

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

Table of Contents

Delinquency Case Law	2
Florida Supreme Court.....	2
First District Court of Appeal	2
Second District Court of Appeal.....	3
Third District Court of Appeal.....	4
Fourth District Court of Appeal.....	4
Fifth District Court of Appeal.....	5
Dependency Case Law	6
Florida Supreme Court.....	6
First District Court of Appeal	6
Second District Court of Appeal.....	6
Third District Court of Appeal.....	7
Fourth District Court of Appeal.....	8
Fifth District Court of Appeal.....	8
Dissolution Case Law	9
Florida Supreme Court.....	9
First District Court of Appeal	9
Second District Court of Appeal.....	11
Third District Court of Appeal.....	11
Fourth District Court of Appeal.....	12
Fifth District Court of Appeal.....	13
Domestic Violence Case Law	13
Florida Supreme Court.....	13
First District Court of Appeal	13
Second District Court of Appeal.....	13
Third District Court of Appeal.....	14
Fourth District Court of Appeal.....	14
Fifth District Court of Appeal.....	14

Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

L.D.S.J. v. State, ___ So.3d ___, 2009 WL 2392894 (Fla. 1st DCA 2009). [ORDER REVOKING PROBATION REVERSED WHERE JUVENILE'S WAIVER OF COUNSEL DID NOT COMPLY WITH THE REQUIREMENTS OF FLA. R. JUV. P. 8.165](#). The juvenile appealed the revocation of his probation where he entered a plea without the assistance of counsel. The juvenile argued that the trial court failed to determine whether he knowingly and intelligently waived his right to counsel and failed to conduct a thorough inquiry into the voluntariness of his waiver of counsel. The First District Court of Appeal found that the record was devoid of any discussion regarding whether the juvenile had a meaningful opportunity to confer with an attorney regarding his right to counsel, as required by Fla. R. Juv. P. 8.165(a). Furthermore, the trial court failed to inquire about the child's comprehension of the offer of counsel, his capacity in making the choice of whether to waive counsel, or about the existence of any unusual circumstances that would preclude the juvenile from exercising the right of self-representation. The State argued that the trial court had the benefit of knowing that the juvenile was only one month away from his 18th birthday and had previous contact with the judicial system. The First District held that this knowledge did not alleviate the court from its obligation to make proper inquiries into intelligence and voluntariness of the juvenile's waiver of right to counsel. The State further argued that the juvenile and his mother had signed a written waiver of rights form. The First District held that the waiver failed to comply with the requirements of Fla. R. Juv. P. 8.165(b) (3) and that the court failed to make proper inquiry. Accordingly, the First District reversed and remanded for a new plea hearing after either appointing counsel for the juvenile or obtaining a waiver of counsel after conducting a thorough inquiry in accordance with Fla. R. Juv. P. 8.165. <http://opinions.1dca.org/written/opinions2009/08-06-2009/08-3873.pdf> (August 6, 2009).

S.L.U. v. State, ___ So.3d ___, 2009 WL 2342931 (Fla. 1st DCA 2009). [DISPOSITION ORDER WAS REVERSED AND REMANDED TO PROVIDE THE TRIAL COURT AN OPPORTUNITY TO ENTER AN ORDER IN COMPLIANCE WITH E.A.R. V. STATE, 4 SO.3D 614 \(FLA.2009\)](#). The juvenile appealed her disposition order. The Department of Juvenile Justice (DJJ) had recommended supervised probation. The trial court departed from the DJJ's recommendation and committed the juvenile to a moderate-risk residential program. The First District Court of Appeal found that when the trial court entered its order, it did not have the benefit of the Florida Supreme Court's decision in E.A.R. v. State, 4 So.3d 614 (Fla.2009), which set forth the rigorous analysis in which trial courts must engage prior to departing from the DJJ's recommendation. The trial court's disposition order was reversed and remanded to provide the trial court an opportunity to enter an order in compliance with E.A.R. <http://opinions.1dca.org/written/opinions2009/07-31-2009/09-0772.pdf> (July 31, 2009).

