT PENALTY; INTEREST EARNED ON EQUALIZATION PAYMENTS FALLS WITHIN STATUTORY DEFINITION OF INCOME AND SHOULD BE CONSIDERED IN CALCULATING SPOUSE'S INCOME.** Both spouses appealed the trial court's calculation of alimony in their amended final judgment of dissolution. Former husband argued that the trial court failed to consider income available to former wife in determining her need for alimony, including two 401k accounts distributed to former wife along with the interest-generating monthly equalization payments he was required to make. The trial court specifically found that the 401ks were income-generating assets; however, it found that former wife would not be able to draw on the income until she turned sixty-five. The appellate court held that retirement accounts distributed to spouses should be considered income for the purpose of determining alimony so long as it is reasonable to conclude that the principal will not be invaded for the purpose of support; this is true regardless of whether the spouse has reached the age at which funds may be withdrawn without penalty. Interest earned on equalization payments falls within statutory definition of

income and should be considered in calculating income. The appellate court found that the trial court abused its discretion in not considering interest income from the 401ks and equalization payments in determining former wife's income. The appellate court agreed with both spouses that the judgment contained a mathematical error in the calculation of former wife's need. Reversed and remanded for redetermination and recalculation of the amount of former wife's need and the alimony award.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/August/August%2012,%202015/2D14-2083.pdf (August 12, 2015)

Niekamp v. Niekamp, __ So. 3d __, 2015 WL 5023119 (Fla. 2d DCA 2015). TWENTY-TWO YEAR MARRIAGE IS LONG-TERM, CARRIES PRESUMPTION IN FAVOR OF ALIMONY; TRIAL COURT MUST GIVE PARENT THE KEY TO RECONNECTING WITH HIS OR HER CHILDREN; ORDER THAT DOES NOT DO SO IS DEFICIENT BECAUSE IT PREVENTS BOTH THE PARENT FROM KNOWING WHAT IS EXPECTED AND ANY SUCCESSOR JUDGE FROM MONITORING THAT PARENT'S PROGRESS; AN ASSET ACQUIRED DURING THE MARRIAGE IS PRESUMED TO BE MARITAL UNLESS SPECIFICALLY ESTABLISHED AS NONMARITAL; IT IS ERROR TO INCLUDE ASSETS DEPLETED DURING DISSOLUTION PROCEEDINGS IN EQUITABLE DISTRIBUTION SCHEME IN ABSENCE OF MISCONDUCT. Former husband argued that the trial court improperly delegated its authority when it asked a therapist to evaluate whether therapeutic reunification was in the best interests of the children in the dissolution of a twenty-two year marriage. The court had reserved jurisdiction to readdress time-sharing based on notice by the therapist that therapeutic reunification had commenced or on motion by either spouse. Former husband's history of mental health issues had led the trial court to find shared responsibility would be detrimental to the children; thus, it awarded sole parental responsibility to former wife. The appellate court cited its holding in Grigsby v. Grigsby, 39 So. 3d 453 (Fla. 2d DCA 2010), that a court must give the parent the key to reconnecting with his or her children; an order that fails to do so is deficient because it prevents the parent from knowing what is expected and prevents any successor judge from monitoring that parent's progress. The appellate court reversed the judgment for failing to provide any "schedule or benchmarks" for reestablishing former husband's parenting of his children; it remanded for the trial court to do so. The appellate court agreed with former husband that the trial court erred by classifying former wife's business as a nonmarital asset; accordingly, it remanded for the trial court to characterize the business as marital and to value it for purposes of equitable distribution. When an asset is acquired during the marriage, it is presumed to be marital unless specifically established as nonmarital. The appellate court also agreed with former husband that the trial court erred by assigning to his share of the equitable distribution a \$25,000 asset that no longer existed because he withdrew funds in that amount to pay attorney's fees. When a spouse uses marital assets during dissolution proceedings to pay for support, living expenses, and litigation expenses, it is error to include the assets in the scheme of equitable distribution in the absence of misconduct. The appellate court found no evidence or finding of misconduct by former husband. It reversed and instructed the trial court to omit the asset and rebalance the distribution accordingly. The appellate court noted that a twenty-two year marriage is considered long-term; it carries with it a presumption in favor of alimony when "warranted" by need and ability. Despite the "ample evidence" that former husband was unable to work due to mental health issues, the trial court concluded that former husband's

unemployment was voluntary. This conclusion and the trial court's subsequent imputation of income to former husband for child support purposes were erroneous. Other than observing that former wife could not afford to continue paying former husband's expenses under the temporary support order, the trial court did not address former wife's ability to pay alimony. The appellate court reversed and remanded for the trial court to award alimony "in a form and amount commensurate" with former husband's need and former wife's ability to pay.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/August/August%2026,%202015/2D14-728.pdf (August 26, 2015)

