

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE JULY 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

No new opinions for this reporting period.

Second District Court of Appeal

K.B. v. State, __ So. 3d __, 2015 WL 3986139 (Fla. 2d DCA 2015). **BURGLARY CHARGE REDUCED TO TRESPASS WHERE THERE WAS NO EVIDENCE OTHER THAN THE JUVENILE'S PRESENCE AT THE CRIME SCENE.** The juvenile appealed the trial court's finding of guilt for burglary of an unoccupied structure. The juvenile argued that the State failed to prove his involvement as a principal. A witness saw three young men walking into the victim's yard. The witness saw two of the intruders going in and out of a portable storage container in the yard. The witness saw the juvenile walking back and forth but did not see him enter the container. The three young men were arrested. At the close evidence, the juvenile moved for a judgment of dismissal. The juvenile argued that the evidence showed only his presence at the scene. The juvenile court ruled that the juvenile acted as a lookout and was therefore guilty as a principal. On appeal, the Second District Court of Appeals found that mere presence at the scene and knowledge of the crime and even flight from the scene was insufficient to show that a defendant was an aider and abettor. To be a principal to the commission of a crime, "one must have a conscious intent that the crime be done and must do some act or say some word which was intended to and does incite, cause, encourage, assist, or advise another person to actually commit the crime." In the instant case, there was no evidence that the juvenile did anything to assist in a burglary. Further, the witness did not recount hearing the juvenile encourage the others. Accordingly, the Second District reversed the trial court's finding of guilt for burglary. However, the Second District found that the juvenile was not entitled to discharge. Trespass is a permissive lesser included offense for burglary if the elements are alleged in the petition and supported by the evidence. In the instant case, the allegations of the delinquency petition were sufficient to encompass the elements of trespass, and the evidence showed that the juvenile made a nonconsensual entry into the fenced backyard. Accordingly, the Second District remanded for the burglary charge to be reduced to trespass and for the trial court to hold a new disposition hearing.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/July/July%2001,%202015/2D14-1403.pdf (July 1, 2015)

C.M. v. State, __ So. 3d __, 2015 WL 4253877 (Fla. 2d DCA 2015). **THE CASE WAS REMANDED FOR THE TRIAL COURT TO AMEND THE WRITTEN ORDER TO REFLECT THE ORALLY PRONOUNCED**

PLACEMENT. CORRECTION OF THE SCRIVENER'S ERROR. In an Anders appeal, the juvenile challenged the trial court's order finding that he committed delinquent acts, withholding adjudication, and placing him on probation for six months. After a thorough review of the record, the Second District Court of Appeals found no harmful, reversible error and affirmed. However, the Second District remanded to correct a scrivener's error. The trial court had orally announced a six-month probationary placement. The written order incorrectly stated that the juvenile was placed on probation indefinitely until his nineteenth birthday. While the appeal was pending, the juvenile violated his probation and the trial court placed him on probation indefinitely until his nineteenth birthday. The public defender argued that the discrepancy between the orally pronounced and written dispositions was moot due to the subsequent probation violation. The Second District found that the issue was not moot. In the event that the juvenile was granted relief from an appeal of the violation of probation order or in post-conviction proceedings, the record should be clear that he was originally placed on six months' probation. Accordingly, the case was remanded for correction of the scrivener's error. The trial court was directed to amend the order to reflect the orally pronounced placement. See W.S.G. v. State, 32 So. 3d 725, 726 (Fla. 2d DCA 2010) ("If a discrepancy exists between the written [disposition] and the oral pronouncement, the written [disposition] must be corrected to conform to the oral pronouncement." (quoting Guerra v. State, 927 So. 2d 248, 249 (Fla. 2d DCA 2006))).

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/July/July%2015,%202015/2D14-2521.pdf (July 15, 2015)

Third District Court of Appeal

J.J. v. State, __ So. 3d __, 2015 WL 4268445 (Fla. 3d DCA 2015). **TESTIMONY DESCRIBING EVENTS THAT WERE BOTH OBSERVED LIVE AND RECORDED DID NOT VIOLATE THE BEST EVIDENCE RULE WHEN RECORDING WAS NOT ADMITTED IN EVIDENCE.** Juvenile was adjudicated delinquent for shoplifting. The theft was observed by loss prevention officers via CCTV (closed-circuit television). The CCTV feed automatically recorded the theft. Two loss prevention officers observed the theft in progress, live, via the CCTV monitor. At trial, the State was unable to play the recording because proprietary equipment was required for playback, and neither the court nor the State had such equipment available. A loss prevention officer testified that he saw the women take the property without paying for it. The defense objected to the testimony based on a violation of the best evidence rule because the recording could not be played. The defense argued that although the loss prevention officer watched the live feed from his office, the best evidence rule still applies because the officer described what a recording of the events showed. The trial court overruled the objection. The juvenile appealed. The juvenile argued that it was harmful error for the trial court to allow direct testimony about what a live video feed showed without placing the recording into evidence. On this issue of first impression in Florida, the Third District Court of

Appeals found that the direct testimony of events observed, even where those events are being concurrently recorded, is not a violation of the best evidence rule when the recording is not placed in evidence. The loss prevention officer did not try to prove the contents of the recording. He recounted his own observations of the events, which he viewed personally and contemporaneously through a closed-circuit surveillance system. The mere fact that a recording was made does not instantly convert the recording into a better piece of evidence. Consequently, the testimony describing a live observation of a subject that is concurrently being recorded is not a violation of the best evidence rule. Accordingly, the Third District affirmed the trial court's withholding of adjudication and probation sentence.

