

OSCA/OCI'S CASE LAW UPDATE MAY 2016

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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

E.G. v. Department of Children and Families, __ So. 3d __, 2016 WL 2731654 (Fla. 3d DCA 2016). **CIRCUIT COURT LACKED THE AUTHORITY TO “ORDER” A PERSON TO “VOLUNTARILY” ENTER A RESIDENTIAL DRUG TREATMENT PROGRAM.** In a dependency proceedings, the circuit court ordered a minor to “voluntarily” enter into a residential drug treatment program, submit to daily/random drug testing, and to abstain from illegal drugs and from running away. Minor sought a writ of certiorari. The Third District Court of Appeal held that the trial court lacked the authority to order any of these conditions. Specifically, as to the order to “voluntarily submit himself” to the residential treatment facility, the Third District found that s. 397.601, F.S., governed voluntary admission into substance abuse treatment facilities. The statute addressed the circumstance in which a person decides to enter a program under his or her own volition. The statute does not authorize a court to “order” a person to “voluntarily” enter treatment. Accordingly, the Third District granted the petition for writ of certiorari, quashed portions of the circuit court’s order and remanded for further proceedings.

<http://www.3dca.flcourts.org/Opinions/3D16-0994.pdf> (May 11, 2016)

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

K.C. v. State, __ So. 3d __, 2016 WL 2609647 (Fla. 5th DCA 2016). **HABEAS CORPUS RELIEF GRANTED WHERE THE ORDER OF INVOLUNTARY COMMITMENT WAS IMPROPER BECAUSE THE EVIDENCE PRESENTED AT THE HEARING DID NOT ESTABLISH, BY CLEAR AND CONVINCING EVIDENCE, THAT THE PETITIONER WAS A DANGER TO HERSELF OR OTHERS.** K.C. petitioned the Fifth District Court of Appeal for habeas corpus relief to obtain immediate release from her confinement at a crisis stabilization unit. K.C. argued that the order of involuntary commitment issued by the lower court pursuant to s. 394.467, F.S., was improper because the evidence presented at the hearing did not establish, by clear and convincing evidence, that the petitioner was a danger to herself or others. In its response, the State acknowledged that the petitioner “appears [to have] established grounds ... to grant the petition.” The Fifth District agreed. Accordingly, the petition for a writ of habeas corpus was granted and the order of involuntary inpatient placement was vacated.

<http://www.5dca.org/Opinions/Opin2016/050216/5D16-1415.op.pdf> (May 5, 2016)

Drug Court/Mental Health/Veterans 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.

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

R.C. v. State, ___ So. 3d ___, 2016 WL 3003641 (Fla. 2d DCA 2016). **THIS OPINION SUPERSEDES THE MARCH 11, 2016, OPINION: IT IS WITHIN THE TRIAL COURT'S DISCRETION TO DETERMINE A WITNESS'S QUALIFICATIONS TO EXPRESS AN OPINION AS AN EXPERT, AND THE COURT'S DETERMINATION WILL NOT BE REVERSED ABSENT A CLEAR SHOWING OF ERROR.** The juvenile appealed a disposition order placing him on probation for possession of marijuana and administering a judicial warning for possession of drug paraphernalia. The juvenile contended that the trial court erred in admitting the testimony of the arresting officer identifying the plant material and the pipe seized from his book bag as marijuana and drug paraphernalia because the State failed to satisfy the recently adopted Daubert standard for the admissibility of expert testimony as stated in s. 90.702, F.S. (2014) (codifying Daubert). Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). On March 11, 2016, the Second District Court of Appeal upheld the trial court's decision. This summary is based on the juvenile's subsequent "motion for rehearing or certification of conflict or question of great importance." The Second District denied the juvenile's motion, and on its own motion withdrew its original opinion dated March 11, 2016 (2016 WL 920571). Here, again, the Second District affirmed the trial court's decision. Hence, the result remains unchanged; however, the revised opinion merely clarifies a few points regarding Daubert and s. 90.702. Regarding the trial court's decision to admit the testimony of the arresting officer, the Second District reemphasized the following: Before the 2013 amendment to s. 90.702, the identification of marijuana by nonscientific means was a settled issue in the Florida courts, and adoption of the Daubert standard has not changed the long-established rule that lay persons can identify marijuana based on their personal experience and knowledge. Such testimony is not admitted based on scientific expertise but instead on the layman's training and experience, for which a predicate establishing a sufficient degree of familiarity is sufficient. Further, the federal courts, which have all followed Daubert since 1993, have long allowed lay testimony to identify illicit substances much as the officer did in this case. Here, the State laid a sufficient foundation for the officer's identification of the substance found in the juvenile's book bag as marijuana based on the deputy's experience and training. Regarding the issue of conflict, the Second District held that its decision was not in conflict with A.A. v. State, 461 So. 2d 165 (Fla. 3d DCA 1984), nor Brooks v. State, 762 So. 2d 879 (Fla. 2000), in permitting the officer to testify as a lay person as opposed to an expert thereby foregoing the requirements imposed on expert witnesses under s. 90.702 (adoption of Daubert). In A.A., the Third District Court of Appeal held that a trial court did not abuse its discretion in permitting an officer to testify as an "expert" in marijuana identification based on his training and experience as the trial court's determination that the officer qualified as an "expert" within the purview of s. 90.702 was a matter "left to the trial court's discretion, reviewable only for abuse." 461 So. 2d at 166. Likewise

