

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
March 2008

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeals

P.Y. v. State, ___ So.2d ___, 2008 WL 704227 (Fla. 1DCA 2008). Juvenile was found to have violated the terms of his probation. The Department of Juvenile Justice (DJJ) recommended that the juvenile be returned to probation. The trial court deviated from the DJJ's recommendation and ordered moderate-level commitment. Juvenile appealed. The First District Court of Appeal reversed and remanded the case. The First District found that although a trial court has statutory discretion to depart from a dispositional recommendation made by the DJJ, it may not deviate merely because it disagrees with the recommendation. The trial court must articulate reasons for not following the DJJ's recommendation. Any factual predicate must be supported by a preponderance of the evidence, and in the event of commitment, the stated reasons must have reference to the characteristics of the restrictiveness level vis-a-vis the needs of the child. See § 985.433(7), Fla. Stat. (2007). In the instant case, the trial judge stated:

“The reasons for the deviation are based on the P.D.R. itself, the recitation of the facts, and ... the fact that the child has engaged in a continuing pattern of delinquent behavior. And this requires a more restrictive disposition to protect the public.”

The First District held that the trial court's reasons for deviating were inadequate because the court did not explain why or how it reached a different conclusion than DJJ based on same facts that were before DJJ as set out in predisposition report, and the trial court did not relate level of commitment it imposed to needs or attributes of the particular juvenile. Basing its decision on the protection of the public did not absolve the trial court of its responsibility to relate the level of commitment it imposed to the needs or attributes of the particular child. The trial court failed to tailor the level of commitment to the needs either of the juvenile or of the public with specific regard to the juvenile, and failed even to address the question of what sanction his particular, individual situation called for. Case reversed and remanded.

<http://opinions.1dca.org/written/opinions2008/03-18-08/07-3989.pdf> (March 18, 2008).

Second District Court of Appeals

D.M.L. v. State, ___ So.2d ___, 2008 WL 724024 (Fla. 2DCA 2008). Juvenile was found guilty of criminal mischief for causing damage to a truck driven by an acquaintance named Cory. Juvenile appealed and challenged various evidentiary rulings of the trial court. At the adjudicatory hearing, Cory and his girlfriend, Brianna, testified that there was bad blood between Cory and the juvenile and that the juvenile intentionally caused damage to the truck with his skateboard. The juvenile testified that Cory tried to hit him with a baseball bat and that he attempted to

defend himself by holding up his skateboard. The baseball bat knocked the skateboard into the truck, causing the damage. The juvenile's girlfriend, Melody, testified for the defense, but was prevented from testifying that she was on the phone with Brianna right around the time of the offense and heard Cory in the background state, "There he is," immediately before the call was disconnected. On rebuttal, the State called Melody, who testified that the juvenile asked her to lie and say that Cory tried to hit him with a bat. On cross-examination, the defense was precluded from impeaching Melody with a prior inconsistent statement because the defense had failed to disclose the witness's prior inconsistent statement to the State. Juvenile was found guilty of criminal mischief. The juvenile appealed and argued that that the trial court improperly excluded evidence on the basis that the juvenile could not assert a defense of self-defense to the offense of criminal mischief. Next, the juvenile challenged the exclusion of his girlfriend's testimony about a phone conversation shortly before the incident. Lastly, the juvenile argued that the trial court erred in not allowing him to question his girlfriend about a prior inconsistent statement she made for purposes of impeachment. The Second District Court of Appeal reversed and remanded the case for a new adjudicatory hearing. First, the Second District held that the self-defense statute does not prohibit the use of this defense against property crimes. Therefore, the trial court erred to the extent that it based its rulings on the view that the juvenile could not assert a defense of self-defense in these circumstances. Next, the Second District held that the trial court abused its discretion in excluding the girlfriend's testimony regarding the phone call. The trial court excluded the testimony on the basis that it was not relevant. The Second District found that the testimony regarding the phone call was relevant because it was evidence tending to prove or disprove a material fact. The testimony would have shown that Cory was actively looking for the juvenile and would also explain the subsequent act of swinging the bat at the juvenile. Further, the trial court placed great weight on Brianna's testimony in making its finding of guilt. Brianna had denied that the phone conversation occurred. Melody's testimony regarding her phone conversation with Brianna would have cast doubt on Brianna's credibility. The statement made by Cory - "There he is" - was not inadmissible as hearsay. The statement was not offered to prove the truth of the matter asserted. Instead, it was offered to prove Cory's state of mind that he was looking for the juvenile, or to prove or explain Cory's subsequent act of swinging the bat at the juvenile. Therefore, the trial court abused its discretion in excluding the testimony. Finally, the Second District held that under the circumstances, the failure to disclose the witness's prior inconsistent statement to the State was not sufficient reason to exclude the evidence at trial. Even if the juvenile's use of the witness's prior inconsistent statement constituted a discovery violation, the trial court was required to conduct a *Richardson* hearing for purpose of determining the extent of violation and appropriate remedy. See Richardson v. State, 246 So.2d 771 (Fla.1971), *receded from in part by* Spradley v. State, 293 So.2d 697 (Fla.1974). When the State called Melody as a rebuttal witness, she testified on direct examination that the juvenile asked her to lie and say that Cory had gone to hit him with a bat. On cross-examination, defense counsel asked if Melody had told the defense investigator that she believed the juvenile wanted her to lie for him. The State objected on the basis that they never received the evidence in discovery. Defense counsel argued that Melody's statement to the investigator was work product, and the trial court stated that defense counsel should have brought in her investigator to testify. Defense counsel argued that she could impeach Melody with her own

statement and that she was trying to get out Melody's "prior inconsistent statement." The trial court sustained the State's objection to the impeachment evidence. The Second District held that the trial court erroneously excluded Melody's prior inconsistent statement on the basis that it had not been disclosed to the State. The work product privilege ceased to exist when the defense attempted to use the statement as impeachment evidence at trial. Further, the trial court could have allowed the State to review the statement, during a recess if necessary. It is clear that the trial court misunderstood the proper method of impeaching a witness with a prior inconsistent statement. Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate the witness on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit making the prior inconsistent statement, extrinsic evidence of such statement is admissible. See § 90.614(2). Defense counsel was correct when she argued that she must first confront Melody about the prior statement before introducing testimony from the defense investigator. It is not clear from the record what the prior inconsistent statement by Melody would have been because the trial court cut off defense counsel and ruled that defense counsel was not going to impeach Melody with her own statement. Therefore, any failure of the juvenile's counsel to proffer the prior inconsistent statement was caused by the trial court's erroneous refusal to permit anything other than the defense investigator's testimony. Thus, any failure of the appellant's attorney to lay the proper predicate was caused by the trial court's refusal to permit it. Accordingly, the Second District Court of Appeal reversed and remanded for a new adjudicatory hearing. <http://www.2dca.org/opinion/March%2019,%202008/2D06-5609.pdf> (March 19, 2008).