Second District Court of Appeal

M.N. v. State, __ So.3d __, 2009 WL 2602282 (Fla. 2d DCA 2009). **CONVICTION AFFIRMED BECAUSE THE JUVENILE HAD NOT EXPRESSLY RESERVED A DISPOSITIVE ORDER FOR REVIEW.**

The juvenile appealed the trial court's order placing him on probation for burglary of an occupied dwelling and criminal mischief. At a change of plea hearing, counsel for the juvenile requested a continuance because, on the previous evening, a witness the defense had been trying to locate contacted the juvenile online and gave the juvenile her telephone number. The juvenile acknowledged that the online contact did not include any information as to what the witness might say. The court denied the motion, noting that the case had been reset several times. The juvenile then agreed to enter a no contest plea to the charges contingent upon his right to appeal the denial of his motion to continue. The court accepted the juvenile's plea, noting that the juvenile was reserving the right to appeal the denial of his motion to continue. However, the court did not expressly find the motion to be dispositive. The court then ordered adjudication withheld and placed the juvenile on probation until the juvenile's nineteenth birthday. The Second District Court of Appeal found that Fla. R. App. P. 9.140(b)(2)(A)(i) authorizes a defendant to appeal from a judgment based on a no contest plea if the defendant expressly reserves the right to appeal a dispositive order of the trial court, identifying with particularity the point of law being reserved. The Second District held that the denial of the juvenile's motion was not a dispositive order because reversal on appeal would not have prevented the State from proceeding to trial. Instead, reversal would have merely allowed the juvenile to attempt to locate a defense witness to use at trial. Thus, because the juvenile had not expressly reserved a dispositive order for review, the juvenile's conviction was affirmed.

The Second District also held that pursuant to Leonard v. State, 760 So.2d 114 (Fla.2000), the failure to preserve an issue for review after entry of a plea is not a jurisdictional bar to appeal but is a limitation on issues that can be addressed on appeal. In light of the controlling authority of Leonard, the Second District receded from Blow v. State, 993 So.2d 540 (Fla. 2d. DCA 2007). The Second District also receded from that portion of any other case decided after Leonard in which this court dismissed an appeal from a plea for lack of jurisdiction based on the appellant's failure to preserve a dispositive issue for review. To the extent that the juvenile believed his plea was involuntary because he was led to believe he could appeal the denial of his motion to continue, the Second District affirmed without prejudice to any right the juvenile might have to file a petition for writ of habeas corpus in the circuit court.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/August/August%2026,%202009/2D08-1953.pdf (August 26, 2009).

J.C. v. State, __ So.3d __, 2009 WL 2341640 (Fla. 2d DCA 2009). **TRIAL COURT ERRED IN DENYING THE JUVENILE'S MOTION TO SUPPRESS MARIJUANA AND PARAPHERNALIA EVIDENCE WHERE POLICE DID NOT HAVE A REASONABLE SUSPICION OF THE COMMISSION OF A CRIME TO JUSTIFY AN INVESTIGATORY STOP.** The police observed the juvenile riding his bicycle on a bike path that runs parallel to a roadway in "a high crime area". Two officers pulled over ahead of the juvenile, exited their car, and walked towards the bike path. As the officers approached the juvenile, the arresting officer testified that he told the juvenile, "Hey, I've got to talk to you for a minute. Hang on." The juvenile did not testify at the suppression hearing. On appeal, the

juvenile argued that the trial court erred in denying his motion to suppress because the officers illegally detained him without the necessary reasonable suspicion by blocking his path of travel and ordering him to “hang on.” The Second District Court of Appeal found that the evidentiary record did not support the juvenile’s contention that the officers blocked his path. However, the trial court’s factual finding, that the stop was consensual, was not supported by the facts. The Second District found that a citizen encounter becomes an investigatory stop once an officer shows authority in a manner that restrains the defendant's freedom of movement such that a reasonable person would feel compelled to comply. The Second District concluded that a reasonable person would not feel free to walk away but rather would feel compelled to comply with a police officer's command, “I've got to talk to you for a minute. Hang on.” Thus, under the totality of the circumstances, this was an investigatory stop which required a reasonable suspicion of the commission of a crime. It was undisputed that the officers had no such suspicion. Therefore, the stop was illegal. Accordingly, the trial court's disposition order was reversed and remanded with instructions to grant the juvenile’s motion to suppress.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2031,%202009/2D08-4415.pdf (July 31, 2009).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