in Brooks, the trial court permitted a crack cocaine dealer to “express his opinion, in the form of expert testimony, regarding the identity and weight of the rocky substance contained in [a] sandwich bag.” 762 So. 2d at 891-92. In sum, reasoned the Second District, the holding in A.A., and Brooks, are not inconsistent with the result reached here. A.A. and Brooks merely held that trial judges in those cases did not abuse their discretion or reversibly err by ruling that a particular witness was qualified to testify as an “expert” within the meaning of s. 90.702 concerning the identification of a substance by nonscientific means. These holdings do not mean that a trial judge may not allow an officer to testify as a lay witness to observable facts concerning the identity of a substance based on training. Thus, here, the trial court correctly ruled that the officer’s identification of the substance found in the juvenile’s book bag as marijuana was admissible in evidence. Accordingly, the Second District affirmed; and, although the result is the same, its original opinion dated March 11, 2016 is hereby superseded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/May/May%2025,%202016/2D15-1738rh.pdf (May 25, 2016)

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.

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

E.G. v. Department of Children and Families, ___ So. 3d ___, 2016 WL 2731654 (Fla. 3d DCA 2016). **WRIT OF CERTIORARI GRANTED**. In a dependency case, the court directed a 15 year old minor to “voluntarily” enter into a residential drug treatment program and abstain from illegal drugs and from running away, and the minor sought a writ of certiorari. The appellate court granted the writ and held that the trial court lacked the authority to direct the minor to “voluntarily submit himself” to residential treatment facility. The court also held that the trial court could not order recurring drug testing and that the order requiring the minor to abstain from drugs was improper since there was no explanation as to why this was needed in the record. The appellate court also noted that the record did not support any justification for the trial court to order the dependent minor to not run away from residential placement under fear of being held in contempt, so therefore the order was quashed.

<http://www.3dca.flcourts.org/Opinions/3D16-0994.pdf> (May 11, 2016)

F.G. v. Department of Children and Families, ___ So. 3d ___, 2016 WL 3001170 (Fla. 3d DCA 2016). **NOTICE OF RELATED CASES REQUIRED IN APPEALS**. The trial court found the children dependent due to a substantial risk of imminent neglect and abuse and harm, and the mother and father appealed separately. This decision replaces the prior opinion issued December 23, 2015. The court held that in the interest of consistency, it would vacate its prior affirmance of the father’s case and conform the father's appeal to the opinion and result in the mother's separate appeal in which the adjudication of dependency was reversed. The court noted the potential for inconsistent outcomes when separate appeals are filed by separate parties from the same underlying proceeding and adjudication, and reminded counsel that they must comply with the administrative order requiring them to file a notice of related cases.

<http://www.3dca.flcourts.org/Opinions/3D15-2432.pdf> (May 25, 2016)

Fourth District Court of Appeal

D. H. v. T.N.L., ___ So. 3d ___, 2016 WL 2744953 (Fla. 4th DCA 2016). **ORDER REGARDING ATTORNEY’S FEES REVERSED**. A minor child was adjudicated dependent as to the mother and placed with the father, and then the father violated the court-ordered parenting plan and was held in contempt and ordered to pay the mother’s attorney’s fees associated with her emergency motion to enforce the timesharing. The trial court held the father in contempt and denied his

motion for relief, and the father appealed. The appellate court stated that the order awarding the mother attorney fees and costs was not void for lack of jurisdiction. However, it also held that the trial court committed fundamental error by holding the father in civil contempt for failure to comply with the order without finding that father had the present ability to comply. <http://www.4dca.org/opinions/May%202016/05-11-16/4D15-3918.op.pdf> (May 11, 2016)

Fifth District Court of Appeal

J.D. v. Department of Children and Families, ___ So. 3d ___, 2016 WL 2609646 (Fla. 5th DCA 2016). **DEPENDENCY ORDER REVERSED**. The Department of Children and Families conceded error since no competent, substantial evidence supported the dependency. In the footnote, the appellate court noted that “(r)eversal of a dependency adjudication is appropriate where only one parent appeals, despite findings relating to both parents.” <http://www.5dca.org/Opinions/Opin2016/050216/5D15-4112.op.pdf> (May 5, 2016)