Third District Court of Appeals

P.N. v. State, ___ So.2d ___, 2008 WL 508095 (Fla. 3DCA 2008). Juvenile appealed adjudication based on consumption or possession of an alcoholic beverage on a public or semi-private area, in violation of a county ordinance. The Third District Court of Appeal reversed the adjudication. From a patrol boat with binoculars, an officer observed the juvenile holding a Budweiser beer bottle on the beach. The juvenile slid the bottle under his leg when he noticed the officer. The officer moved the boat into shore and ordered the juvenile to board the patrol boat. The juvenile initially ignored the officer but then complied. The juvenile left the beer bottle on the beach. The bottle was retrieved by a friend of the juvenile and turned over to the officer. The officer testified that the bottle was full of sand and salt water upon his receipt, and he discarded the beer bottle at the end of his shift. At no time did the juvenile admit that the beer bottle contained alcohol while in his possession. At the end of the State's case, the defense moved for a judgment of dismissal on the ground that the State failed to present any evidence that the beer bottle contained alcohol. The trial court denied the motion and the juvenile appealed. The Third District found that the State failed to present any evidence that the contents of the bottle possessed by the juvenile contained alcohol. The juvenile did not make any statement to law enforcement admitting that the bottle contained alcohol. Moreover, the officer testified that when the beer bottle was recovered, it was full of sand and salt water. Although the officer testified that he approached the juvenile because he was holding a beer bottle, the officer did

not testify that he saw the juvenile drinking from the beer bottle or that the contents of the bottle were alcoholic. As the State conceded during oral argument, it is not illegal for a minor to possess a beer bottle that contains no alcohol. Accordingly, the case was reversed and remanded. <http://www.3dca.flcourts.org/Opinions/3D06-3185.pdf> (February 27, 2008).

C.A. v. State, __ So.2d ___, 2008 WL 583881 (Fla. 3DCA 2008). Juvenile appealed the denial of a motion to suppress evidence (marijuana) obtained in an in-school search. The Third District Court of Appeal found that the search was not the result of a reasonable suspicion of criminal activity by the juvenile and reversed. The juvenile's teacher was working one-on-one with another student in her classroom during the break between classes. The teacher saw the juvenile in the classroom. The juvenile was not supposed to be in the classroom during the break. The teacher asked the juvenile to leave the classroom, and she asked him what he was doing there. The juvenile answered that he "came to get something." The teacher escorted the juvenile to the door and went back to the student who had been talking with the juvenile. When she returned to that student, the teacher immediately smelled a strong smell of marijuana. The teacher had not smelled the odor of marijuana as she escorted the juvenile to the door. The teacher only recognized the smell when she returned to the other student after the juvenile had left the room. The teacher left the classroom and asked the head of school security to investigate both the juvenile and the other student. The juvenile was then taken to the assistant principal's office and questioned by the school security officer. When asked to empty his pockets, the juvenile complied. Another school official asked if the juvenile had anything in his wallet. When the juvenile hesitated, the school official instructed the juvenile, "If you have anything, go ahead and give it up so we don't have to go through all of this." The juvenile then opened his wallet and removed a bag of marijuana. A one-count petition for delinquency was filed charging the juvenile with possession of cannabis. The juvenile filed a motion to suppress, and this was denied by the trial court. Citing the "totality of the circumstances," the trial court ruled that no search under the Fourth Amendment had occurred, because the opening of the wallet by the juvenile was voluntary, and there was a reasonable basis for the school officials to ask the juvenile whether he had anything he should not have. The juvenile entered a plea, reserving his right to appeal the denial of the motion to suppress. The State conceded that the search was a Fourth Amendment search. The Third District found that the juvenile was clearly a suspect when escorted to the school officials' offices and the legal effect of the instruction to remove items from his pockets and wallet is the same as an officer's search of the pockets and wallet. Therefore, the trial court erred when it determined that the encounter represented a consensual disclosure of the contents of the juvenile's pockets and wallet and the juvenile's appeal turns on the reasonableness of the grounds for that search. In a school, the more relaxed "reasonable suspicion" standard applies. See New Jersey v. T.L.O., 469 U.S. 325, 333 (1985). A "reasonable suspicion" requires proof that the school officials have "specific and articulable facts that, when taken together with the rational inferences from those facts, reasonably warrant the intrusion." See C.G. v. State, 941 So.2d 503, 504 (Fla. 3d DCA 2006). Although a "hunch" or an "intuition" may in some instances disclose wrongdoing, these more ephemeral precursors to questioning are insufficient as a matter of law. In the instant case, the Third District held that the facts concerning the juvenile did not support reasonable suspicion. The teacher's concern regarding the student in her

classroom visited by the juvenile and bearing the odor of marijuana (but only *after* the juvenile had left the classroom) was based on specific, articulable facts and appropriate inferences from those facts. However, the same cannot be said of the facts regarding the juvenile. The teacher did not smell marijuana while in the juvenile's presence or while escorting him to the door. The teacher did not see the juvenile take anything from (or pass anything to) the other student, and she simply associated the juvenile with her suspicion that the other student possessed marijuana. Suspicion by association or transference is not "reasonable suspicion." Case was reversed. <http://www.3dca.flcourts.org/Opinions/3D07-1638.pdf> (March 5, 2008).

K.F. v. State, __ So.2d ___, 2008 WL 724045 (Fla. 3DCA 2008). Juvenile was adjudicated delinquent upon finding that he committed offense of trespass. Juvenile appealed. The Third District Court of Appeal held that the evidence was insufficient to support delinquency adjudication on charge of trespass and reversed. The juvenile was originally charged with committing a burglary of an unoccupied dwelling. At trial, a State witness testified that she heard glass break at a house across the street from her house and that she saw five boys outside the house trying to pry open the back door. She identified the juvenile as one of the boys whom she saw pick up a rock and throw it at the house, breaking a window. She further testified that she did not see any of the boys inside the house. An officer testified that the juvenile told him that he was at the property to watch, not to participate, and that another boy broke the window. At the conclusion of the State's case, the juvenile moved for entry of a dismissal of the burglary charge, arguing that there was no evidence that he had entered the property, and that the building, which had no roof, did not qualify as a dwelling. The trial court found that the State failed to meet its burden of proof on the burglary charge because the house did not have a roof and thus did not qualify as a dwelling. The trial court then reduced the charge to trespass and found the juvenile guilty of that charge. The trial court stated: "[P]utting it all together leads us to believe the defendant got in with a bunch of kids and threw a rock. That's the case." The Third District found that based upon the trial court's factual determinations, the State failed to meet its burden of proving the crime of trespass. The trespass statutes §§ 810.08 and 810.09 include entry as an element of the offense. The trial court found, consistent with the testimony presented by the State's witnesses, that the juvenile never entered the building. Thus, the juvenile could not be found guilty of violating either trespass statute. Accordingly, the Third District reversed and remanded for entry of a dismissal of the trespass count. <http://www.3dca.flcourts.org/Opinions/3D07-0876.pdf> (March 12, 2008).