S.B. v. State, __ So.3d __, 2009 WL 2517041 (Fla. 4th DCA 2009). [THE TRIAL COURT'S EXPLANATION FOR ITS DEPARTURE FROM THE DEPARTMENT OF JUVENILE JUSTICE'S ASSESSMENT AND RECOMMENDATION WAS NOT IN ACCORDANCE WITH THE REQUIRED ANALYSIS AS OUTLINED IN E.A.R. V. STATE, 4 SO.3D 614 \(FLA.2009\).](#) The juvenile appealed his disposition order. The Department of Juvenile Justice (DJJ) recommended juvenile probation. The trial court departed from the DJJ’s recommendation and committed the juvenile to a moderate-risk program. The trial court indicated that it was departing from DJJ's recommendation due to the “seriousness of offense to community; protection of community requires commitment; offense was aggressive, premeditated and willful; record and previous criminal history; no prospect for adequate protection of public and no likelihood for rehabilitation in a community service program.” The Fourth District Court of Appeal found that the trial court's explanation for departing from the DJJ's assessment and recommendation was not in accordance with the required analysis as outlined in E.A.R. v. State, 4 So.3d 614 (Fla.2009), which was decided after the disposition hearing. Reversed and remanded for a new disposition hearing.

<http://www.4dca.org/opinions/Aug2009/08-19-09/4D08-1606.op.pdf> (August 19, 2009).

E.R. v. State, __ So.3d __, 2009 WL 2382383 (Fla. 4th DCA 2009). **THE TRIAL COURT'S EXPLANATION FOR ITS DEPARTURE FROM THE DEPARTMENT OF JUVENILE JUSTICE'S ASSESSMENT AND RECOMMENDATION WAS NOT IN ACCORDANCE WITH E.A.R. V. STATE, 4 SO.3D 614 (FLA.2009).** The juvenile appealed his disposition order. The Department of Juvenile Justice (DJJ) had recommended juvenile probation and participation in the "Re-directions program." The trial court departed from the DJJ's recommendation and placed the juvenile in a low-risk commitment program. The Fourth District Court of Appeal held that the trial court's explanation for its departure from DJJ's assessment and recommendation was not in accordance with the required analysis set forth by the Florida Supreme Court in E.A.R. v. State, 4 So.3d 614 (Fla.2009). Accordingly, the disposition order was reversed and remanded for the trial court to either impose the probation recommended by DJJ or depart from DJJ's recommendation in accordance with (E.A.R.).
<http://www.4dca.org/opinions/Aug2009/08-05-09/4D08-3650.op.pdf> (August 5, 2009).

Fifth District Court of Appeal

J.L. v. State, __ So.3d __, 2009 WL 2632154(Fla. 5th DCA 2009). **SECTION 984.09(1), F.S. (2008) AUTHORIZES THE IMPOSITION OF EITHER SECURE DETENTION OR ALTERNATIVE SANCTIONS.** The juvenile appealed the trial court's imposition of both alternative sanctions and secure detention for a single violation of probation. The Fifth District Court of Appeal held that s.984.09 (1), F.S. (2008), authorized either secure detention or alternative sanctions, but not both. Reversed and remanded.
<http://www.5dca.org/Opinions/Opin2009/082409/5D09-162.op.pdf> (August 28, 2009).

W.W. v. State, __ So.3d __, 2009 WL 2632174 (Fla. 5th DCA 2009). **WHERE A JUVENILE IS CHARGED WITH BOTH A FELONY AND A MISDEMEANOR TRAFFIC OFFENSE AND THE CHARGES ARISE OUT OF THE SAME CIRCUMSTANCES JURISDICTION LIES WITH THE CIRCUIT COURT.** The juvenile was charged with leaving the scene of an accident with injuries, driving under the influence (DUI), and carrying a concealed weapon. The juvenile moved to dismiss the DUI count contending that the circuit court lacked jurisdiction over a juvenile charged with a misdemeanor traffic offense. The circuit court agreed and dismissed the DUI count without prejudice to the State to re-file in the county court. The Fifth District Court of Appeal held that where a juvenile is charged with both a felony and a misdemeanor traffic offense, and the charges arise out of the same circumstances, jurisdiction lies with the circuit court. Section 26.012(2) (d), F.S., provides that circuit courts shall have exclusive original jurisdiction of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged. Judgment reversed and remanded. Judge Cohen filed a dissenting opinion.
<http://www.5dca.org/Opinions/Opin2009/082409/5D09-321.op.pdf> (August 28, 2009).