<http://www.3dca.flcourts.org/Opinions/3D14-2328.pdf> (July 15, 2015)

M.P. v. State, __ So. 3d __, 2015 WL 4464557 (Fla. 3d DCA 2015). THE STATE PRESENTED SUFFICIENT EVIDENCE THAT WAS INCONSISTENT WITH THE HYPOTHESIS OF INNOCENCE CLAIMED BY THE JUVENILE. The trial court determined that the juvenile had committed the delinquent act of uttering a forged instrument. The Third District Court of Appeal found that regardless of the special standard of review in circumstantial evidence cases used in this case, the State presented sufficient evidence that was inconsistent with the juvenile's claimed hypothesis of innocence. Therefore, the trial court properly denied the motion for judgment of dismissal and determined that the evidence established beyond a reasonable doubt that the juvenile committed the delinquent act. The court noted that for a thorough analysis of the special standard of review in circumstantial evidence cases and its sometimes-inconsistent application by Florida appellate courts, see Knight v. State, 107 So. 3d 449 (Fla. 5th DCA 2013), review granted 151 So. 3d 1226 (Fla. 2014). Accordingly, the adjudicatory order and disposition order were affirmed.

<http://www.3dca.flcourts.org/Opinions/3D14-2370.pdf> (July 22, 2015)

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

J.B. v. Florida Department of Children and Families, __ So. 3d __, 2015 WL 4112321 (Fla. 2015). **PARENTS ARE ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS.** A mother challenged the termination of her parental rights (TPR) due to ineffective assistance of counsel, and the Supreme Court upheld the lower court's decision. The Court, however, also answered two certified questions. First, the Court held that parents are entitled to the effective assistance of counsel in TPR proceedings based upon article I, section 9 of the Florida Constitution. The court noted that the criminal standard that applies to ineffective assistance of counsel claims was not appropriate in TPR cases, and adopted a new procedure which requires:

1. a parent must identify specific errors or commission or omission made by the their attorney that under the totality of the circumstances evidence a deficiency in the exercise of a reasonable professional judgment in the case;
2. the parent must establish that, cumulatively, this deficient representation so prejudiced the outcome of the TPR proceeding that but for counsel's deficient representation, the parent's rights would not have been terminated.

If the parent establishes the case, the order terminating the parental rights should be vacated and the case remanded to the lower court for further proceedings. The court also directed a rule of procedure be developed for future cases, and outlined a temporary procedure to be followed until the rules could be adopted.

<http://www.floridasupremecourt.org/decisions/2015/sc14-1990.pdf> (July 9, 2015)

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

M.M. v. Department of Children and Family Services, __ So. 3d __, 2015 WL 4077501 (Fla. 3d DCA 2015). **VISITATION ORDER REVERSED.** The children had achieved permanency with the mother, and the court terminated supervision by the Department of Children and Families. The father filed a petition for writ of certiorari claiming that he had been denied due process because termination occurred without a motion. Since the Department requested termination in a written report pursuant to Fla. Rule of Juv. Proc. 8.345(b), the court denied relief. However, the appellate court quashed the part of the trial court's order that limited the father's ability to seek future contact with the children based solely upon the children's discretion, and noted that the father was free to request modification of visitation in the future through the courts by a motion and hearing.

<http://www.3dca.flcourts.org/Opinions/3D14-2372.pdf> (July 1, 2015)

S.V. v. the Department of Children and Families, __ So. 3d __, 2015 WL 4095258 (Fla. 3rd DCA 2015). [TRIAL COURT'S ORDER SETTING ASIDE MAGISTRATE'S RECOMMENDED ORDER UPHeld.](#) The trial court disagreed with the magistrate's recommended order to reunite the father with his children, and placed the children in permanent guardianship with the maternal aunt where they were making progress with extensive therapeutic, medical, and educational services. The father sought certiorari review of the trial court's non-final order that set aside the general magistrate's report and recommendations. The appellate court noted that its certiorari review of the trial court's non-final order was limited to whether or not the trial court departed from the essential requirements of law which resulted in irreparable harm that could not be remedied on direct appeal. In this case, the judge conducted a thoughtful and comprehensive analysis of the applicable law, and found that currently, the father did not have the ability to meet the children's extensive and unremitting therapeutic needs. Since the trial court determined that the magistrate had misconceived the legal effect of the evidence, the appellate court denied the father's petition, but noted that the decision was without prejudice so the father could re-file in the future.