Kyriacou v. Kyriacou, __ So. 3d __, 2015 WL 5023436 (Fla. 2d DCA 2015). **TRIAL COURT MUST CONSIDER ALL FACTORS IN SECTION 61.075(1), F.S.; DISPARATE EARNING CAPACITY, STANDING ALONE, CANNOT SUPPORT UNEQUAL DISTRIBUTION.** Former husband appealed the final judgment of dissolution. The appellate court reversed the trial court's unequal distribution because the record did not indicate that the trial court had considered the requisite statutory factors when making that award. The trial court based the unequal distribution on its finding that it was equitable based on the facts at hand, including former husband's "superior" wage-earning ability. Although a trial court may consider wage-earning ability in awarding an unequal distribution, disparate earning capacity, standing alone, cannot support unequal distribution. A trial court must consider all factors in s. 61.075(1), F.S. (2011). Here, it was instructed to do so on remand. As the record was unclear regarding the values that the trial court's assigned to certain assets, and there was a question of former husband having improperly dissipated the assets, the appellate court remanded for the trial court to reconsider the "inclusion and valuation" of those assets prior to recalculating equitable distribution amounts.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/August/August%2026,%202015/2D14-1915.pdf (August 26, 2015)

Third District Court of Appeal

Garcia v. Garcia, __ So. 3d __, 2015 WL 4747216 (Fla. 3d DCA 2015). **MAGISTRATE IS RESPONSIBLE FOR CREATING AN ACCURATE AND COMPLETE RECORD OF PROCEEDINGS; TRIAL COURT ABUSES ITS DISCRETION IF IT ADOPTS AN INCOMPLETE REPORT.** Former husband petitioned for a downward modification of child support; former wife countered with a motion for contempt and to compel compliance with the final judgment. Former husband appealed the trial court's order ratifying the general magistrate's report and denying his exceptions. The appellate court reversed because the report was based on an incomplete record that did not contain the testimony of former husband or his accountant. Although former husband and his accountant had testified at one of the evidentiary hearings, the hearing was inaudible and could not be transcribed. The appellate court cited its holding in *DeClements v. DeClements*, 662 So. 2d 1276, 1283-84 (Fla. 3d DCA 1995), that a magistrate is responsible for creating an accurate and complete record of the proceedings. A trial court may not adopt or ratify a magistrate's report if the magistrate failed to file a complete record of the evidence with the report—regardless of whether exceptions have been filed. If a trial court has not received a complete record when the magistrate files his or her report, all actions based on the report are subject to being found erroneous. Because the testimony of former husband and his accountant were absent from the record that went to the trial court, the court did not have a full written record to review and abused its discretion when

it ratified the magistrate's report. Reversed and remanded for further proceedings, included a new hearing if necessary.

<http://www.3dca.flcourts.org/Opinions/3D12-2514.pdf> (August 12, 2015)

Amsalem v. Amsalem, __So. 3d__, 2015 WL 5093567 (Fla. 3d DCA 2015). **WRIT OF PROHIBITION GRANTED AFTER APPELLATE COURT FOUND PETITIONER'S ALLEGATIONS, TAKEN AS TRUE, REFLECTED THAT A REASONABLY PRUDENT PERSON WOULD HAVE A WELL-FOUNDED FEAR OF NOT RECEIVING A FAIR AND IMPARTIAL TRIAL.** Former husband appealed a denial of his motion to disqualify. A writ of prohibition was granted after the appellate court, accepting former husband's allegations as true, concluded that a reasonably prudent person would have a well-founded fear of not receiving a fair and impartial trial.