B.M. v. Dobuler, __ So.2d ___, 2008 WL 724045 (Fla. 3DCA 2008). Juvenile filed petition for a writ of habeas corpus on the ground that she was being held illegally in secure detention pending disposition of a violation by her of the conditions of her probation. The Third District Court of Appeal granted the petition. Juvenile was an unmanageable fourteen-year-old child who was charged with misdemeanor battery for kicking her mother in the leg during an argument. She failed to complete a diversionary program. The juvenile voluntarily appeared in court and pled guilty to the misdemeanor charge. The juvenile was sentenced to probation. The juvenile failed to comply with the terms of probation and an affidavit of violation of probation was filed. The juvenile appeared voluntarily before the court and pled guilty to the violation of

probation and was sentenced to attend a nonresidential commitment program and comply with other conditions. The juvenile failed to comply and a second affidavit of violation of probation was filed. The juvenile appeared voluntarily and again admitted to violating her probation. Disposition was set and the judge summarily ordered her from the courtroom to secure detention pending disposition. The juvenile's counsel objected and the court responded that it would issue an order to show cause why the juvenile should not be held in contempt of court for her unruly behavior. Two days later, the rule issued. Before a hearing was held on the show cause order, the court issued an Order of Detention. After chronicling the juvenile's conduct, the court stated:

This unfortunate history of this child running away, staying away from home for days at a time with people the Mother is unaware of is dangerous and risky behavior. The child has shown a willful, wanton disregard for all prior orders of the Court notwithstanding the Court, and DJJ's efforts to modify the Respondent's behavior. Both the Court and the Mother are afraid that this child will continue to run and eventually disappear and not return home, thereby subjecting her to the possibility of being killed or injured while she is out on the street. Further, there is a great possibility that the child will commit new law violations in order to support herself on the street or at the request of others who may be supporting her. This is an untenable and unacceptable risk both to the child and to the community. Based on this child's extensive record of absconding from home and her [u]tter disregard of the Court process, the Court has determined that it is in the best interest of the child to be detained until the date of her next hearing, which is the disposition on her second admission to a violation of probation scheduled for November 9th at 9:00 a.m.

The juvenile filed a petition for writ of habeas corpus on the ground that she was being held illegally in secure detention pending disposition of a violation by her of the conditions of her probation. The Third District held that the trial court's findings were insufficient to justify secure placement pursuant to statute governing departures from placements indicated in risk assessment instruments; the record was insufficient to support characterization of juvenile as absconder; the record was insufficient to support finding that juvenile's disregard of court process justified ordering her into secure detention; and the trial court's expressed concern that juvenile would "continue to run and eventually disappear and not return home" was insufficient basis for ordering her into secure detention. The Third District found generally, that the placement of a child into detention is dependent upon the existence of a validly prepared and scored risk assessment instrument supporting the placement. Section 985.255(3)(b), Fla. Stats. (2007) authorizes a juvenile court judge to depart from the placement indicated in the risk assessment instrument and order a more restrictive placement. However, the court must state, in writing, clear and convincing reasons for such placement. In the instant case, there was no evidence that the court had a risk assessment instrument in front of it when it ordered the juvenile from the courtroom to secure detention. Thus, the order of detention could not fairly be called a "departure" from anything. A properly-convened indirect contempt proceeding, rather than an order for the juvenile's placement in secure detention pending disposition for probation violation, was the proper vehicle through which to address juvenile's alleged

disregard of court process in delinquency proceedings. The trial court ordered, but did not conduct, such a proceeding. Instead, the trial court chose to accept a plea by the juvenile and set her case for disposition. Having so chosen, the trial court was limited to the remedies prescribed in § 985.439(4)(a)-(d), Fla. Stats. (2007). Secure detention was not among these remedies. The State conceded that the summary detention could not be sustained under the juvenile court's statutory contempt powers, but argued that the trial court's dual findings that the juvenile presented an "extensive record of absconding from home" as well as "disregard of the Court process" were sufficient to justify secure detention under § 985.255(3)(b), Fla. Stats. (2007). The Fifth District found that to the extent the court sought to label the juvenile as an "absconder" to justify detaining her, this post-hoc justification is not supportable either factually or legally. There was no suggestion in the record of extraordinarily lengthy absences or even an effort to avoid judicial process. That these facts were insufficient to warrant the designation of juvenile as an "absconder" was supported by reference both to case law and the manual of the Florida Department of Juvenile Justice. The "disregard of court process" finding was also an insufficient reason to support secure detention in this case. This finding was not factually supported because the juvenile appeared voluntarily at every court hearing set in her case. Finally, fear that the juvenile will "continue to run and eventually disappear and not return home" with all of its potential consequences was insufficient basis for ordering juvenile into secure detention following probation violation hearing. Petition granted.

<http://www.3dca.flcourts.org/Opinions/3D07-2734.pdf> (March 19, 2008).

C.R. v. State, ___ So.2d ___, 2008 WL 782578 Fla. 3DCA 2008). Juvenile appealed an adjudication and disposition placing him in a high-risk residential program. The Third District Court of Appeal reversed and remanded for a new hearing. The Third District held that the trial court and the predisposition report upon which the court relied, failed to make specific findings as to the reasons for adjudicating and committing the juvenile to the Florida Department of Juvenile Justice as required by § 985.23, Fla. Stat. (2005).

<http://www.3dca.flcourts.org/Opinions/3D06-3055.pdf> (March 26, 2008).

Fourth District Court of Appeals

E.A.R. v. State, ___ So.2d ___, 2008 WL 583791 (Fla. 4DCA 2008). The issue raised was whether § 985.433(7)(b), Fla. Stats. (2007) requires a trial court to specifically identify the "characteristics of the restrictiveness level imposed vis-à-vis the needs of the juvenile," when the trial court sentences a juvenile to a different restrictiveness level than that recommended by the Department of Juvenile Justice ("DJJ"). The Fourth District Court of Appeal held that the statute does not impose such a requirement on a sentencing judge and affirmed. The Fourth District certified conflict with the Second District Court's decision in M.S. v. State, 927 So.2d 1044 (Fla. 2d DCA 2006). In the instant case, the juvenile entered a plea to a felony and violations of probation. The DJJ predisposition report recommended a moderate-risk commitment. The trial judge sentenced the juvenile to a high-risk residential program, giving these reasons for the decision:

[H]e has become ungovernable; secondly, he is truly a flight risk; third, gang affiliation;

next, danger to-- to the public and society. Page 6 of the P.D.R. talks about his violent outbursts, his potential for harming others, uncontrolled anger. And there's more than support that he is a danger to-- to the public.... I'm going to accept the statements of the probation officer, her review of the Child and looking at what he wrote on his computer and things of that nature. There is a gang affiliation here. And for all of those reasons, the Court's going to place him in a Level 8 program.

The Fourth District found that the substance of § 985.433(7)(b), Fla. Stats. (2007) is identical to its predecessor, § 985.23(3)(c), Fla. Stats. (2004). In K.S. v. State, 835 So.2d 350, 352 (Fla. 4th DCA 2003), the Fourth District recognized that this statutory language “does not require the court to explain why it is imposing a different restrictiveness level by articulating the ‘characteristics of the restrictiveness level imposed vis-à-vis the needs of the juvenile.’” The Fourth District noted that other courts have taken a different approach to the same statutory language citing M.S. v. State where the Second District Court of Appeal held that the trial court must reference the characteristics of the restrictiveness level vis-à-vis the needs of the child. The Fourth District in its analysis explained that cases such as M.S. expanded statutory language to impose a mandatory requirement upon the sentencing judge. This development crept into Florida law from Judge Griffin's dissent in J.L.O. v. State, 721 So.2d 440, 443 (Fla. 5th DCA 1998) (Griffin, J., dissenting), where she wrote that a judge's reason for departing from a DJJ recommendation “must have reference to the characteristics of the restrictiveness level vis-à-vis the needs of the child.” This general requirement makes sense because a judge's sentence should address the needs of the child. In A.C.N. v. State, 727 So.2d 368, 370 (Fla. 1st DCA 1999), the court adopted Judge Griffin's observation as a sentencing requirement under § 985.23, that the reasons for departure “have reference to the characteristics of the restrictiveness level” as they relate to the needs of the child. In cases that came after A.C.N. and J.L.O., the observation that the bases for a sentencing departure “have reference” to the sentence imposed morphed into the requirement that the trial judge articulate at sentencing how the characteristics of a restrictiveness level address the needs of the child. Thus in A.G. v. State, 737 So.2d 1244, 1247 (Fla. 5th DCA 1999), the court wrote: “Not only must the court state in writing or on the record its reasons for disregarding the recommended level, but in addition, the reasons must reference the characteristics of the restrictiveness level vis-à-vis the needs of the child.” Although A.G. cited A.C.N. in support of this proposition, the case expanded the language of A.C.N. by changing the phrase “have reference to” to “reference.” See J.M. v. State, 939 So.2d 1138, 1139 (Fla. 5th DCA 2006) (relying on A.G. for the proposition that a judge disregarding a DJJ commitment recommendation “must state its reasons and ‘must reference the characteristics of the restrictiveness level vis-à-vis the needs of the child’”) and R.T. v. State, 946 So.2d 112, 113 (Fla. 1st DCA 2007). In this way, a general concept of relatedness evolved into a judge's obligation to articulate the precise connection between a sentence and the child's needs. The Fourth District held that in the instant case, the trial court adequately provided its reasons for disregarding DJJ's recommendation and those reasons were “supported by a preponderance of the evidence.” in accordance with K.S. Even without the finding of a gang affiliation, for which the evidence was flimsy, there was adequate evidence that appellant was ungovernable, a flight risk, and a danger to the public. The sentence was affirmed and conflict certified with M.S. v. State, 927 So.2d 1044 (Fla. 2d DCA 2006).