<http://www.3dca.flcourts.org/Opinions/3D15-0636.pdf> (July 8, 2015)

In the Interest of B.Y.G.M., __ So. 3d __, 2015 WL 4268719 (Fla. 3d DCA 2015). [PETITION FOR DEPENDENCY TO SUPPORT SPECIAL IMMIGRANT JUVENILE STATUS DENIED.](#) A 17-year old girl filed a private petition for dependency based upon abandonment and neglect by her father which occurred when she was a baby in El Salvador. The trial court denied the petition since the girl was living with her mother who was providing her with supervision and care. The girl argued that she was a native of El Salvador and qualified for a Special Immigrant Juvenile Status (SIJS) visa. This type of visa allows a child to apply for lawful permanent residency in the United States after which the child can seek citizenship. However, to be eligible for SIJS, a court must declare an alien minor to be dependent, and must find that it would not be in the alien child's best interest to be returned to their country of origin. The appellate court affirmed the denial of the petition because the evidence was insufficient to support a finding of abandonment or neglect.

<http://www.3dca.flcourts.org/Opinions/3D14-2409.pdf> (July 15, 2015)

In the Interest of K.B.L.V., __ So. 3d __, 2015 WL 4268740 (Fla. 3d DCA 2015). [PETITION FOR DEPENDENCY TO SUPPORT SPECIAL IMMIGRANT JUVENILE STATUS DENIED.](#) A 17-year old boy filed a private petition for dependency based upon abandonment and neglect by his father which occurred when he was a baby in Honduras. The trial court denied the petition since the boy was living with his mother who was providing him with supervision and care. The boy argued that he was a native of Honduras and qualified for a Special Immigrant Juvenile Status (SIJS) visa. This type of visa allows a child to apply for lawful permanent residency in the United States after which the child can seek citizenship. However, to be eligible for SIJS, a court must declare an alien minor to be dependent, and must find that it would not be in the alien child's best interest to be returned to their country of origin. The appellate court affirmed the denial of the petition because the evidence was insufficient to support a finding of abandonment or neglect.

<http://www.3dca.flcourts.org/Opinions/3D14-2746.pdf> (July 15, 2015)

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.

Dissolution Case Law

Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Hutchinson v. Hutchinson, __ So. 3d __, 2015 WL 4557045 (Fla. 1st DCA 2015). **IF FINAL JUDGMENT LEAVES SPOUSES IN SUBSTANTIALLY SIMILAR FINANCIAL CIRCUMSTANCES AND EQUALLY ABLE TO PAY FEES, A TRIAL COURT ABUSES ITS DISCRETION IF IT AWARDS FEES.** Former husband appealed the alimony and attorney's fees and costs awarded to former wife in the dissolution of their thirty-six-year marriage. The trial court equitably distributed the spouses' property pursuant to their agreement, determined their net incomes, and awarded former wife alimony and fees. The appellate court noted that if marital property has been equitably distributed and the spouses' incomes equalized through alimony, a trial court abuses its discretion by requiring one spouse to pay the other's fees. Here, the final judgment left the spouses on substantially similar financial footing and equally able to pay fees and costs; thus, the trial court abused its discretion by awarding fees. Remainder of the judgment was affirmed. https://edca.1dca.org/DCADocs/2015/0232/150232_DC08_07292015_102644_i.pdf (July 29, 2015)

Second District Court of Appeal

Smith v. Smith, __ So. 3d __, 2015 WL 3986136, 40 Fla. L. Weekly D 1518 (Fla. 2d DCA 2015). **IN THE ABSENCE OF A MARITAL SETTLEMENT AGREEMENT, FILING DATE OF PETITION FOR DISSOLUTION IS THE DATE FOR DETERMINING WHETHER ASSET OR LIABILITY IS NON-MARITAL; ASSETS AND LIABILITIES NOT EXISTING ON THAT DATE SHOULD NOT BE CLASSIFIED AS MARITAL; APPEAL OF ATTORNEYS' FEES IS PREMATURE IF TRIAL COURT ADDRESSES ENTITLEMENT ONLY AND DOES NOT SET AN AMOUNT.** Former husband appealed the final judgment of dissolution. The appellate court held that the trial court erred in including as a marital asset a vehicle purchased by former husband after the petition was filed but prior to the final judgment. In the absence of a marital settlement agreement, the applicable date for determining whether assets and liabilities are classified as marital or non-marital is the filing date of the petition for dissolution. Assets and liabilities not in existence on that date should not be classified as marital. Fortune v. Fortune, 61 So. 3d 441 (Fla. 2d DCA 2011). The appellate court dismissed former husband's appeal of fees as premature because the trial court addressed entitlement only and did not set an amount. The remainder of the judgment was affirmed. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/July/July%2001,%202015/2D13-4831.pdf (July 1, 2015)