<http://www.3dca.flcourts.org/Opinions/3D15-1416.pdf> (August 31, 2015)

Fourth District Court of Appeal

Lopez v. Lopez, __So. 3d__, 2015 WL 4637184 (Fla. 4th DCA 2015). **APPEAL OF NON-FINAL ORDER NOT FILED WITHIN 30 DAYS OF RENDITION DISMISSED AS UNTIMELY; MOTION FOR REHEARING DOES NOT SUSPEND RENDITION OF A NON-FINAL ORDER.** Former husband's appeal of a post-dissolution non-final order was not filed within 30 days of rendition of the order and thus was dismissed as untimely. A motion for rehearing does not suspend rendition of a non-final order because a rehearing is not authorized for non-final orders.

<http://www.4dca.org/opinions/Aug%202015/8-05-15/4D15-611.op.pdf> (August 5, 2015)

Whissell v. Whissell, __So. 3d__, 2015 WL (Fla. 4th DCA 2015). **APPEAL OF NON-PAYING SPOUSE DISMISSED; APPELLATE COURT RELINQUISHED ITS JURISDICTION TO THE TRIAL COURT FOR 30 DAYS TO ALLOW SPOUSE TO SHOW COMPLIANCE.** Former husband appealed a non-final order holding him in contempt for the fourth time due to his "repeated failure" to make court-ordered temporary support payments and to comply with discovery. The trial court found that former husband owed former wife \$103,432. Former wife moved to dismiss the appeal due to former husband's failure to pay any court-ordered temporary support. The appellate court granted former wife's motion to dismiss; however, it gave former husband thirty days from the filing of its opinion to show his substantial compliance with the trial court's orders. The appellate court relinquished jurisdiction to the trial court for thirty days to conduct any necessary proceedings to determine former husband's compliance and to provide a status report as to whether he was in compliance to the trial court's satisfaction.

<http://www.4dca.org/opinions/Aug%202015/8-05-15/4D15-671.op.pdf> (August 5, 2015)

Hall v. Hall, __So. 3d __, 2015 WL (Fla. 4th DCA 2015). **TRIAL COURT DID NOT ERR IN FINDING TWO-PAGE MARITAL SETTLEMENT AGREEMENT COMPLETE, BUT ABUSED ITS DISCRETION IN DENYING SPOUSE LEAVE TO AMEND HIS ANSWER.** In this appeal involving a missing page of a marital settlement agreement (MSA), former husband's initial answer did not request any affirmative relief. Immediately following mediation, former husband's attorney "repeatedly contacted" former wife's attorney claiming to have forgotten to present the first page of the draft of the MSA for former wife to consider. Former husband's attorney requested that former wife's attorney confirm that the additional page reflected the spouses' agreement. Former wife's

attorney never responded, but ultimately filed the two-page MSA. Former husband asked for leave to amend his answer, requested an order declaring the two-page MSA to be incomplete, and attached an amended answer in which he requested affirmative relief. Following a hearing, at which neither former husband nor his attorney could present the original of the missing page, the trial court denied former husband's request to find the two-page MSA incomplete and leave to amend his answer. The final judgment of dissolution adopted the two-page MSA. After reviewing the reasons for setting aside MSAs and the specific circumstances of this case, the appellate court held that the trial court did not err in its ruling that the two-page MSA filed by former wife was valid and enforceable; however, it found that the trial court had abused its discretion when it denied former husband leave to amend. Although the MSA was dispositive as to the spouses' assets, it did not address child support, alimony, time-sharing, or attorney's fees. Allowing former husband to amend his answer would have given him a chance to raise unaddressed issues, was not an abuse of his privilege to amend, as it was his first request to amend, and would not have prejudiced former wife. Remanded with instructions to allow former husband to amend.

<http://www.4dca.org/opinions/Aug%202015/8-12-15/4D13-2897.op.pdf> (August 12, 2015)

Weaver v. Weaver, __ So. 3d __, 2015 WL (Fla. 4th DCA 2015). **REVERSED AND REMANDED DUE TO TRIAL COURT ERROR IN DIVIDING REAL PROPERTY.** Former husband argued trial court error in the award of \$40,000 interest in the marital home, which he had acquired before the marriage, to former wife. The appellate court found that because the evidence did not support the trial court's finding that former wife invested \$40,000 in the home the home was not a marital asset, and as it did not increase in value during the marriage, but actually decreased, the trial court erred in requiring former husband to pay former wife any interest in the house. The appellate court also found that the trial court had failed to make the required findings of fact to equitably distribute lots owned by the spouses in Georgia. Due to the errors in dividing the real property, the appellate court reversed and remanded for further proceedings to equitably distribute the marital assets; it affirmed the alimony award.