A.W. v. State, __ So.3d __, 2009 WL 2407663 (Fla. 5th DCA 2009). **SECTION 938.29, F.S. (2009) DOES NOT AUTHORIZE THE IMPOSITION OF COSTS OF PROSECUTION IN DELINQUENCY CASES.** The juvenile was adjudicated delinquent for possession of cocaine. The juvenile argued that the trial court erred in denying his motion for dismissal. The juvenile also argued that the trial court erred in imposing \$150 for costs of prosecution pursuant to s.938.29, F.S. (2009). The Fifth

District Court of Appeal affirmed the motion for dismissal without discussion. However, the Fifth District held that s.938.29; F.S. (2009) does not authorize the imposition of costs of prosecution in delinquency cases. Accordingly, the part of the order assessing the costs of prosecution was reversed.

<http://www.5dca.org/Opinions/Opin2009/080309/5D08-2920.op.pdf> (August 7, 2009).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

The Justice Administrative Commission v. Stanford, ___ So. 3d ____, 2009 WL 2777176 (Fla. 1st DCA 2009). [THE JUSTICE ADMINISTRATIVE COMMISSION IS NOT REQUIRED TO PAY ATTORNEY'S FEES FOR COUNSEL APPOINTED FOR GRANDPARENTS.](#)

The Justice Administrative Commission (JAC) sought a writ of certiorari to challenge an order requiring it to process bills for attorney's fees for counsel appointed to represent grandparents of a juvenile in a dependency proceeding. Relying on decisions in Justice Administrative Commission v. Peterson, 989 So. 2d 663 (Fla. 2nd DCA 2008) and Justice Administrative Commission v. Grover, 2009 WL 1770155 (Fla. 1st DCA June 24 2009), the court held that the grandparents had neither a constitutional nor statutory right to counsel and there was no authority compelling the JAC to pay the attorney's fees. Because the circuit court departed from the essential requirements of the law, the court granted the petition for a writ of certiorari and quashed the order.

<http://opinions.1dca.org/written/opinions2009/08-28-2009/09-2360.pdf> (August 28, 2009).

Second District Court of Appeal

J.O., Sr. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ____, 2009 WL 2602215 (Fla. 2nd DCA 2009).

[DEPENDENCY ORDER REVERSED.](#)

The Department conceded that the dependency order on appeal lacked adequate findings of fact and that there was insufficient evidence for an adjudication of dependency. The court agreed, reversed the order, and remanded the case with instructions for the children to be returned to their father.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/August/August%2026,%202009/2D08-3787.pdf (August 26, 2009).

Third District Court of Appeal

D.G. v. Department of Children and Family Services and the Guardian ad Litem Program,
___ So. 3d ___, 2009 WL 2601876 (Fla. 3rd DCA 2009).

ORDER GRANTING GRANDPARENT VISITATION THAT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW REVERSED.

A father sought a writ of certiorari to quash a non-final order granting the maternal grandparents unsupervised weekly and biweekly visitation rights with his child. The Department had brought the dependency case in October 2008. Because the mother was deceased and the father had a history of drug use, the child was removed from the father and temporarily placed with the maternal grandparents. The father consented to dependency in November 2008. In May 2009, the father was granted temporary custody but a separate order granted the maternal grandparents biweekly unsupervised visits. After another, similar order was entered, the father petitioned for certiorari. On appeal, the court noted that the requirements to grant a writ of certiorari are that the appellate court must find that: 1) the trial court departed from the essential requirements of the law; 2) the departure will result in material injury for the remainder of the case; and 3) the departure cannot be corrected on post-judgment appeal. The court found that the order in question met the required standard. The court noted that the visitation rights granted to grandparents under section 39.509, Florida Statutes (2008), terminate when the child is returned to the physical custody of the parent. The court observed that the record unambiguously stated that the father regained physical custody of the child under the June 2009 reunification order and the father was not found to pose a threat of harm to the child at that time. The court therefore found that the trial court departed from the essential requirements of the law, granted the petition, and quashed the order.

<http://www.3dca.flcourts.org/Opinions/3D09-1730.pdf> (August 26, 2009).

R.S., Sr. and Y.S. v. Department of Children and Family Services,
___ So. 3d ___, 2009 WL 2513826, 35 Fla.L.Weekly D1683 (Fla. 3rd DCA 2009).