Thompson v. Malickj, __ So. 3d __, WL 2015 4154181, 40 Fla. L. Weekly D 1593 (Fla. 2d DCA 2015). **SUFFICIENT FINDINGS OF FACT AND COMPETENT, SUBSTANTIAL EVIDENCE MUST SUPPORT IMPUTATION OF INCOME.** Former wife appealed the review of a supplemental final judgment denying her motion for relocation and granting modification of time-sharing and child support. The trial court found that relocation was not in the children's best interest, but granted a modification of time-sharing and child support based on the modified time-sharing schedule. The

appellate court affirmed as to the modified time-sharing and denial of relocation; it reversed as to the amount of child support which was based on imputed income and not supported by sufficient findings of fact or supported by competent, substantial evidence. Accordingly, it reversed and remanded as to the imputation and the amount of child support calculated pursuant to the imputed income. For purposes of calculating child support, s. 61.30(2)(b), F.S. (2011), requires a trial court to impute income to a voluntarily unemployed or underemployed parent in the absence of findings of fact of either a physical or mental incapacity, or circumstances over which the parent has no control. If income is imputed, the parent's employability and probable earnings should be determined based upon his or her recent work history, occupational qualifications, and prevailing earnings in the community. The appellate court concluded that the trial court's findings that former wife did not have either a mental or physical condition prohibiting full-time employment were supported by the record; however, the judgment lacked sufficient findings regarding recent work history, occupational qualifications, and the prevailing earnings to support the amount of income imputed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/July/July%2010,%202015/2D14-791.pdf (July 10, 2015)

Sikora v. Sikora, ___ So. 3d ___, 2015 WL 4136763, 40 Fla. L. Weekly D1594 (Fla. 2d DCA 2015). ABSENT SPECIAL CIRCUMSTANCES, AN ALIMONY AWARD SHOULD NOT EXCEED A SPOUSE'S NEED; IMPUTATION OF INCOME REQUIRES COMPETENT, SUBSTANTIAL EVIDENCE; GENERALLY, A TRIAL COURT ABUSES ITS DISCRETION IF IT FAILS TO MAKE ALIMONY RETROACTIVE TO THE DATE OF FILING; HOWEVER, AN EXCEPTION EXISTS IF TEMPORARY ALIMONY IS AWARDED DURING THE PROCEEDINGS; A TRIAL COURT MUST EXPLAIN THE NEED FOR SPOUSE TO SECURE AN OBLIGATION; THERE MUST BE A CORRELATION BETWEEN THE AMOUNT OF THE OBLIGATION AND THE SECURITY; LUMP SUM ALIMONY AWARDS MUST BE SUPPORTED BY THE EVIDENCE; GENERALLY, IT IS ERROR TO INCLUDE ASSETS IN AN EQUITABLE DISTRIBUTION SCHEME THAT HAVE BEEN DEPLETED DURING THE PROCEEDINGS IN ABSENCE OF MISCONDUCT. The appellate court agreed with arguments both spouses raised in the dissolution of their thirty-year marriage; accordingly, it reversed and remanded on a number of issues. It agreed with former husband that the trial court erred by awarding former wife permanent, periodic alimony in an amount exceeding her need. Absent special circumstances, an alimony award should not exceed a spouse's need. Because the trial court failed to include findings detailing any special circumstance, the appellate court instructed it on remand to either include such findings or reconsider the issue. The appellate court also instructed the trial court to adjust the alimony award because there was no competent, substantial evidence to support the rate of return it used to impute retirement income to former wife. The appellate court reiterated that generally, a trial court abuses its discretion if it fails to make alimony retroactive to the date of filing of the petition for dissolution. An exception is when a trial court enters temporary alimony during the proceedings, in which case a retroactive award is limited to the date that the request for an increased award is filed. A temporary alimony award can be re-addressed at a final hearing if the temporary award was made "without prejudice." Because the trial court gave no explanation as to how it reached the amount required of former husband to secure his alimony obligation and did not correlate the amount of coverage with the amount of alimony, the appellate court remanded the life insurance requirement for further proceedings. Finding no evidence justifying

the amount of lump sum awarded to former wife and holding that lump sum alimony awards without evidentiary support are subject to reversal, the appellate court remanded that alimony award for reconsideration based on evidence in the record. Noting that generally it is error to include assets in an equitable distribution scheme that have been depleted during dissolution proceedings in absence of misconduct, the appellate court concluded that the trial court had sanctioned former wife for not having fully documented her necessary medical and dental expenses pursuant to the spouses' stipulation by attributing the expenses to her in the equitable distribution. Finding no evidence to support the inclusion of those expenses in former wife's equitable distribution, the appellate court reversed and remanded the equitable distribution.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/July/July%2010,%202015/2D14-1073.pdf (July 10, 2015)

Quinn v. Quinn, ___ So. 3d ___, 2015 WL 4154179, 40 Fla. L. Weekly D1598 (Fla. 2d DCA 2015). IN ABSENCE OF EITHER A TRANSCRIPT OR A STIPULATED STATEMENT, APPELLATE REVIEW IS LIMITED TO ERRORS ON THE FACE OF THE JUDGMENT; CHILD SUPPORT DIFFERS FROM ALIMONY OR EQUITABLE DISTRIBUTION BECAUSE IT IS NOT A REQUIREMENT IMPOSED BY ONE PARENT ON THE OTHER, BUT A STATE-IMPOSED OBLIGATION ON BOTH PARENTS; CHILD SUPPORT CALCULATION REMANDED FOR DISCREPANCY IN NUMBER OF OVERNIGHTS IN PARENTING PLAN AND CHILD SUPPORT GUIDELINES WORKSHEET THAT TRIAL COURT DID NOT ADDRESS. The appellate court found no merit in former husband's arguments regarding the scheme of equitable distribution, calculation of former wife's income, or the amount of child support arrearages in a final judgment of dissolution, but did find an error in the calculation of child support on the face of the judgment requiring reversal. Due to the absence of either a transcript or a stipulated statement, appellate review was limited to errors on the face of the judgment. The appellate court recognized child support differs from alimony or equitable distribution. Child support is not a requirement imposed by one parent on the other; it is a state-imposed obligation on both parents. Here, the parenting plan attached to the final judgment provided for 260 overnights with former wife and 105 with former husband while the child support guidelines worksheet provided for 292 overnights with former wife and 73 with former husband. Because the trial court did not address this discrepancy in its final judgment, the appellate court reversed and remanded for recalculation of the child support and for any further findings should the trial court decide to deviate from the child support guidelines.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/July/July%2010,%202015/2D14-3306.pdf (July 10, 2015)