Dissolution of Marriage Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Angeli v. Kluka, __ So. 3d __, 2016 WL 3001813 (Fla. 1st DCA 2016). **ONE PARENT’S CONSENT IS SUFFICIENT FOR A HEALTH CARE PROVIDER TO RENDER NON-EMERGENCY MEDICAL CARE OR TREATMENT TO A MINOR CHILD; FLORIDA LAW DOES NOT REQUIRE HEALTH CARE PROVIDERS TO RESOLVE DISPUTES BETWEEN PARENTS AS TO CONSENT.** At issue was whether a health care provider must obtain informed consent from both parents of a minor child prior to rendering non-emergency medical care or treatment. The situation arose during the pendency of a dissolution of marriage action while the parents were separated. The record did not reflect any order depriving either parent of authority to consent to medical care for the children, nor was there any other “legal impediment” to either parent’s consent. The appellate court agreed with the trial court’s conclusion that the consent of one parent in such circumstances is sufficient, even if the health provider “allegedly knew or should have known” that the other parent objected to the care or treatment. Noting that this case appeared to be one of first impression in Florida, the appellate court found no statute requiring a health care provider to obtain consent from both parents or from more than one among multiple persons authorized to give consent for medical care of a minor. To require consent from both parents would require adding words to the statute, which was not permissible. It would also place health care providers in what the judge termed an “untenable position” of resolving disputes between parents as to consent, which Florida law does not require of health care providers.

https://edca.1dca.org/DCADocs/2015/4217/154217_DC05_05252016_084918_i.pdf (May 25, 2016)

Second District Court of Appeal

Ivanovich v. Valladarez, __ So. 3d __, 2016 WL 2247951 (Fla. 2d DCA 2016). **RETROACTIVE CHILD SUPPORT MAY NOT BE IMPOSED PRIOR TO THE FILING OF A PETITION SEEKING MODIFICATION; IN ABSENCE OF A TRANSCRIPT, APPELLATE COURT MAY REVERSE WHEN ERRORS ARE APPARENT ON THE FACE OF THE JUDGMENT; TRANSPORTATION EXPENSES FOR VISITATION MUST BE FACTORED INTO CHILD SUPPORT CALCULATIONS; TRIAL COURT’S FAILURE TO MAKE FINDINGS OF NEED AND ABILITY TO PAY FEES AND COSTS IS REVERSIBLE ERROR.** Following their dissolution in 2005, former spouses battled over custody of their minor child. In November 2011, the trial court entered an order on the spouses’ competing modification petitions in favor of former husband, reserving jurisdiction on the financial issues. The hearing on those issues was held October, 2013; the order was issued February, 2014. Former wife appealed the 2014 order and the trial court’s denial of her motion to vacate. The appellate court affirmed the trial court’s denial of the motion to vacate, but reversed the order due to several errors apparent on its face. Former wife argued that the trial court erred in ordering child support retroactive to a date preceding former husband’s request for child support. Citing its opinion in Webber v. Webber, 56 So. 3d 822 (Fla. 2d DCA 2011), the appellate court agreed. Retroactive child support may not be imposed prior to the filing of a petition seeking modification. Here, former husband sought

custody in December, 2009, but did not seek modification of child support until July, 2010. The trial court was bound by former husband's pleadings; it erred in ordering child support retroactive to December, 2009. Because the trial court's errors were apparent on the face of the judgment, absence of a transcript did not preclude reversal. The appellate court reiterated that a trial court's failure to include findings regarding the spouses' incomes for purposes of child support calculations also renders a judgment facially erroneous; here, the trial court's order lacked findings as to how it derived the spouses' net incomes from their gross income. The appellate court agreed with former wife that the trial court erred in not factoring transportation expenses for visitation into the child support calculations and reversed for reconsideration on this issue. Former wife also argued that the trial court erred in failing to make specific factual findings supporting its award of fees and costs to former husband. The appellate court concluded that the trial court's failure to make any findings as to need and ability to pay—the primary considerations in family law cases regarding fees and costs – was reversible error even in absence of an adequate record of the hearing.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/May/May%2004,%202016/2D14-1325.pdf (May 4, 2016)

Perez v. Perez, ___ So. 3d ___, 2016 WL 2602926 (Fla. 2d DCA 2016). TRIAL COURTS HAVE GREAT DISCRETION WITH TEMPORARY RELIEF AWARDS; BECAUSE CHILD SUPPORT GUIDELINES APPLY TO TEMPORARY CHILD SUPPORT AWARDS, A TRIAL COURT'S FAILURE TO IDENTIFY WHICH PORTION OF AN AWARD IS CHILD SUPPORT MAKES DETERMINATION AS TO WHETHER THE GUIDELINES WERE FOLLOWED IMPOSSIBLE; ALIMONY AWARD REQUIRES SPECIFIC FINDINGS AS TO SPOUSES' NEEDS AND ABILITIES TO PAY. The appellate court reversed a non-final support order issued in dissolution proceedings because the order failed to differentiate between child support and alimony. Temporary relief awards are among those areas in which the trial courts have the greatest discretion; however, because the child support guidelines are applicable to temporary child support awards, a trial court's failure to identify a child support award renders a determination of whether the guidelines were followed impossible. The appellate court noted that a trial court must make findings regarding the spouses' incomes for purposes of applying the child support guidelines; here, it failed to do so. The appellate court reversed and remanded for the trial court to reconsider the issue of temporary support. It instructed the trial court that if it made an alimony award on remand, it was required to make specific findings as to the spouses' needs and abilities to pay.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/May/May%2006,%202016/2D15-2074.pdf (May 6, 2016)