<http://www.4dca.org/opfrm.html> (March 5, 2008).

Fifth District Court of Appeals

X.R. v. State, __ So.2d ___, 2008 WL 611610 (Fla. 5DCA 2008) Juvenile appealed an order holding him in contempt of court in delinquency proceeding. The juvenile was charged with possession of cannabis. The trial court entered a behavior order which set forth conditions for pre-trial release. Defense counsel objected to entry of the behavior order. Shortly thereafter, an affidavit for order to show cause for behavior order violation was filed. A show cause order was issued by the trial court and a hearing was set. The affidavit alleged that the juvenile was failing to comply with the behavioral order. The juvenile failed to appear for the hearing and was taken into custody. The next day the show cause hearing was held. The juvenile was found to be in contempt. The juvenile appealed and argued that the juvenile court lacked authority to hold him in contempt of court for his failure to comply with a behavior order which was entered in connection with his pre-trial release. The Fifth District held that it did not have to address the precise point raised by the juvenile because the record supported the sanction of contempt because of the juvenile's disobedience of the show cause order. The juvenile court had subject matter jurisdiction over the juvenile who was charged with a delinquent act. The juvenile was not free to simply disobey the court's order to appear and show cause. So long as the trial court's order was entered with subject matter jurisdiction, the juvenile was obligated to obey the order even if erroneous. The show cause order was operative unless and until the behavior order was reversed or vacated. Thus, the juvenile was required to appear in response to the order to show cause even if the entering of the behavioral order was erroneous and was free to raise his objections and seek appellate review of any adverse ruling. The juvenile's disobedience of the court's directive, in and of itself, exposed him to contempt of court sanctions for failure to appear. The Fifth District in dicta was of the opinion that the Legislature has not authorized the use of pre-trial behavior orders. However, when a trial court is authorized to order pre-trial secure detention, the court may utilize the less restrictive approach of releasing the juvenile conditioned on the juvenile's compliance with a pre-trial behavior order. In the present case, the trial court could not have lawfully order secure detention and the behavior order was erroneously entered. However, juvenile was required to appear in response to the order to show cause even if the entering of the behavioral order was erroneous. Judgment affirmed.

<http://www.5dca.org/Opinions/Opin2008/030308/5D07-2462.op.pdf> (March 7, 2008).

J.S. v. State, __ So.2d ___, 2008 WL 611676 (Fla. 5DCA 2008) Juvenile was released to his parents subject to a behavior order. Juvenile's father filed an affidavit alleging that juvenile had failed to abide by the condition of the order. Indirect criminal contempt was found and juvenile was sentenced to five days in secure detention. The juvenile appealed and challenged the validity of behavior order and the five days of detention. The juvenile had been arrested and detained for battery upon his younger brother. Detention for such an offense was authorized under § 985.255(1)(d), Fla. Stats. (2006). A detention review hearing was held at which time the trial court, exercising its discretion, ordered the juvenile released from detention to his parents'

custody under conditions set forth in a document entitled "Standard Behavior Order for Juveniles Charged with Committing a Delinquent Act." A condition of his release was that he conform to the behavior order. An affidavit was filed reflecting that the juvenile was not complying with the behavior order which triggered the contempt proceeding. In response, the trial court issued an order to show cause and set a hearing. Counsel for the juvenile objected to the validity of the behavior order. However, based upon the court's prior rulings on the same issue, the juvenile entered a plea of no contest and was sentenced to five days in secure detention. The Fifth District found that the trial court had the authority to issue a behavior order when it released juvenile to the custody of his parents pending delinquency proceeding. The trial court had the authority to detain the juvenile but instead, let the juvenile go home upon compliance with the behavior order's conditions which were less restrictive than secure detention. When the court otherwise has the authority to impose secure detention, it may also condition release from detention upon reasonable terms and conditions to insure the presence of the child at trial and protect the public, including the victim. The remaining issue involved the court's refusal to allow credit for time served over the weekend. The Fifth District held that the record was devoid of any basis to impose a sentence greater than five days. See § 985.037(2), Fla. Stat. (2006). The trial court was without authority to exclude weekends when calculating time served. While the written order lawfully sentenced the juvenile to five days in secure detention, the corresponding provision that ordered his release after five weekdays had elapsed was error. Accordingly, the Fifth District affirmed in part and reversed in part. <http://www.5dca.org/Opinions/Opin2008/030308/5D07-2713.op.pdf> (March 7, 2008).

C.A.F. v. State, __ So.2d ___, 2008 WL 611684 (Fla. 5DCA 2008). Juvenile sought habeas corpus review of release order imposing conditions of release that he contended unlawfully imposed significant restraints on his liberty. Juvenile was detained by deputies for the sale or delivery of cannabis. Rather than arrest the juvenile, the deputies released him to the custody of his father at the scene. The State Attorney filed a delinquency petition against the juvenile and issued him a notice to appear in court. The juvenile appeared in court for his arraignment without an attorney. No attorney was appointed. The court ordered the juvenile released to the custody of his parents with conditions of release. The court wrote and signed an additional order containing these various conditions of release. After obtaining counsel, the juvenile appeared before the court on a Motion to Release Child from Pre-Trial Discretionary Conditions of Release. The trial court denied the motion and continued the conditions of release. The juvenile filed a petition for habeas corpus seeking review of the release order. The Fifth District held that the trial court lacked authority for the release order imposing conditions of release because the child was in no legal status from which the court may "release" the child nor impose conditions on any such "release." The Fifth District Court of Appeal found that the power to place those charged with delinquent acts is entirely statutory as provided in § 985.215 Stats. (2007)(renumbered §§ 985.24-.27) and the Florida Rules of Juvenile Procedure 8.005-.013. In the instant case, none of the detention procedures were followed and no risk assessment was ever done. To the extent that the appealed order was a form of detention, it was illegal. The level of restriction on the accused juvenile's freedom of movement and association without complying with the statutory requirements or procedural safeguards was outside of Florida law. The State argued that the conditions imposed did not amount to a

“detention.” This argument fails because if the juvenile had not been detained, then there was no status from which he may have been “released.” Even if the terms of the “release order” did not rise to the level of “detention,” there is still no authority to impose them. The Fifth District found that the Juvenile was entitled to issuance of the writ. However, juvenile was tried before this issue was resolved and the issue became moot. Therefore the issuance of the writ was withheld.<http://www.5dca.org/Opinions/Opin2008/030308/5D07-3982.op.pdf> (March 7, 2008).