<http://www.4dca.org/opinions/Aug%202015/8-19-15/4D13-4275.op.pdf> (August 19, 2015)

Hooker v. Hooker, __ So. 3d __, 2015 WL (Fla. 4th DCA 2015). **INTERSPOUSAL GIFT REQUIRES EVIDENCE OF DONATIVE INTENT; UNEQUAL DISTRIBUTION REQUIRES CERTAIN FINDINGS.** Both spouses appealed their amended final judgment of dissolution. The appellate court agreed with former husband that there was a lack of evidence to support the trial court's finding that former husband gifted an interest in one piece of real property to former wife (the horse farm), but disagreed with former husband on another piece of property (the lake house). Both pieces of property were acquired by former husband during the marriage with separate nonmarital funds. The spouses had executed a prenuptial agreement to keep their substantial premarital assets separate. Pursuant to that agreement, any appreciation of those assets remained separate; therefore, the only way former wife could claim an interest was through an interspousal gift. Although the trial court found facts, supported by the record, to establish an interspousal gift for horse farm, the appellate court concluded that none of those facts evidenced former husband's "clear and unmistakable intention" to gift any interest to former wife. Her name was not on the title, she was not liable for any loans, and there was no testimony that former husband

acknowledged that she had any interest in the property. The appellate court reached a different conclusion with the lake house, in which it found that the facts evidenced sufficient donative intent. Former husband had sent former wife a happy tenth anniversary card with a picture of the property after she expressed a desire to have a home up north, they had searched for suitable property, and she paid for some furnishings and incidentals from her separate funds, although he paid for the building and maintenance. The appellate court noted that former wife's name did not appear on any of the official documents related to the property, but found this not to be dispositive as the donative intent was "conveyed through the anniversary card." It held that the trial court did not abuse its discretion in finding that delivery was made when former wife got her keys to the property and began to possess it as her summer home. Holding that the trial court made the requisite findings supporting unequal distribution, the appellate court affirmed the 25% interest in the lake property that the trial court awarded former wife. The appellate court reversed the entire equitable distribution schedule and instructed the trial court to recalculate on remand after awarding 100% of the horse farm to former husband.

<http://www.4dca.org/opinions/Aug%202015/8-26-15/4D13-1841.op.pdf> (August 26, 2015)

Fifth District Court of Appeal

Blevins v. Blevins, ___ So. 3d ___, 2015 WL (Fla. 5th DCA 2015). **IN THE ABSENCE OF COMPETENT, SUBSTANTIAL EVIDENCE OF A SUBSTANTIAL CHANGE OF CIRCUMSTANCES, TRIAL COURT ABUSED ITS DISCRETION IN GRANTING MODIFICATION.** Former husband appealed an order granting former wife's supplemental petition to modify the time-sharing schedule of their final judgment of dissolution. The order also granted relief regarding the distance of their son's school which was close to former husband's home but approximately a one-hour drive from former wife's home. The appellate court observed that the trial court had known the location of both spouses' residences at the time of the final judgment and had selected former husband's home as the child's designated school address; therefore, "concerns related to this issue" could not form the basis for the modification order. The appellate court concluded that because no competent, substantial evidence of a substantial change of circumstances was presented, the trial court abused its discretion in granting former wife's petition for modification. It reversed and remanded with instructions for the trial court to reinstate the equal time-sharing schedule set forth in the final judgment of dissolution.

<http://www.5dca.org/Opinions/Opin2015/081715/5D14-3832.op.pdf> (August 21, 2015)

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Floyd v. Gray, ___ So. 3d ___, 2015 WL 4773922 (Fla. 1st DCA 2015). **DATING VIOLENCE INJUNCTION UPHOLD**. The mother filed a petition for an injunction against dating violence on behalf of her daughter, who was the victim of threatened and actual violence by defendant. The court entered a two-year protective injunction, prohibiting defendant from having any contact with or committing any violence against daughter, who was his girlfriend for a short period; defendant appealed, claiming that he did not have a dating relationship with the girl. The appellate court found that the victim's testimony demonstrated a dating relationship, even though the victim was 14 years old and the relationship between the teens was different from an adult relationship, and upheld the injunction.

https://edca.1dca.org/DCADocs/2014/4475/144475_DC05_08142015_122625_i.pdf (August 14, 2015)

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.

Drug Court/Mental Health Court 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.