Bellant v. Bellant, ___ So. 3d ___, 2016 WL 2731197 (Fla. 2d DCA 2016). TRIAL COURT FAILED TO ADEQUATELY EXPLAIN WHAT CONSTITUTED BAD FAITH CONDUCT BY SPOUSE AND HER COUNSEL; REMANDED FOR TRIAL COURT TO STRIKE THE PORTION OF ITS ORDER AWARDING FEES AND COSTS FOR BAD FAITH; REMAINING FEES AND COSTS AFFIRMED. Former wife appealed an order awarding former husband fees and costs in opposing her motion to compel discovery which the trial court denied. Although neither former wife nor her counsel appeared at the hearing on former wife's motion to compel, the trial court heard argument by former husband's counsel before denying the motion and finding that former husband had produced all requested

documents. The appellate court affirmed the trial court's award of attorney's fees pursuant to Florida Rule of Civil Procedure 1.380(a)(4); however, it vacated the portion of the order finding former husband entitled to fees because of bad faith conduct by former wife and her counsel after finding that the order failed to "adequately explain" what the trial court found to have constituted bad faith. The appellate court remanded with instructions that the trial court strike the portion of its order awarding fees for bad faith.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/May/May%2011,%202016/2D15-2634.pdf (May 11, 2016)

Shulstad v. Shulstad, __ So. 3d __, 2016 WL 3003291 (Fla. 2d DCA 2016). **RECORD SHOULD CONTAIN EVIDENCE OF SPOUSE'S INSURABILITY AND HIS/HER ABILITY TO AFFORD COVERAGE IF TRIAL COURT REQUIRES LIFE INSURANCE TO SECURE OBLIGATIONS.** The appellate court held that the trial court erred in ordering former husband to maintain \$750,000 in life insurance coverage to secure post-dissolution support obligations. Former wife conceded that the trial court erred in ordering an increase in the life insurance coverage. The appellate court held that a trial court may require a spouse to secure alimony and child support obligations with life insurance; however, the record should contain evidence of the obligor's insurability, cost of the insurance, and the obligor's ability to afford the insurance. Here, the trial court had evidence as to the cost and former husband's ability to maintain his \$500,000 policy, but had no evidence of either the cost or his ability to maintain a higher coverage of \$750,000. Reversed and remanded for further proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/May/May%2025,%202016/2D15-941.pdf (May 25, 2016)

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Feliciano v. Feliciano, __ So. 3d __, 2016 WL 2342882 (Fla. 4th DCA 2016). **TRIAL COURT'S DEFICIENCY JUDGMENT CONTRADICTED TERMS OF SETTLEMENT AGREEMENT; MARITAL SETTLEMENT AGREEMENT IS INTERPRETED LIKE ANY OTHER CONTRACT; ABSENT SPECIAL MEANING BEING AFFORDED TO ITS TERMS, INTERPRETATION SHOULD BE BASED ON PLAIN MEANING OF WORDS.** The appellate court agreed with former husband that the trial court's deficiency judgment contradicted the terms of the spouses' marital settlement agreement (MSA). The spouses agreed to sell their marital home and split the proceeds. They also agreed that they would be separately responsible for the mortgage and other obligations and would then each be entitled to credit or reimbursement from the other's share of the proceeds against payments made on their obligations. Former wife paid approximately \$125,000 towards the first mortgage while living in the house; former husband paid approximately \$25,000 toward a home equity line of credit (HELOC), an installment loan, and former wife's alimony. The sale netted \$64,000. Former wife argued that she should receive reimbursement for half of her payments—regardless of the source of the funds. Former husband agreed that former wife was entitled to all of the proceeds of the sale; however, the trial court found that she was entitled to additional funds and entered a judgment against him for approximately \$18,000. Former husband argued

that the terms of the MSA limited her recovery to money received from the proceeds of the sale. The appellate court held that an MSA is interpreted like any other contract; absent any evidence that the parties intended that the terms in it be afforded a special meaning, unambiguous language should be interpreted based on the plain, everyday meaning of the words. Here, the MSA entitled each spouse to credit from the other's share of the proceeds to reimburse them for payments made; the key was "from the other party's share of the proceeds". The appellate court concluded that had the spouses intended this to be a general debt obligation, they would have omitted those words. It reasoned that the words were in the MSA for a reason. The appellate court found no alternative source of funding provided for in the MSA nor a provision within it allowing for deficiency in the event the sale proceeds did not fully compensate the creditor spouse. Although its interpretation of the MSA resulted in former wife being responsible for more than half of the mortgage payments during the period prior to the sale of the home, the appellate court noted that she had had exclusive possession and use of the home during the twenty months between the dissolution and sale of the home. It reasoned that placing unequal payments on the sole occupant of the home was not "inherently unfair."