Dravis v. Dravis, ___ So. 3d ___, 2015 WL 4253855, 40 Fla. L. Weekly D1609 (Fla. 2d DCA 2015). CASH GIFTS COMMINGLED WITH MARITAL ASSETS DURING THE MARRIAGE ARE MARITAL; ASSETS THAT HAVE BEEN DIMINISHED OR DEPLETED DURING DISSOLUTION PROCEEDINGS SHOULD NOT BE INCLUDED IN EQUITABLE DISTRIBUTION SCHEME UNLESS TRIAL COURT MAKES SPECIFIC FACTUAL FINDINGS OF MISCONDUCT WHICH ARE SUPPORTED BY THE EVIDENCE. Former wife raised four issues in her appeal of a final judgment of dissolution; the appellate court reversed and remanded on the equitable distribution issue and affirmed the remainder of the judgment. Former wife's first issue related to \$78,000 in cash she received from her mother for birthdays and Christmas. The appellate court agreed with former wife that non-interspousal gifts

are treated as nonmarital assets; however, they lose that quality once commingled with marital assets. This is especially true with money because once commingled, it loses its separate character. The fact that an account may be titled in one spouse's name alone makes no difference; if cash gifts are commingled with marital assets during the marriage, they are marital assets. The appellate court reiterated that it is error for a trial court to include assets in an equitable distribution scheme that have been diminished or depleted during the dissolution proceedings unless the trial court makes specific factual findings which are supported by the evidence. Because those findings were absent, the appellate court reversed and remanded for the trial court to recalculate the equitable distribution in keeping with its opinion. It instructed the trial court not to double-count the proceeds of a closed bank account; it also held that former wife could not raise the issue of retroactive alimony for the first time on appeal.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/July/July%2015,%202015/2D13-5513.pdf (July 15, 2015)

Somasca v. Somasca, __ So. 3d __, 2015 WL 4610463 (Fla. 2d DCA 2015). TRIAL COURT ERRED BY NOT TREATING REDUCTION IN AMOUNT OF MORTGAGE ON NONMARITAL PROPERTY AS MARITAL ASSET WHEN MARITAL FUNDS WERE USED TO PAY DOWN THE MORTGAGE; MORTGAGE REDUCTION ENHANCED EQUITY OF THE NONMARITAL PROPERTY EVEN THOUGH ITS VALUE DECREASED DURING THE MARRIAGE; TRIAL COURT'S RELIANCE ON KAAA MISPLACED. Former wife argued on appeal that the trial court failed to treat the reduction in the amount the mortgage on former husband's nonmarital property as a marital asset. Although it was undisputed that marital funds were used to make the mortgage payments, the trial court reasoned that because the property did not appreciate in value during the marriage, the amount of the reduction in the mortgage was "moot and not compensable" to former wife. Former wife contended that use of marital funds to pay down the mortgage rendered an enhancement in the value of the property a marital asset subject to equitable distribution. Former husband countered that in the absence of any evidence in appreciation in the value of the property—in fact, the value decreased during the marriage-- former wife was not entitled to credit for one-half of the amount of the mortgage reduction. The appellate court cited Dwyer v. Dwyer, 981 So. 2d 1284 (Fla. 2d DCA 2008), in which it found that the trial court erred in a similar situation by not having accounted for the increased equity as a marital asset subject to equitable distribution. It concluded that here, as in Dwyer, the reduction of the mortgage enhanced the equity value of former husband's nonmarital asset. It found that trial court's reliance on Kaaa v. Kaaa, 50 So. 3d 867 (Fla. 2010), was misplaced because Kaaa had addressed a question involving "passive, market-driven appreciation in a nonmarital asset", rather than mortgage reduction. Finding no merit in former wife's other arguments, the appellate court reversed and remanded the equitable distribution and affirmed the remainder of the judgment.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/July/July%2031,%202015/2D14-2822.pdf (July 31, 2015)

Third District Court of Appeal

Fosshage v. Fosshage, 167 So. 3d 525 (Fla. 3d DCA 2015). THERE IS A CLEAR DISTINCTION BETWEEN MODIFICATION BASED ON CHANGED CIRCUMSTANCES AND PETITION FOR RELOCATION; TRIAL COURT ERRED IN NOT CONSIDERING REQUEST TO CHANGE CHILD'S