ADJUDICATION OF DEPENDENCY BASED ON NEGLECT REVERSED.

The court reversed an adjudication of dependency based on neglect. The child's parents had lived separately since January 2007 and the child, then seven-years old, moved with the mother to her new residence. On appeal, the court noted that the factual basis of the trial court's neglect findings were based on the conditions at the father's home on May 31, 2007. The police had executed a search warrant on the father for sale of cocaine within 1000 feet of a school zone and the both the mother and the child, inside the house, witnessed the father's arrest. Hours later the mother was arrested at the home for the same crimes. The adjudicatory hearing was held on January 16, 2008, and neither the Department on the trial court disputed the mother and the child had not resided at the father's house since January 2007. The father had frequent contact with the child after the parents separated and apart from a couple of occasions there was no testimony that the child entered the house with the father. Although not a model parent, the father had some interest in parenting the child. On January 22, 2008, the trial court entered a judicial review order finding the mother compliant with parent, substance abuse evaluation, individual therapy, and employment. On February 12, 2008, the

trial court ordered child's release to the mother finding that it was in the child's best interest to be placed with the mother and that there was a positive home study on the mother's home. On March 7, 2008, the trial court entered an adjudicatory order finding that the child was at present and prospective risk of neglect or abuse, specifically finding that the father brought the child to his home; cocaine, cash, and an unsecured firearm were found in the father's home; and that the child was present at the father's home on the day the parents were arrested, went to school within 25 feet of the father's home, and frequently visited his friend next door to the father's home regularly. On appeal, the court noted that the trial court improperly expanded the reach of the law on neglect and that the case turned on the meaning of the phrase "live in an environment" in the definition of neglect in section 39.01(43), Florida Statutes. The full definition states that:

"neglect" occurs when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment or a child is permitted to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired.

Section 39.01(43), Florida Statutes (emphasis in opinion). The court disagreed with the Department's argument as to the phrase's breadth and noted that it was undisputed that the child did not reside at the father's house at the anytime relevant to the case. The court concluded that the trial court's findings were insufficient as a matter of law to sustain an adjudication of dependency and further declined to extend the statute's reach beyond the actual residence of the child and its surrounding cartilage. The court therefore reversed the adjudication of dependency.

<http://www.3dca.flcourts.org/Opinions/3D08-0825.pdf> (August 19, 2009).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

D.C.J.-S. v. Department of Children and Families,

___ So. 3d ___, 2009 WL 2567464, 34 Fla.L.Weekly D1704 (Fla. 5th DCA 2009).

TERMINATION OF PARENTAL RIGHTS AFFIRMED.

The court affirmed the termination of the mother's parental rights. The court noted that the Department had made reasonable efforts to assist the parents in completing the case plan and that the mother was virtually non-compliant. In addition, the trial court had noted that the mother's parental rights to a sibling had previously been terminated involuntarily. The trial court had also found both that termination of parental rights in the children's manifest best interests and that termination was the least restrictive means of protecting the children. On

appeal, the court noted that the findings were supported by competent, substantial evidence and affirmed the order.

<http://www.5dca.org/Opinions/Opin2009/081709/5D08-4140.op.pdf> (August 20, 2009).

B.T. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 2605254 (Fla. 5th DCA 2009). **DEPENDENCY ADJUDICATION AFFIRMED BUT CASE REMANDED.**

The father appealed an order adjudicating his child dependent, specifically noting the trial court's findings on abandonment. On appeal, the court noted that although the adjudication of dependency was supported by evidence, the finding on abandonment was not. The court recounted that the father had convictions for drug and firearm offenses and had been incarcerated since before the child's birth on March 20, 2004. The adjudicatory hearing was held on February 10, 2009, and the father was still incarcerated with a release date of July 4, 2011. The court noted that although a parent's incarceration may support a finding of abandonment, it alone does not necessarily constitute abandonment. A court must look at the totality of the circumstances. The father had testified at the adjudicatory hearing that he received photographs and updates about his daughter and that his failure to provide financially for her was due to his incarceration. The Department did not present any evidence of abandonment beyond the father's incarceration. Although the court on appeal did not state that the child was not abandoned, there was a failure to prove abandonment. The court therefore affirmed the adjudication of dependency but remanded the case for the trial court to amend its order.