Dependency Case Law

Florida Supreme Court

State v. Contreras, --- So.2d ----, 2008 WL 657867 (Fla. 2008) A child was sexually abused and interviewed by the Child Protection Team (CPT) about the abuse. Later, the CPT recording of the interview was used as evidence against the defendant, and the child was declared unavailable to testify after a psychologist testified that the child would suffer emotional and psychological harm if required to testify in person. The Defendant appealed stating he was never given a chance to cross examine the child, and therefore, the CPT recording should have been excluded due to his constitutional right of confrontation. The Florida Supreme Court found that the child victim's statements to the CPT interviewer were testimonial. Thus, the statements had to meet the requirements of ***Crawford v. Washington, 541 U.S. 36*** (2004) in order not to violate the defendant's constitutional right to confrontation. In Crawford, the Supreme Court dispensed with the Roberts reliability analysis for testimonial hearsay statements and held the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement is testimonial, (2) the declarant is unavailable, and (3) the defendant lacked a prior opportunity for cross-examination of the declarant. Although the defendant had two opportunities to depose the child, the defendant was not present at either deposition. The court held that exercising the right to take a discovery deposition under rule 3.220 is not the functional substitute of in-court confrontation of the witness because the defendant is usually prohibited from being present, the motivation for the deposition does not result in the "equivalent of significant cross-examination," and the resulting deposition cannot be admitted as substantive evidence at trial. Therefore, because the child's hearsay statement was testimonial and the defendant had no opportunity to cross-examine the child, the admission of the CPT recorded statement violated the Defendant's Sixth Amendment right of confrontation. Finally, in discussing the age requirement of the child hearsay exception, the opinion notes that “[n]othing in the statute provides that a finding of unavailability is limited by the victim’s current age. The only age requirement is that the statement being admitted as hearsay must have been made by a victim eleven years or less in age. The victim in the instant case was eleven when she made the statements in question.” (second emphasis supplied). The Court therefore held that the exception applied, rendering the victim unavailable, even though the victim was not of the “correct” age by the time of trial. (She was 13 years old).

<http://www.floridasupremecourt.org/decisions/2008/sc05-1767.pdf> (March 13, 2008).

First District Court of Appeals

No new opinions for this reporting period.

Second District Court of Appeals

D.M. v. Department of Children and Families, --- So.2d ----, 2008 WL 783291 (Fla. 2d DCA 2008)
Grandmother who had been caring for her grandchild as temporary legal custodian due to a dependency case appealed when the child was returned to the father's care pursuant to 39.521, Florida Statutes. The appellate court held that while the grandmother was a participant, she was not a party as defined by statute. Therefore, section 39.510(1), Florida Statutes, supersedes **rule 9.146(b)** such that the grandmother does not have standing to appeal the order of the trial court placing the child with the father.

<http://www.2dca.org/opinion/March%2026,%202008/2D07-1609.pdf> (March 26, 2008).

Third District Court of Appeals

No new opinions for this reporting period.

Fourth District Court of Appeals

M.F. v. Department of Children and Families, --- So.2d ----, 2008 WL 583892 (Fla. 4th DCA 2008)
An adjudication of dependency was reversed against the father because the Department failed to establish that the father's drug use placed the children at risk of imminent neglect, and that he failed to protect the children from the mother's drug use. In order to support a finding that the father actually neglected the children by failing to protect them from the mother's substance abuse, the department had the burden of proving by a preponderance of the evidence that (1) the father knew about the mother's drug use, and (2) he was capable of preventing the child's exposure, but failed to do so. The court also held that the absence of prenatal care is not determinative of either the father's knowledge of the mother's drug use, or the father's ability to prevent the mother's drug use. To support an adjudication of dependency where a parent's substance abuse problem poses a substantial risk of imminent harm, the department must show (1) that the parent has an ongoing substance abuse problem, (2) that it adversely affected his ability to care for the child, and (3) that the child suffered harm or injury - physical, mental or emotional - as a consequence of the parent's drug use. The department did establish that the father recently tested positive for cocaine use, however, they failed to prove that the drug use placed the children at risk of imminent harm. The department must also show that the father's drug use affected his ability to parent, but the department presented no evidence that the father used drugs in the presence of the children or that his drug use adversely affected the children or had an adverse effect on his ability to parent. "While it is not necessary to show [the child] was present for the parents' alleged drug use, the

totality of the circumstances must show an imminent risk of harm is created by the actions of the parent(s)."

<http://www.4dca.org/Mar2008/03-05-08/4D07-3741.op.pdf> (March 5, 2008).

T.W. v. Department of Children and Families, --- So.2d ----, 2008 WL 584926 (Fla. 4th DCA 2008)

A termination of parental rights case was affirmed against the mother who refused drug treatment and failed to complete her case plan. The court also agreed that the trial court's refusal to let two of her children testify was harmless because both children had no new evidence to offer and were only going to reiterate how much they loved their mother, which had already been established through the testimony of two other siblings.

<http://www.4dca.org/Mar2008/03-05-08/4D07-4781.op.pdf> (March 5, 2008).

J.R. v. Department of Children and Families, --- So.2d ----, 2008 WL 649613 (Fla.4th DCA 2008)

The mother was awarded supervised visitation after her child was adjudicated dependent, however, a short time later, the court modified the visitation order due to the mother's behavior. The appellate court remanded the case to the trial court because the trial court failed to include specific findings of fact to support the modification in the order. Rule 8.260(a) of the Florida Rules of Juvenile Procedure requires all court orders to contain specific findings of fact and conclusions of law. <http://www.4dca.org/Mar2008/03-12-08/4D07-3894.op.pdf> (March 12, 2008).

Fifth District Court of Appeals

C.B. v. Department of Children and Families, --- So.2d ----, 2008 WL 611606 (Fla. 5th DCA 2008)

Children were sheltered but left in the home and adjudication was withheld. After supervision was terminated by the court, a new event occurred and the Department attempted to remove the children and reinstate supervision without filing a new petition for dependency. The court held that because the children were never adjudicated dependent, the lower court was not allowed to exercise jurisdiction over the children after termination of supervision without following the statutory requirements governing new dependency actions. The court also stated that although section 39.521(b)(3) provides that the court's "termination of supervision may be with or without retaining jurisdiction," this provision, by the statute's express terms, only applies to children "adjudicated by a court to be dependent."

<http://www.5dca.org/Opinions/Opin2008/030308/5D07-2049.op.pdf> (March 5, 2008).

J.S. v. Department of Children and Families, --- So.2d ----, 2008 WL 818319, (Fla. 5th DCA 2008) A child was

adjudicated dependent based on domestic violence between the mother and the father and the father appealed. The court held that there was no evidence that the child was affected by the incidents of domestic violence or the poor relationship between the parents, and any risk to the child was based on the mother's actions. Therefore, the father was a non-offending father.

<http://www.5dca.org/Opinions/Opin2008/032408/5D07-3892.op.pdf> (March 24, 2008).