<http://www.4dca.org/opinions/May%202016/05-04-16/4D14-3242.op.pdf> (May 4, 2016)

Lardizzone v. Lardizzone, ___ So. 3d ___, 2016 WL 2342902 (Fla. 4th DCA 2016). **REVERSED AND REMANDED FOR TRIAL COURT TO CLARIFY FINDINGS REGARDING MEDICAL BILLS.** Former wife appealed final judgment of dissolution. The appellate court reversed and remanded solely for the trial court to clarify its findings regarding former husband's \$60,000 medical bills incurred as the result of an injury. The trial court indicated in its judgment it was unclear how many of the bills had been or would be paid. The trial court awarded former husband a \$30,000 credit towards his child support obligation and arrearages because of the medical bills. Former wife argued on appeal that the spouses were separated when former husband suffered his injury and that the \$60,000 figure was inaccurate because he was covered by insurance and by workers' compensation. In absence of a transcript, the appellate court was unable to review whether former husband's injury occurred while the marriage was still intact; however, it reversed and remanded because the trial court's findings regarding the medical bills were ambiguous. The appellate court instructed the trial court to clarify the amount of unpaid medical bills for which former husband was personally liable on the cut-off date for determining marital liabilities to determine the amount that should be treated as a marital liability and to adjust former husband's credit towards his child support obligation if necessary.

<http://www.4dca.org/opinions/May%202016/05-04-16/4D15-2149.op.pdf> (May 4, 2016)

Steinman v. Steinman, ___ So. 3d ___, 2016 WL 2745062 (Fla. 4th DCA 2016). **PORTIONS OF ORDER FINDING SPOUSE IN CONTEMPT REVERSED; COURTS HAVE CONSISTENTLY OVERTURNED RESTRICTIONS PREVENTING A PARENT FROM EXPOSING A CHILD TO HIS OR HER RELIGIOUS BELIEFS AND PRACTICES ABSENT A FINDING THEY ARE HARMFUL TO THE CHILD.** Former wife appealed an order finding her in contempt for making major decisions regarding religious education for the spouses' two minor children in contravention of a marital settlement agreement (MSA) which provided for joint decision-making involving both parents. The appellate court reversed because former husband's primary concern was with the scheduling of afterschool care; there was no evidence the children were harmed by exposure to conservative

or orthodox religious beliefs. Following a hearing, the trial court granted former husband's motion for contempt in part; it did not find former wife in contempt for sending the children to a religious-related afterschool care, but found her in contempt for unilaterally changing the children's religion. The order provided that the children be raised under Reform Judaism unless the spouses agreed otherwise. Former wife argued on appeal that because there was no evidence that the children were being harmed by her faith, the contempt ruling impermissibly impinged on her religious freedom. The appellate court noted that courts have consistently overturned restrictions preventing one parent from exposing a child to his or her religious beliefs and practices unless there is an affirmative showing that the religious activity is harmful to the child. Here, former husband raised a general objection to former wife making religious decisions affecting the children without his input and expressed concern that the children were confused by the different practices and diet between their two homes; however, there was no "affirmative evidence" of harm to permit the trial court to interfere with former wife's religious practice, with the children's religious upbringing, or with their exposure to religious practices. Accordingly, the appellate court vacated the portions of the order finding her in contempt.

<http://www.4dca.org/opinions/May%202016/05-11-16/4D15-4016.op.pdf> (May 11, 2016)

Henry v. Henry, ___ So. 3d ___, 2016 WL 2897643 (Fla. 4th DCA 2016). **USE OF INCORRECT FIGURES FOR GROSS INCOMES FOR SPOUSES REQUIRED RECALCULATION; TRIAL COURTS HAVE INHERENT AUTHORITY TO AWARD FEES WITHOUT FINDINGS AS TO NEED AND ABILITY TO PAY; HOWEVER, SUCH AWARDS ARE RESERVED FOR EXTREME CASES AND REQUIRE EXPRESS FINDINGS OF BAD FAITH AND SUPPORTING FACTS TO JUSTIFY THEM.** The trial court miscalculated the gross incomes of both spouses; former wife conceded error. Former husband's miscalculation was due to his bonus not being fully removed from his income. The appellate court remanded with instructions to the trial court to recalculate the net incomes of both spouses; this in turn would require recalculation of the alimony and child support. The appellate court expressed concern as to a statement made by the trial court regarding former husband's earning capacity and suggested further explanation if this statement were relied on as a factor in the new alimony award. The retroactive child support also required recalculation due to: the spouses' corrected gross monthly incomes; the fact that the spouses were still living together for two of the months that the support was ordered; and the indication in the record that the spouses had a 50/50, not 60/40, split in overnights. The appellate court reversed the retroactive alimony award because the trial court failed to make specific findings of former wife's need and former husband's ability to pay during the retroactive period; its findings were limited to the spouses' *current* needs and abilities. (Emphasis in opinion). If the trial court determined on remand that retroactive alimony were appropriate, then it would need to recalculate using the spouses' correct gross incomes and the number of months they actually lived together. Although attorney's fees usually require findings of need and ability to pay, trial courts have the inherent authority to prevent "vexatious litigation" by awarding fees without such findings; however, these awards should be reserved for extreme cases. If making an award under this authority, a trial court must make express findings of bad faith, including supporting facts, to justify the award. Here, the appellate court found a "dearth of evidence" in the record in addition to with a lack of findings to justify the award. The appellate court instructed the trial court on remand that it could award fees under s. 61.16, F.S., but must first determine need and ability before determining the amount.