<http://www.5dca.org/Opinions/Opin2009/081009/5D09-774.op.pdf> (August 14, 2009).

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Fashingbauer v. Fashingbauer, ___ So.3rd ____, 2009 WL ____, (Fla. 1st DCA 2009).

USING MARITAL FUNDS TO PAY THE TAXES ON A NON-MARITAL PARCEL DOES NOT CONVERT IT INTO A MARITAL ASSET; DIVIDING PREDISSOLUTION EXPENSES BETWEEN SPOUSES WITH RELATIVELY EQUAL RESOURCES IS REASONABLE; HOWEVER, SUCH DIVISION WHEN SPOUSES RESOURCES ARE NOT EQUAL MAY HAVE THE NET EFFECT OF INVADING THE ASSET SHARE OF THE LOWER INCOME SPOUSE.

Former husband appealed final judgment of dissolution of marriage contending that trial court had erred in awarding former wife an interest in his non-marital property and inequitably distributing their assets. Appellate court concluded that the trial court had erred in treating an undeveloped lot as marital property when it was undisputed that former husband had owned it prior to the marriage and it was not encumbered by a mortgage although it had been used as collateral to finance the spouses' home. The appellate court held that the fact that marital

funds were used to pay taxes on the lot did not convert it into a marital asset. The court also stated that when spouses' resources are relatively equal, it is reasonable for the trial court to divide them equally; however, if the marital assets have been acquired through the strength of one spouse's income and the trial court divides predissolution expenses equally, the net effect can be to invade the asset share of the lower-income spouse. The appellate court remanded to the trial court with instructions to revise the equitable distribution.

<http://opinions.1dca.org/written/opinions2009/08-28-2009/08-4498.pdf> (August 28, 2009).

Chaphe v. Chaphe, __ So.3rd __, 2009 WL _____, (Fla. 1st DCA 2009).

IT IS ERROR FOR TRIAL COURT TO MODIFY MSA IN ABSENCE OF A PENDING MOTION TO MODIFY.

Former wife appealed trial court's order entered on her motion for contempt for former husband's failure to reimburse her for education expenses as required by the marital settlement agreement (MSA). Appellate court reversed because the order modified the MSA without any pending motion to modify. The appellate court held that while a MSA is a contract subject to interpretation, a court may not remake it under the guise of interpreting it, even if an ambiguity exists. The appellate court also held that modification of a judgment constitutes a jurisdictional defect where there has been no pleading requesting modification. Accordingly, the appellate court reversed and remanded.

<http://opinions.1dca.org/written/opinions2009/08-28-2009/08-6248.pdf> (August 28, 2009).

Green v. Green, __ So.3rd __, 2009 WL 2602350, (Fla. 1st DCA 2009).

FORMER SPOUSE MAY RECEIVE CREDIT FOR MORTGAGE PAYMENTS ON THE FORMER MARITAL HOME AFTER DISSOLUTION UNLESS THE PAYMENTS ARE MADE IN LIEU OF CHILD SUPPORT OR ALIMONY.

Twenty-four years after their marriage was dissolved, both former spouses appealed a final judgment of partition which had awarded credit to former husband for mortgage payments he had made on the former marital residence; appellate court reversed. In doing so, the appellate court noted that tenants by the entirety become tenants in common upon dissolution and are then responsible for equally dividing all payments including the mortgage. The general rule is that if one co-tenant makes all the mortgage payments, then he or she is entitled to credit for payment of the other tenant's share when the house is sold; however, an exception to this rule is when the mortgage payments are in lieu of child support. In the absence of any orders explicitly stating that the mortgage payments were in lieu of child support, the appellate court held that the trial court was correct in having determined that former husband was not entitled to a 50% credit for the mortgage payments; its error was in having awarded him a smaller percentage without justification. The appellate court stated that a former spouse cannot have it both ways; if the payments were not deemed to be additional child support or alimony, then a former spouse should receive credit; if the payments are in lieu of child support, then no credit should be given. <http://opinions.1dca.org/written/opinions2009/08-26-2009/08-3977.pdf> (August 26, 2009).

Second District Court of Appeal

Pipitone v. Pipitone, __So.3rd __, 9009 WL 2634085, (Fla. 2nd DCA 2009).