PRIMARY RESIDENCE AS PETITION FOR RELOCATION. Former wife appealed an order changing the primary residence of the spouses' seven-year old son from the Florida Keys to Wisconsin; the appellate court reversed. The spouses lived in the Keys when their son was born and after their separation; the final judgment provided for equal time-sharing at one-week intervals. After relocating to Wisconsin former husband petitioned for modification of the parenting plan based on changed circumstances. He cited a pending child abuse investigation involving former wife's then boyfriend, now husband, and former wife's alleged interference with former husband's attempts to visit their son in the Keys. The magistrate found the evidence did not support the child abuse allegations, but determined that former wife was interfering with former husband's time-sharing. The magistrate recommended changing the child's residence to Wisconsin; the trial court approved that recommendation. The appellate court found a "clear distinction" between modification based on changed circumstances and relocation. It concluded that former husband's petition was "in essence" a petition for relocation and that the trial court erred in not considering it as such; accordingly, it reversed and remanded for proceedings under the relocation statute.

<http://www.3dca.flcourts.org/Opinions/3D14-1493.pdf> (July 15, 2015)

Fourth District Court of Appeal

Boyd v. Boyd, __ So. 3d __, 2015 WL 4002258, 40 Fla. L. Weekly D1530 (Fla. 4th DCA 2015). **IF A SPOUSE CONCEDES NOT ALL COURT-ORDERED SUPPORT HAS BEEN PAID, TRIAL COURT ERRS IF IT FAILS TO RESOLVE AMOUNT OF ARREARAGE; CONFLICTING EVIDENCE MUST BE RESOLVED BY MAGISTRATE OR TRIAL COURT AND ARREARAGE MUST BE CALCULATED.** Former wife appealed a post-dissolution order. The appellate court held that the trial court erred by not having established a child support arrearage amount due and payable by former husband. Ten years after their dissolution, former wife petitioned for an upward modification of child support based on an alleged increase in former husband's income; she also calculated the child support arrearage. The general magistrate did not set an arrearage amount, finding that there was no credible evidence that former husband owed the arrearage amount calculated by former wife. The trial court denied former wife's exceptions and approved the magistrate's report and recommendations. The appellate court held: first, that an arrearage amount should have been calculated for the period of time the child attended private school; and second, that there should have been a determination of credibility of the testimony relating to the child support once the child began attending public school. If a spouse concedes that not all court-ordered child support has been paid, the trial court errs if it fails to resolve the amount of the arrearage; if there is conflicting evidence, either the magistrate or the trial court is required to resolve that conflict and calculate an arrearage. Reversed and remanded for the trial court to resolve the issue of arrearages.

<http://www.4dca.org/opinions/July%202015/07-01-15/4D14-198.1876.op.pdf> (July 1, 2015)

Elias v. Elias, __ So. 3d __, 2015 WL 4002203 (Fla. 4th DCA 2015). **THE CHILD SUPPORT GUIDELINES ARE THE STARTING POINT FOR DETERMINING BOTH TEMPORARY AND FINAL CHILD SUPPORT; A TRIAL COURT MAY DEVIATE FROM THE AMOUNT BASED ON A VARIETY OF FACTORS, BUT MUST DETERMINE GUIDELINE AMOUNT FIRST.** Former husband appealed a non-final order on temporary support; the appellate court reversed. The trial court concluded that neither

spouse needed to pay child support to the other because former wife's annual income of over \$1 million allowed her to provide for most of the children's needs by direct payments as she had offered to do; however, in doing so, the trial court considered any expenditures by former husband, with 50% time-sharing, incidental. The appellate court held that the trial court erred in having declined to apply the child support guidelines. It held that the guidelines are the starting point for determining temporary child support just as they are for child support in final orders. A trial court may deviate from the guideline amount based on a variety of factors; however, the guideline amount must be determined first.

<http://www.4dca.org/opinions/July%202015/07-01-15/4D14-1854.op.pdf> (July 1, 2015)

Tucker v. Tucker, __ So. 3d __, 2015 WL 4463816, 40 Fla. L. Weekly D1695 (Fla. 4th DCA 2015).

TRIAL COURT'S VALUATION OF STOCK MUST BE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE. The appellate court agreed with former wife that the trial court did not have competent, substantial evidence to value shares of stock former husband was directed to transfer to her. One spouse's expert valued the stock at one cent; the other at four cents. The court declined to hear further testimony and valued the stock at two and one-half cents per share. The appellate court found three errors in the trial court determination of the value of the stock: one, before allowing former wife to finish presenting her evidence; two, by relying on former husband's attorney's unsworn statement in lieu of hearing former husband's evidence; and three, by splitting the difference without providing a factual explanation. Remanded for the trial court to complete the evidentiary hearing in a manner consistent with the opinion.

<http://www.4dca.org/opinions/July%202015/07-22-15/4D14-4423.op.pdf> (July 22, 2015)

Fifth District Court of Appeal

Richeson v. Richeson, __ So. 3d __, 2015 WL 4002429, 40 Fla. L. Weekly D1562 (Fla. 5th DCA 2015). **TRIAL COURT CANNOT ORDER PARTITION IN ABSENCE OF SPECIFIC PLEADING REQUESTING IT.** Trial court erred in having directed partition in absence of any pleading requesting it. Reversed for reinstatement of equitable distribution scheme set forth in original final judgment.