<http://www.4dca.org/opinions/May%202016/05-18-16/4D15-755.op.pdf> (May 18, 2016)

Watford v. Watford, __ So. 3d __, 2016 WL 2897619 (Fla. 4th DCA 2016). **ERRORS IN ALIMONY AND FEE AWARDS AND SCHEME OF EQUITABLE DISTRIBUTION REQUIRED REMAND FOR NECESSARY FINDINGS AND REEVALUATION OF NEED AND ABILITY REGARDING FEES.** The appellate court agreed with former husband that the trial court erred in its alimony and fee awards to former wife and its scheme of equitable distribution. The final judgment did not include the requisite factual findings as to alimony. The appellate court found no competent, substantial evidence supporting the trial court's determination of former husband's gross income. It also found no evidence that former husband's withdrawal from an IRA constituted dissipation of marital funds from the IRA; thus, the trial court's requirement that former husband pay additional funds to former wife from the IRA was error. The appellate court found that the trial court erred in relying on former husband's gross income instead of net in calculating alimony. The trial court found that former wife had a need for attorney's fees; however, it failed to make any findings as to former husband's ability to pay or the reasonableness of the rate and hours expended. Accordingly, the appellate court reversed and remanded for the trial court to make the necessary findings and reconsider need and ability with regard to fees.

<http://www.4dca.org/opinions/May%202016/05-18-16/4D15-1605.op.pdf> (May 18, 2016)

Maciekowich v. Maciekowich, __ So. 3d __, 2016 WL 3011728 (Fla. 4th DCA 2016). **TRIAL COURT ERRED IN AWARDING SPOUSE \$1 YEAR OF ALIMONY AFTER FINDING SHE HAD ESTABLISHED A COMPELLING CASE OF NEED; TWO PRIME CONSIDERATIONS FOR AWARDING PERMANENT PERIODIC ALIMONY ARE NEEDS OF ONE SPOUSE AND ABILITY OF OTHER TO PAY; A TRANSCRIPT IS NOT REQUIRED IF ERRORS ARE APPARENT ON FACE OF JUDGMENT.** The appellate court agreed with former wife that the trial court erred in awarding her alimony of \$1 per year after having found she had established a "compelling case" of need for permanent alimony but did not determine an amount of her actual need. A transcript is not required if an error is apparent on the face of the judgment. The appellate court reiterated that the two prime considerations when a trial court determines permanent periodic alimony are the needs of one spouse for funds and the ability of the other to provide those funds. The appellate court reversed and remanded for further proceedings on the issue of permanent alimony; it authorized the trial court to take additional evidence as necessary to "fashion an equitable award".

<http://www.4dca.org/opinions/May%202016/05-25-16/4D15-1003.op.pdf> (May 25, 2016)

Valdes v. Valdes, __ So. 3d __, 2016 WL 3011786 (Fla. 4th DCA 2016). **REMANDED FOR RECALCULATION AND CLARIFICATION OF TIME-SHARING FOR SPOUSE.** The appellate court agreed with former husband that the trial court erred in its calculation of time-sharing. The final judgment of dissolution and parenting plan awarded former husband approximately 42% time-sharing; however, the parenting plan reflected only 22% of actual time-sharing for former husband. Accordingly, the appellate court reversed and remanded for recalculation and for clarification as to when former husband's weekend time-sharing began.

<http://www.4dca.org/opinions/May%202016/05-25-16/4D15-1797.op.pdf> (May 25, 2016)

Fifth District Court of Appeal

Salazar v. Giraldo, ___ So. 3d ___, 2016 WL 2596051 (Fla. 5th DCA 2016). **REMAND NECESSARY TO CLARIFY SPOUSE'S ENTITLEMENT TO CREDIT OR SET-OFFS.** The appellate court agreed with former husband that the trial court erred in failing to consider whether he was entitled to any credit or set-offs for payment of expenses to maintain the marital home pending sale; it affirmed on all other issues raised by former husband. In addition to the judgment being silent as to former husband's entitlement to credit, the record did not establish whether the trial court considered the factors enumerated in s. 61.077, F.S., before entering its judgment. The appellate court held that, "under these circumstances", remand was necessary to clarify any entitlement former husband had to credit upon sale of the home. The trial court was permitted to take additional evidence on the issue if necessary.