S.E.G. v. Department of Children and Families, --- So.2d ----, 2008 WL 817381 (Fla. 5th DCA 2008)

The trial court could terminate the parental rights of both parents, even though DCF failed to

prove which parent had actually caused the injuries. At the time the four-month-old child was removed from Appellants' care, almost all of the child's ribs were fractured, he had a fractured leg, a fractured arm, and a hematoma on his head. Appellants, who were the child's sole caretakers at all relevant times, had no credible explanation for the child's injuries, and the child exhibited frequent bruising and manifestations of pain, such as irritability, fussiness and difficulty sleeping. <http://www.5dca.org/Opinions/Opin2008/032408/5D07-567.op.pdf> (March 24, 2008).

Dissolution of Marriage Case Law

Florida Supreme Court

There are no new cases for this reporting period.

First District Court of Appeals

Anderson v. Russell, __So.2d__, 2008WL515027 (Fla.App.1Dist., Feb. 28, 2008)(NO. 1D07-0492) Former husband's appeal stemmed from a final judgment of dissolution of marriage (1987) which had awarded a two-acre parcel of property to him and his former wife, requiring that they divide the property in half as agreed to by them. Some five years later (1992), former wife signed a document, addressed to former husband, indicating an intent to transfer some interest in the property to former husband and then to their daughter; however, former wife never executed a deed of conveyance. Nearly 20 years after the dissolution (2005), after negotiating a lease for a cell tower on the property, former husband sought specific performance, asking that former wife be required to convey the property per the 1992 agreement; former wife countered-claimed for partition. The trial court entered a final judgment of specific performance and found that because former wife had conveyed her interests to the property, there was no property to be partitioned. The trial court went on to award the one acre parcel on which the cell tower was located to former husband and to grant him a life estate in the other acre. The trial court also ordered that the property be surveyed to create a legal description for two one acre parcels, and that former wife execute deeds in conformity with its judgment. Former wife filed a motion for rehearing, arguing that she and former husband had intended that the entire two-acre parcel ultimately go to their daughter; the trial court then struck its original order and issued a subsequent one awarding former husband a life estate in the entire parcel with remainder to the daughter. The appellate court found that the trial court lacked legal authority or an evidentiary basis to disturb former husband's undivided one-half interest in the property and accordingly, directed the trial court to reinstate its final judgment which had directed that the property be divided into two one acre parcels with former husband having fee simple interest in one and a life estate in the other with the daughter as the remainderman.

<http://opinions.1dca.org/written/opinions2008/02-28-08/07-0492.pdf> (February 28, 2008).

Tanner v. Tanner, __ So.2d __, 2008WL595942,(Fla.App.1Dist., Mar 06, 2008)(NO. 1D07-4962)
Former husband sought review of an order setting aside a consent final judgment of dissolution of marriage. The appellate court found that the trial court had abused its discretion by reaching a conclusion that, in the words of the appellate court, “no reasonable person could have reached.” The appellate court found that the evidence established nothing more than the former wife feeling in hindsight that the terms of the agreement were not in her best interest and commented that “ ‘buyer’s remorse’ is not a sufficient basis for overturning a marital settlement agreement freely and voluntarily entered into.”
<http://opinions.1dca.org/written/opinions2008/03-06-08/07-4962.pdf> (March 6, 2008).

Kelly v. Colston, __ So.2d __, 2008WL704215 (Fla. App.1Dist. Mar 18, 2008)(NO. 1D07-3594)
Case in which the former wife had filed a notice of voluntary dismissal 10 days after the general magistrate had filed a report following a hearing and the trial court had entered a final judgment of dissolution of marriage 20 days after the filing of the voluntary dismissal. Roughly a year later, former husband, believing the dissolution to be valid, sought to modify the terms of the final judgment regarding custody and visitation and appealed the trial court’s denial of his petition for modification. The appellate court concluded that the trial court lacked jurisdiction because neither the hearing held by the magistrate nor the filing of the report constituted “submission . . . to the court for decision” under Rule 1.420, Rules of Civil Procedure, regarding voluntary dismissal. The appellate court held that because the case was not submitted to the trial court for decision prior to the voluntary dismissal, the trial court was divested of jurisdiction to enter either the dissolution order or any subsequent related orders. Accordingly, the appellate court vacated the dissolution order and all orders subsequent to it.
<http://opinions.1dca.org/written/opinions2008/03-18-08/07-3594.pdf> (March 18, 2008).

Second District Court of Appeals

Parker v. Parker, __ So.2d __, 2008WL541378 (Fla.App.2Dist. Feb 29,2008)(NO. 2D06-2818)
Former husband appealed final judgment of dissolution of marriage, arguing that the trial court had erred in its distribution of the marital assets and award of alimony to former wife; appellate court agreed and reversed on those issues. The appellate court noted that s. 61.075, F.S. requires the trial court to use as its starting point that the distribution be equal and that the final distribution—equal or unequal—be supported by competent, substantial evidence. Concluding that certain findings made by the trial court in distributing the marital assets and awarding alimony were not based on competent, substantial evidence, the appellate court reversed and remanded to the trial court.
<http://www.2dca.org/opinion/February%2029,%202008/2D06-2818.pdf> (February 29, 2008).

Schulz v. Schulz, __ So.2d __, 2008WL649448 (Fla.App.2Dist. Mar 12, 2008)(NO. 2D06-5245)
Former husband appealed final judgment of dissolution of marriage in a short-term marriage (fewer than two years), arguing that the trial court had erred in the distribution of marital assets and in its award of attorney’s fees to former wife. The appellate court reversed as to the equitable distribution. Although certain items had been identified as non-marital by former husband and wife, they were treated as marital assets by the trial court leading the appellate

court to conclude that the trial court had abused its discretion. The appellate court also directed the trial court to correct errors in its scheme for equitable distribution.

<http://www.2dca.org/opinion/March%2012,%202008/2D06-5245.pdf> (March 12, 2008).

Voronin v. Voronina, __ So.2d __, 2008WL649201 (Fla.App.2Dist. Mar 12, 2008)

(NO. 2D07-1079) Former husband appealed final judgment of dissolution of marriage, arguing that the trial court erred in its equitable distribution of assets and liabilities as well as in the child support award. Although the appellate court noted that its review was hampered by the absence of a court reporter at trial, it concluded that two items on the face of the judgment warranted reversal. As to the child support, although the trial court's order referred to an attached child support guideline, none was attached to the order, leading the appellate court to reverse the award and remand for a new hearing on that issue. As to the equitable distribution, the appellate court found that former husband and wife had no real estate and that prior to trial they had filed a stipulation resolving distribution of most of the assets with the remaining assets and debts to be distributed at trial. Even without a transcript, the exhibits reflected that 90% of the debt had been placed on the former husband leading the appellate court to find that to be dramatically unequal especially in the absence of an explanation by the trial court. The appellate court distinguished this case from Esaw v. Esaw, 965 So. 2d 1261 (Fla. 2nd DCA 2007), a case also lacking a transcript, due to the harmful errors in the final judgment.

<http://www.2dca.org/opinion/Maarch%2012,%202008/2D07-1079.pdf> (March 12, 2008).