<http://www.5dca.org/Opinions/Opin2015/062915/5D14-2122.op.pdf> (July 2, 2015)

Sowell v. McConnell, 167 So. 3d 521 (Fla. 5th DCA 2015). **CHILD'S UNCOVERED MEDICAL EXPENSES PAID PER PARENT'S CHILD SUPPORT PERCENTAGE.** The appellate court affirmed the final judgment of dissolution with the exception of the trial court's failure to require former husband to reimburse former wife for a portion of the minor children's medical expenses incurred during spouses' separation. The medical bills were admitted into evidence without objection when former wife testified to the amounts. Remanded for the trial court to calculate and award former wife a portion of the children's medical bills that she paid.

<http://www.5dca.org/Opinions/Opin2015/062915/5D14-275.op.pdf> (July 2, 2015)

Stantchev v. Stantcheva, __ So. 3d __, 2015 WL 4002532, 40 Fla. L. Weekly D1561 (Fla. 5th DCA 2105). **ERRORS IN EQUITABLE DISTRIBUTION NEED TO BE CORRECTED ON REMAND.** Former husband argued that the trial court erred in the final judgment of dissolution: by granting former wife a monthly alimony amount not based on actual need and by unfairly dividing the spouses'

assets. The appellate court affirmed the alimony without comment, but found three errors in the equitable distribution that needed to be corrected on remand. One, a nonmarital account should not have been included as a marital asset; two, former husband's repayment to former wife of 50% of funds from an account transferred to Bulgaria (the spouse's native county) prior to the petition for dissolution should have taken the conversion rate into account; and three, former husband should be credited with one-half of the amount former wife used for an initial payment to her attorney because she removed the funds from a marital account before she filed for dissolution and while the spouses were living together.

<http://www.5dca.org/Opinions/Opin2015/062915/5D14-248.op.pdf> (July 2, 2015)

Suleiman v. Yunis, ___ So. 3d ___, 2015 WL 4002327, 40 Fla. L. Weekly D1555 (Fla. 5th DCA 2015). FAILURE TO GIVE NOTICE OF A HEARING TO OPPOSING PARTY ABSENT A TRUE EMERGENCY DEPRIVES THAT PARTY OF ITS RIGHT TO PROCEDURAL DUE PROCESS; EX PARTE ORDER TO RETURN CHILDREN SHOULD HAVE BEEN VACATED DUE TO INSUFFICIENT ALLEGATIONS; TRIAL COURT ABUSED ITS DISCRETION IN NOT DISSOLVING ORDER ON THAT BASIS; TRIAL COURT IMPROPERLY MODIFIED SPOUSES' TIME-SHARING BASED ON INSUFFICIENT EVIDENCE. Former wife appealed the trial court's emergency ex parte order on former husband's motion for return of children and the order denying her emergency motion to vacate the ex parte order. The appellate court found that the "net effect" of the two orders was to modify the spouses' time-sharing. Concluding that former wife was denied due process and owing to insufficient evidence to modify time-sharing, the appellate court reversed. Former husband's motion was based on allegations that former wife had prevented him from exercising his time-sharing and had changed the children's school without having discussed it with him. The trial court granted his motion without notice to former wife. The appellate court reiterated that failure to give notice of a hearing to the opposing party absent a true emergency deprives the opposing party of its right to procedural due process. Loudermilk v. Loudermilk, 693 So. 2d 666, 668 (Fla. 2d DCA 1997). The appellate court agreed with former wife that former husband did not allege that the children were being threatened with physical harm or were about to be improperly removed from the state. It held that on this basis alone, the ex parte order should have been vacated. Former wife's appropriate procedure to contest the ex parte order should have shifted the burden of proof to former husband to show sufficient evidence to support issuance of the ex parte order. Former husband did not present sufficient, competent evidence that a substantial change of circumstances had occurred and that a modification of time-sharing would be in the children's best interests. The appellate court found that the trial court abused its discretion by failing to dissolve the ex parte order in absence of any evidence to support its issuance; and that it erred in changing the spouses' time-sharing based on its conclusion of a violation in shared parenting.

<http://www.5dca.org/Opinions/Opin2015/062915/5D15-295.op.pdf> (July 2, 2015)

Hernandez v. Hernandez, ___ So. 3d ___, 2015 WL 4366533 (Fla. 5th DCA 2015). TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HANDLING ISSUES RAISED IN SUPPLEMENTAL PETITION SEPARATELY AFTER DETERMINING ISSUES ON REMAND. The appellate court found no abuse of discretion in the trial court's decision to handle issues raised in a supplemental petition separately after determining the issues on remand.