<http://www.5dca.org/Opinions/Opin2016/050216/5D15-2065.op.pdf> (May 6, 2016)

Songur v. Songur, ___ So. 3d ___, 2016 WL 2760103 (Fla. 5th DCA 2016). **TRIAL COURT ERRED IN GRANTING ULTIMATE DECISION-MAKING AUTHORITY OVER CHILD'S EDUCATION TO PARENT ABSENT A FINDING THAT SHARED PARENTAL RESPONSIBILITY WOULD BE DETRIMENTAL TO CHILD OR THAT ULTIMATE DECISION-MAKING WAS IN THE CHILD'S BEST INTEREST; TRIAL COURT ALSO ERRED IN IMPUTING INCOME TO SPOUSES WITHOUT EVIDENTIARY BASIS FOR AMOUNTS OR AN EXPLANATION OF ITS FINDINGS; ON REMAND SPOUSES WOULD BE ALLOWED TO PRESENT ADDITIONAL EVIDENCE REGARDING THEIR INCOMES.** The appellate court agreed with former wife that the trial court erred in its supplemental final judgment modifying parental responsibility: first, by granting ultimate decision-making authority over the eldest child's educational decisions to former husband, absent a finding that shared parental responsibility would be detrimental to the child, or that ultimate responsibility was in the child's best interest; and second, by imputing income to both parents, for purposes of determining child support, without any evidentiary basis for the amounts imputed or any explanation of the basis for the findings. Reversed and remanded for the trial court to reconsider the ultimate decision-making and to determine appropriate amount of child support under the guidelines. Spouses allowed on remand to present additional evidence as to incomes.

<http://www.5dca.org/Opinions/Opin2016/050916/5D15-2960.op.pdf> (May 13, 2016)

Serbousek v. Lucas, ___ So. 3d ___, 2016 WL 2943237 (Fla. 5th DCA 2016). **TRIAL COURTS ARE AFFORDED BROAD DISCRETION IN DETERMINING ALIMONY AND FEES; BOTH REQUIRE A FINDING AS TO NEED AND ABILITY TO PAY; PURPOSE OF FEE AWARD IN A DISSOLUTION CASE IS TO ENSURE EACH SPOUSE IS ABLE TO RETAIN COMPETENT COUNSEL; FEE AWARD IS INAPPROPRIATE IF SPOUSES ARE LEFT ON RELATIVELY EQUAL FINANCIAL FOOTING.** Former wife raised four issues in her appeal of the final judgment dissolving a thirty-eight year marriage: the trial court erred in its equitable distribution and the amount of permanent periodic alimony and in its failure to award her retroactive alimony and attorney's fees. The appellate court affirmed in part and reversed in part. During the marriage, former wife was the primary caretaker for the spouses' two children; she also assisted former husband's contracting business by keeping the books and cleaning at construction sites. The spouses' main asset subject to equitable distribution was the marital home; however, the amount of debt it secured exceeded its value. Finding neither spouse credible, the trial court relied on expert testimony to determine the spouses' needs and abilities

to pay alimony. The appellate court observed that neither spouse was “particularly veracious”. The appellate court found no abuse in the trial court’s determination of alimony; a trial court is afforded broad discretion in determining the appropriate amount of alimony. However, the appellate court found that the trial court erred in failing to directly address former wife’s claim for retroactive alimony. A trial court’s broad discretion also extends to determining the spouses’ needs and abilities as to attorney’s fees. The purpose of fees in a dissolution case is to ensure that each spouse is able to retain competent legal counsel. The appellate court concluded that the trial court did not abuse its discretion in denying former wife’s request for fees. The trial court divided the marital assets “roughly equally” between the spouses and awarded former wife alimony to equalize their positions. An award of attorney’s fees is inappropriate if the spouses are left on relatively equal financial footing after the dissolution. Remanded for reconsideration of former wife’s claim for retroactive alimony and correction of the equitable distribution. The trial court was instructed on remand to: correctly value former wife’s IRA account and the spouses’ credit-card debt; correct and clarify its findings on these issues; and adjust the equitable distribution accordingly.

<http://www.5dca.org/Opinions/Opin2016/051616/5D14-3444.op.pdf> (May 20, 2016)