Bishop v. Bishop, __ So.2d __, 2008WL681336 (Fla.App.2Dist. Mar 14, 2008)(NO. 2D07-2745)

Former husband appealed final judgment of dissolution on two grounds, one of which, the award of permanent alimony, was found by the appellate court to have merit as it concluded that the trial court had applied incorrect law regarding the length of the marriage. The appellate court found that the trial court had correctly relied on the filing date of the petition for dissolution as the date for termination of the marriage and also found that there was no dispute by either former husband or wife that the length of their marriage (12 years) qualified it as being in a "gray area" without a presumption for or against permanent alimony; however, the appellate court held that the trial court had erred when it entered a judgment declaring that the marriage was long-term and therefore carried a presumption favoring an award of permanent alimony. The appellate court went on to find that this error was not in the nature of a scrivener's error because both former husband and wife had brought it to the court's attention via a motion for rehearing which was denied. The appellate court directed the trial court on remand to apply the correct legal standard to a marriage in a "gray area" to determine whether an award of permanent alimony was appropriate. (March 14, 2008).

<http://www.2dca.org/opinion/March%2014,%202008/2D07-2745.pdf>

Bell v. Hill, __ So.2d. __, 2008WL782866 (Fla. App.2Dist. Mar 26, 2008)(NO. 2D07-807)

Former wife appealed a post-dissolution order modifying the terms of a visitation agreement; the appellate court reversed and remanded due to the trial court having failed to include within its findings that there had been a substantial change in circumstances subsequent to the agreement and that a change in the visitation schedule was in the best interest of the child.

The trial court was permitted on remand to take additional evidence to determine the child's best interest.

<http://www.2dca.org/opinion/March%2026,%202008/2D07-807.pdf> (March 26, 2008).

Storey v Storey, __ So.2d __, 2008WL782860 (Fla.App.2Dist Mar 26, 2008)(NO. 2D06-5824) Former husband appealed amended final judgment of dissolution of marriage; appellate court reversed due to the trial court having erroneously included the monthly expenses of the children in calculating alimony with the result that the child support was "double counted." The appellate court remanded with instructions for the trial court to recalculate the alimony. <http://www.2dca.org/opinion/March%2026,%202008/2D06-5824.pdf> (March 26, 2008).

Third District Court of Appeals

Karten v. Karten, __ So.2d __, 2008WL782600 (Fla. App. 3Dist. Mar 26, 2008)(NO. 3D07-1023) Former husband appealed a post-judgment order re his petitions to modify child support stemming from a dissolution of marriage case which had begun some 20 years before. Appellate court found no error in the conclusions drawn by the general magistrate regarding either modifications of child support or arrearages owed by former husband and affirmed the trial court's order which had incorporated the magistrate's findings. The appellate court pointed out that a parent paying unallocated support has the duty to petition the court for a reduction either at the time or promptly after each child ages out of eligibility for support and that for a parent receiving support to accept an amount below that which is due for support does not preclude that parent from the collection of past-due amounts. In the words of the appellate court, "The clear, if cautionary, lesson from this case is that provisions requiring recomputation of an unallocated monthly child support amount require prompt action and diligent prosecution if a reduction is sought by the obligor and is not otherwise self-executing." <http://www.3dca.flcourts.org/Opinions/3D07-1023.pdf> (March 26, 2008).

Patman v. Patman, __ So. 2d __, 2008WL782646 (Fla. App 3Dist. Mar 26, 2008) (NO. 3D07-1164) Former husband appealed an amended final judgment of dissolution of marriage in which former wife conceded to an error of \$6000 in the equitable distribution award. In discussing the necessity of correcting the amended final judgment, the appellate court noted that the trial court was correct in valuing the marital home as of the date of trial rather than the date of filing of the petition for dissolution and cited Norwood v. Anapol-Norwood, 931 So. 2d 951 (Fla. 3rd DCA 2006). <http://www.3dca.flcourts.org/Opinions/3D07-1164.pdf> (March 26, 2008).

Fourth District Court of Appeals

Rosenstein v. Rosentein, __ So. 2d __, 2008WL508609 (Fla. App. 4Dist. Feb 27, 2008) (NO. 4D07-2595) Former husband appealed a post-dissolution order requiring that he pay former wife's rent based on his agreement to make mortgage payments on the marital home which former wife sold; appellate court reversed. The issue was whether former husband, who had originally agreed to pay the mortgage on the marital home until the youngest child reached

majority and who had subsequently agreed to former wife moving to a new “childhood residence” was obligated to pay former wife’s rent in the new home. The appellate court concluded that, in absence of a specific provision requiring that former husband pay the rent, that he was not obligated to do so; the two agreements he had entered into should not have been interpreted to require payment of rent. Citing McCutcheon v. Tracy, 928 So. 2d 364 (Fla. 3rd DCA 2006) and Beach Resort Hotel Corp v. Wieder, 79 So. 2d 6659 (Fla. 1955), the appellate court noted that a court may not change the terms of a contract either to achieve what it may think a more appropriate result or to relieve one side from an improvident bargain. <http://www.4dca.org/opfrm.html> (February 27, 2008).

Salm v. Salm, __ So. 2d __, 2008WL508177 (Fla. App. 4Dist. Feb 27, 2008)(NO. 4D06-3691) Brief opinion in which the former husband and wife appealed and cross-appealed a final judgment of dissolution of marriage on numerous issues. The appellate court affirmed with two exceptions: one, regarding an error in the equitable distribution chart, and the other regarding a handwritten clause in the judgment relating to responsibility for repairs to the marital home. The appellate court remanded for correction of the error and clarification of the clause. <http://www.4dca.org/opfrm.html> (February 27, 2008).

Bardowell v. Bardowell, __ So. 2d __, 2008WL582568 (Fla. App. 4Dist. Mar 05, 2008) (NO. 4D06-972) Former wife appealed a final judgment of dissolution of marriage on several grounds, one of which—the valuation and award of former husband’s pension—was found by the appellate court to have merit. The appellate court reiterated that the standard of review of a trial court’s plan for equitable is whether the trial court abused its discretion and that the equitable distribution must be supported by competent, substantial evidence. The appellate court in this case found that the trial court had abused its discretion by not awarding former wife any portion of former husband’s pension plan. The appellate court also briefly referred to cases which discuss reducing pensions to present value. <http://www.4dca.org/opfrm.html> (March 5, 2008).

Chipman v. Chipman, __ So.2d __, 2008WL583670 (Fla. App. 4Dist. Mar 05, 2008)(NO. 4D06-3935) Former wife appealed a final judgment of dissolution of marriage and former husband cross-appealed; appellate court reversed. The case concerned a post-nuptial agreement which provided that former wife receive a special equity in return for use by her of funds from her pension and retirement plan to pay off the 1st mortgage on the marital home; former husband, in turn, agreed to waive any right to former wife’s pension or retirement plan. The trial court found that although former husband had not met his burden of proof to show that the agreement was invalid, that the agreement was not binding on him because the condition regarding the 1st mortgage had not been met. (Former wife used her funds to refinance rather than pay off the mortgage). The appellate court found that the trial court erred in its conclusion that the contract was not binding because a condition was not satisfied and noted that a post-nuptial agreement is subject to interpretation as is any other contract; therefore, it remanded to the trial court to reconsider and recalculate the obligations owed by former husband and wife. The appellate court also found that the trial court erred in the amount of income it had imputed to former wife and reiterated that the standard of review regarding imputing of

income is whether it is based on competent, substantial evidence. The appellate court then discussed the two step analysis required in imputing income. Finding that the trial court had also abused its discretion by having ordered former husband to share the tax consequences of former wife's pension funds which had been liquidated, the appellate court pointed out that former husband should not have to share the tax liability for funds he relinquished the rights to. <http://www.4dca.org/opfrm.html> (March 5, 2008).