<http://www.5dca.org/Opinions/Opin2015/071315/5D14-3061.op.pdf> (July 17, 2015)

Dickson v. Dickson, ___ So. 3d ___, 2015 WL 4366487, 40 Fla. L. Weekly D1664 (Fla. 5th DCA 2015). TRIAL COURT ABUSES DISCRETION IF IT MODIFIES TIME-SHARING WITHOUT EVIDENCE THAT MODIFICATION IS IN CHILD'S BEST INTEREST; A MOVE OF 49 MILES "AS THE CROW FLIES" DOES NOT REQUIRE PETITION TO RELOCATE; SHARED PARENTAL RESPONSIBILITY REQUIRES THAT MAJOR DECISIONS AFFECTING A CHILD'S WELFARE ARE MADE AFTER PARENTS CONFER AND REACH AGREEMENT; IF THEY CANNOT, TRIAL COURT MUST "RESOLVE THE IMPASSE" TO DETERMINE CHILD'S BEST INTEREST; REMANDED FOR TRIAL COURT TO DETERMINE IF MODIFICATION IS IN CHILD'S BEST INTERESTS AND ADJUST TIME-SHARING ACCORDINGLY. Former wife appealed a post-judgment order designating the school of the spouses' minor child and placing him in former husband's care on school nights. The appellate court reversed and remanded. The final judgment of dissolution incorporated a marital settlement agreement (MSA) which included a time-sharing schedule providing that the child would primarily reside with former wife, but would stay with former husband Wednesday nights and alternating weekends. It neither designated a school nor prohibited relocation; however, it granted the spouses shared parental responsibility on major decisions affecting the child's welfare, including educational. Former husband filed an emergency motion to require the child be re-enrolled in his old school after former wife moved to a different county and enrolled the child in a new school in that county. The trial court determined that former wife had violated the MSA, found that it was in the child's best interests to be re-enrolled in his old school, and modified time-sharing to grant former husband school nights. The appellate court found the trial court abused its discretion by modifying time-sharing in absence of evidence that returning the child to his old school was in his best interests. The spouses agreed that former wife's move was 49 miles "as the crow flies." The appellate court held that former wife's move violated neither the MSA nor the relocation statute, which requires at least a 50-mile change of residence, but that she was required to obtain court approval before "unilaterally" changing the child's school. If spouses are granted shared parental responsibility, major decisions affecting a child's welfare are to be made after the spouses confer and reach an agreement; if they cannot, the trial court must "resolve that impasse" and determine the child's best interests. Here, because the spouses were unable to agree on the school, the appellate court remanded for the trial court to determine if modification was in the child's best interests. Once that determination was made, the trial court could adjust the time-sharing schedule to accommodate the child's school schedule.

<http://www.5dca.org/Opinions/Opin2015/071315/5D14-3679.op.pdf> (July 17, 2015)

Rossi v. Rossi, ___ So. 3d ___, 2015 WL 4366476, 40 Fla. L. Weekly D1662 (Fla. 5th DCA 2015). TRIAL COURT'S DETERMINATION THAT A MOTION OR OTHER FILING IS IMPROPER IS A QUESTION OF LAW AND IS REVIEWED DE NOVO; FLORIDA COURTS PLACE SUBSTANCE OVER FORM; IF AN IMPROPERLY-LABELED MOTION IS INTENDED TO OPERATE AS AN AUTHORIZED MOTION, APPELLATE COURT MUST CONSIDER MOTION AS IF IT WERE PROPERLY LABELED. The appellate court agreed with former wife that the trial court should have treated her motion for rehearing on the general magistrate's report and recommendations as a list of exceptions; accordingly, it reversed the final judgment and remanded for further proceedings. Former wife took issue with the magistrate's unequal distribution of the assets without having considered the requisite statutory factors. The magistrate found that the bulk of the marital assets was a coin collection

worth over \$1 million and that former husband had continuously tried to hide or sell coins from the collection. The trial court concluded that former wife's timely filed motion for rehearing on the magistrate's report was not authorized under Florida Family Law Rule of Procedure 12.490, and that her list of exceptions to the report was not timely filed, before adopting the magistrate's report without modification. The appellate court stated that a trial court's determination that a motion or other filing is improper, as labeled, is a question of law and reviewed de novo. If an improperly-labeled motion is "intended to operate" as an authorized motion, an appellate court must consider the motion as if it were properly labeled. The appellate court noted that Florida courts have placed substance over form in the characterization of motions. Because the trial court found no issue with the substance of former wife's list of exceptions -- which was identical to the timely-filed motion for rehearing -- it should have treated former wife's unauthorized motion as an authorized list of exceptions and held a hearing on the magistrate's report. Accordingly, the appellate court reversed the trial court's final judgment and remanded for a hearing on former wife's list of exceptions to the report.

<http://www.5dca.org/Opinions/Opin2015/071315/5D14-4634.op.pdf> (July 17, 2015)

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

Bennett v. Abdo, __ So. 3d __, 2015 WL 4002373 (Fla. 5th DCA 2015). [DENIAL OF MOTION FOR MODIFICATION REVERSED](#). An inmate motioned for a modification of an injunction for protection against domestic violence, but the trial court summarily denied the motion without a hearing or explanation. The appellate court held that the trial court's action was improper since the motion was legally sufficient and the inmate had a right to be heard. <http://www.5dca.org/Opinions/Opin2015/062915/5D14-3565.op.pdf> (July 02, 2015)

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.