Stark v. Stark, __ So. 3d __, 2016 WL 303831 (Fla. 5th DCA 2016). **FACTS SUPPORTED AWARD OF PERMANENT, NOT DURATIONAL, ALIMONY TO FOLLOW BRIDGE-THE-GAP; TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO MAKE ENTIRE ALIMONY AWARD FOLLOWING BRIDGE-THE-GAP PERMANENT ALIMONY; DURATIONAL ALIMONY IS FOR USE IN LONG-TERM MARRIAGES WITH NO ONGOING NEED FOR SUPPORT ON A PERMANENT BASIS.** Following the dissolution of a twenty-seven year marriage, former wife was awarded \$7000 bridge-the-gap alimony for eight months, followed by durational alimony of \$4900 per month for nine years, and \$100 per month in permanent alimony. She did not appeal the amount of alimony awarded, but argued that the trial court erred in awarding a combination of durational and permanent alimony rather than solely awarding permanent alimony. The appellate court agreed. It held that the facts supported an award of permanent periodic alimony. For the majority of their long-term marriage, former wife was a homemaker, having raised three children. The trial court found that the spouses lived above their means. They had a “significant” amount of marital debt and little set aside for retirement. The appellate court found the trial court’s factual findings regarding the spouses’ incomes were supported by the record; those findings established former wife had an actual need for alimony and former husband had the ability to pay. The appellate court observed that durational alimony has been described as a middle-ground between bridge-the-gap and permanent alimony; its use has been authorized by the Legislature following a marriage of long duration where there is no ongoing need for permanent support. Here, the appellate court held that the evidence failed to demonstrate that former wife’s need or former husband’s ability to pay would be any different at the end of the durational alimony period than at the time the final judgment was entered. Therefore, it concluded that the trial court abused its discretion by failing to make the entire \$5000 alimony award following bridge-the-gap permanent alimony. Remanded for entry of an amended final judgment.

<http://www.5dca.org/Opinions/Opin2016/052316/5D15-1812.op.pdf> (May 27, 2016)

Interpersonal Violence Injunctions (DV, SV, Dating, Repeat, Stalking) 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

Smith v. Wiker, ___ So. 3d ___, 2016 WL 3003257 (Fla. 2d DCA 2016). **STALKING INJUCTION REVERSED IN PART**. A neighbor received a stalking injunction against the other neighbor that included a provision that provided: "The Respondent may travel on his driveway to enter and leave his property but may not linger on his driveway. The Respondent is permitted to continue to live in his home but shall have no contact w/the Petitioner." The injunction also required the respondent to remove the cameras bordering the neighbor's property within ten days and allowed the respondent to be on his driveway for that ten-day period in order to comply with the injunction. The appellate court affirmed the injunction, but reversed the portion of the order that required the respondent to stay off of his driveway. The court ruled that this provision was overbroad because it included both behavior that could constitute stalking, and legal behavior that should have been permitted.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/May/May%2025,%202016/2D14-3341.pdf (May 25, 2016)

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Richards v. Crowder, ___ So. 3d ___, 2016 WL 2654609 (Fla. 4th DCA 2016). **DENIAL OF MOTION FOR RELIEF REVERSED**. A former girlfriend received an injunction for protection against stalking against a former boyfriend. The former boyfriend then hired an attorney and filed a motion for relief from the judgment, alleging that he had low-to-average intelligence and that his verbal and comprehension deficits left him unable to understand the temporary injunction imposed before the final injunction or the notice of evidentiary hearing that he received. The trial court denied the motion, and the boyfriend appealed. The appellate court reversed, stating that the trial court abused its discretion by not allowing the boyfriend to have a hearing on his motion. The court also noted that, "Florida courts have recognized that illness or psychological conditions, as well as difficulties with reading and comprehending, can form the basis of a finding of excusable neglect warranting relief from judgment."

<http://www.4dca.org/opinions/May%202016/05-10-16/4D15-4034.op.pdf> (May 10, 2016)

David v. Schack, ___ So. 3d ___, 2016 WL 3011787 (Fla. 4th DCA 2016). **STALKING INJUCTION REVERSED**. Petitioner was awarded an injunction against stalking the respondent appealed. At a very brief hearing in which both parties appeared pro se, the respondent was not allowed an opportunity to present his case. The appellate court reversed because there was not competent

and substantial evidence to support the stalking injunction since the petitioner did not show that respondent's behavior caused substantial emotional distress, and only described one incident rather than the requisite two. The court also noted that even if the evidence presented was sufficient, they would have still reversed because the trial court did not give the appellant a full hearing or an opportunity to present his case to satisfy due process.

<http://www.4dca.org/opinions/May%202016/05-25-16/4D15-1973.op.pdf> (May 25, 2016)

Eye v. Bennett, ___ So. 3d ___, 2016 WL 3010493 (Fla. 4th DCA 2016). **DENIAL OF STALKING INJUNCTION REVERSED**. The petitioner's petition was denied without a hearing because the trial court ruled that she failed to allege specific facts and circumstances to establish that she was a victim of stalking, and she appealed. Her petition alleged that her relationship with her former husband deteriorated, and that she had to fire him from her company. He then began to make threatening phone calls and harassed her and her employees at various job sites. In November, 2015, the respondent entered a plea of guilty to two counts of making threatening phone calls and was sentenced to six months of probation. As a condition of his probation, the respondent agreed to cooperate with the entry of a permanent injunction against stalking. Due to the respondent's plea agreement and the petitioner's allegations, the appellate court concluded that the petitioner's petition was facially sufficient, and remanded the case for an evidentiary hearing. <http://www.4dca.org/opinions/May%202016/05-25-16/4D16-44.op.pdf> (May 25, 2016)

Fifth District Court of Appeal

No new opinions for this reporting period.