Coots v. Coots, __ So. 2d __, 2008WL649436 (Fla.App.4Dist. Mar 12, 2008) (NO. 4D07-1046) Former husband appealed final judgment of dissolution of marriage. Appellate court held that while the trial court did not abuse its discretion in the equitable distribution of assets and the award of lump sum alimony to former wife, that it did abuse its discretion in requiring former husband to pay over one-half of former wife's attorney's fees in light of the relative financial situations of the former husband and wife. <http://www.4dca.org/opfrm.html> (March 12, 2008).

Crossin v. Crossin, __ So.2d __, 2008WL649110 (Fla.App. 4Dist., Mar 12, 2008)(NO. 4D06-4899) Former husband appealed final judgment of dissolution of marriage; appellate court reversed the portions regarding parental responsibility and child support obligations and reiterated that the guiding principle in child custody considerations is always the best interest of the child. With regard to the child support, the appellate court found that nothing in the record showed that former husband had a legal source of funds to support the amount ordered and noted that a court cannot base its award of support on the assumption that a parent will violate the law to obtain the funds necessary to pay. Accordingly, the appellate court remanded for the trial court to determine former husband's earning capacity from legal pursuits. (Former husband had been convicted on a cocaine charge prior to the marriage and at one point had some \$400,000 stashed in his mother-in-law's attic which the former couple had reportedly lived on). <http://www.4dca.org/opfrm.html> (March 12, 2008).

Salazar v. Salazar, __ So.2d __, 2008WL649478 (Fla. App. 4 Dist., Mar 12, 2008)(NO. 4D07-1407) Former wife appealed final judgment dissolving her 31 year marriage to former husband. The appellate court affirmed the denial of attorney's fees, but reversed on the issues of periodic alimony, medical and dental expenses of the minor child, and the tax consequences of a minor child. With regard to the periodic alimony, the appellate court concluded that the trial court had abused its discretion in failing to award any alimony and recognized the presumption in favor of alimony in a long-term marriage. As to the medical and dental expenses, the appellate court noted that the trial court had erred by not having followed the requirements of s. 61.30(8), F.S. regarding payment of uncovered medical and dental expenses by parents on a percentage basis. On the issue of whether former husband or wife could claim the minor child as a dependent for income tax purposes, the appellate court found that although the trial court had not erred in determining that former husband should get the benefit of claiming the minor child as a dependent every other year, that it had erred by not having structured the transfer of the exemption in accordance with s. 61.30(11)(a)(8), F.S. <http://www.4dca.org/opfrm.html> (March 12, 2008).

Donoff v. Donoff, __ So.2d __, 2008WL724203 (Fla. App. 4Dist., Mar 19, 2008) (NO. 4D07-3332)

Former wife appealed from an amended final judgment of dissolution of marriage which stemmed from a reversal and remand of a prior final judgment. On remand, former wife had agreed to an alimony reduction to \$1 a month; however, the trial court in its amended final judgment made the reduction retroactive to the date of filing of the petition and ordered her to pay former husband \$271,740. Concluding that the trial court had erred by providing relief beyond the directive of the mandate, the appellate court reversed.

<http://www.4dca.org/opfrm.html> (March 19, 2008).

Stewart v. Stewart, ___ So.2d ___, 2008WL783300 (Fla. App. 4Dist. Mar 26, 2008)(NO. 4D07-53) Former husband appealed a final judgment of dissolution of marriage on two grounds, one of which—whether the trial court properly reserved jurisdiction for an automatic upward modification of alimony—was found to have merit. Citing to Hamilton v. Hamilton, 552 So.2d 929, 931 (Fla. 1st DCA 1989), for its language that “automatic increases in alimony based solely on income increases of the paying party are generally improper,” the appellate court noted there is an exception to this rule when the trial court finds that the financial needs of the person entitled to receive alimony exceed the financial ability of the person obligated to pay the alimony. In this case, the trial court had found that the former husband had the ability to pay more than the amount of the alimony ordered; therefore, the trial court should not have reserved jurisdiction for any increases in alimony without a showing of substantial change in circumstances. <http://www.4dca.org/opofrm.html> (March 26, 2008).

Fifth District Court of Appeals

There were no cases for this reporting period.

Domestic Violence Case Law

Florida Supreme Court

There were no cases for this reporting period.

First District Court of Appeals

Reyes v. State, --- So.2d ----, 2008 WL 704200 (Fla. 1st DCA 2008) In a criminal DV case, the trial court erred in allowing evidence concerning the defendant’s sexual escapades with other people outside the country. The State did not establish that admission of this irrelevant evidence was harmless beyond a reasonable doubt, and the defendant’s conviction for aggravated assault was reversed. <http://opinions.1dca.org/written/opinions2008/03-18-08/07-1611.pdf> (March 18, 2008).

Second District Court of Appeals

There were no cases for this reporting period.

Third District Court of Appeals

There were no cases for this reporting period.

Fourth District Court of Appeals

Betterman v. Kukelhan, --- So.2d ----, 2008 WL 724195 (Fla. 4th DCA 2008) A former boyfriend made a motion to vacate an injunction against domestic violence pursuant to **section 741.30(6)(c), Florida Statutes** (2007). The court issued an order denying the motion without a hearing. The appellate court reversed and held that the trial court erred in denying the motion without giving the boyfriend a hearing and an opportunity to be heard. The summary denial of a motion to vacate without a hearing violates due process requirements.

<http://www.4dca.org/Mar2008/03-19-08/4D07-3173.op.pdf> (March 19, 2008).

Fifth District Court of Appeals

State v. Clyatt, --- So.2d ----, 2008 WL 731545 (Fla. 5th DCA 2008) The Defendant was charged with felony battery pursuant to **section 784.03(2), Florida Statutes** (2007) for repeatedly striking the victim. The victim refused to testify, but the state attorney's office pursued the case. To prove the case pursuant to **§ 784.03 (1)(a)1**, the State was required to prove that the defendant touched or struck the victim against her will. Because the State could not produce a Florida case stating that a purported battery victim's lack of consent could be proved circumstantially without the victim's testimony, the trial court did not allow the State's witnesses to testify regarding their observations. Although no Florida court has directly held that lack of consent can be established by circumstantial evidence in a simple battery case, Florida courts have recognized circumstantial evidence as sufficient to support a lack of consent finding in other types of criminal prosecutions. Additionally, Florida courts have routinely found circumstantial evidence sufficient to prove a victim's or defendant's state of mind on issues other than consent. Generally, the test for admissibility of evidence is its relevance. Because the State's evidence was clearly relevant to the issue of the victim's lack of consent, and because there is no rule of law barring the State from using circumstantial evidence to prove lack of consent, the appellate court held that the trial court should have allowed the witnesses to testify. <http://www.5dca.org/Opinions/Opin2008/031708/5D07-989.op.pdf> (March 20, 2008).

J.S. v. Department of Children and Families, --- So.2d ----, 2008 WL 818319, (Fla. 5th DCA 2008) A child was adjudicated dependent based on domestic violence between the mother and the father and the father appealed. The court held that there was no evidence that the child was affected by the incidents of domestic violence or the poor relationship between the parents, and any risk to

the child was based on the mother's actions. Therefore, the father was a non-offending father.
<http://www.5dca.org/Opinions/Opin2008/032408/5D07-3892.op.pdf> (March 24, 2008).