LUMP SUM ALIMONY MAY PROVIDE FOR EQUITABLE DISTRIBUTION OR SUPPORT; THE REMEDIES AVAILABLE TO ENFORCE THE PAYMENT DEPEND ON ITS INTENDED USE; PAYMENTS FOR SUPPORT ARE ENFORCEABLE BY CONTEMPT, PAYMENTS FOR EQUITABLE DISTRIBUTION ARE NOT.

Former wife appealed post-judgment order denying her motion to enforce the final judgment of dissolution of marriage which incorporated a marital settlement agreement (MSA). Appellate court found that the trial court had erred in its ruling that the MSA provided the exclusive means available to enforce payment of lump sum alimony. The appellate court held that lump sum alimony may provide for either equitable distribution or for support; the remedies available to enforce payment depend on its intended use. Alimony payments for support, even if they are lump sum payable in installments, are enforceable by contempt; payments for equitable distribution are not. When a MSA is silent as to the intended use of the alimony, the trial court must make that determination by assessing whether: 1) the payments are made in exchange for a property interest; 2) the payments are modifiable; 3) the payments terminate upon either remarriage or death; 4) the payments are taxable to the receiving spouse and deductible for the paying spouse. Although the fact that the payments may not be modified is a poor indicator that they are intended as equitable distribution, a specific statement, as in this case, that the payment is in consideration for a former spouse's obligation on a line of credit, indicates that it is intended for equitable distribution. The appellate court commented that the trial court's determination on remand of available remedies would depend on its conclusion as to whether the payments were for support or equitable distribution.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/August/August%2028,%202009/2D08-5032.pdf (August 28, 2009).

Third District Court of Appeal

Lake v. Lake, __So.3rd __, 2009 WL 2382338, (Fla. 3rd DCA 2009).

ONCE A TRIAL JUDGE RECUSES HIMSELF, HE OR SHE HAS NO FURTHER AUTHORITY TO ENTER ORDERS.

Former wife moved to enforce the final judgment of dissolution when a dispute arose regarding the responsibilities of the former spouses under the judgment. Former husband responded by moving to disqualify the judge, who recused himself and then entered an order awarding fees and costs to former wife's counsel. Appellate court held that once a trial judge recuses himself he has no further authority to enter orders.

<http://www.3dca.flcourts.org/Opinions/3D08-2525.pdf> (August 5, 2009).

Fourth District Court of Appeal

Eaton v. Eaton, __So.3rd __, 2009 WL 2601642 (Fla. 4th DCA 2009).

TRIAL COURT MUST FACTOR IN ALL OBLIGATIONS IMPOSED ON FORMER SPOUSE UNDER DOM JUDGMENT AND MUST MAKE REQUIRED FINDINGS BEFORE ORDERING LIFE INSURANCE AS GUARANTEE OF PAYMENT OF ALIMONY AND CHILD SUPPORT.

Former husband contended that the trial court's alimony award to former wife virtually exhausted his income. Appellate court found that the trial court had not factored in all the obligations imposed on former husband by the final judgment when it concluded that he had sufficient sums to support himself. Thus, without reaching the merits of the argument re alimony, the appellate court remanded to the trial court for it to ascertain former husband's obligations under the final judgment and exercise its discretion in determining whether he would be left with an appropriate retained income after paying them. Concluding that the trial court had failed to make the requisite findings before ordering former husband to maintain life insurance to guarantee payment of alimony and child support, the appellate court reversed and remanded on this issue as well.

<http://www.4dca.org/opinions/Aug2009/08-26-09/4D08-3258.op.pdf> (August 26, 2009).

Trovato v. Trovato, __So.3rd __, 2009 WL 2601686, (Fla. 4th DCA 2009).

FORMER WIFE REQUIRED ON REMAND TO PRODUCE EVIDENCE OF REASONABLENESS OF ATTORNEY'S FEES AND THAT THEY RESULTED FROM FORMER HUSBAND'S FAILURE TO COMPLY WITH DISCOVERY.

Former husband appealed trial court's order modifying his alimony obligations and imposing sanctions regarding discovery. Appellate court reversed the award of attorney's fees to former wife and remanded for former wife to produce evidence that the fees were reasonable and resulted from former husband's failure to comply with the trial court's discovery orders.

<http://www.4dca.org/opinions/Aug2009/08-26-09/4D08-3627.op.pdf> (August 26, 2009).

Durand v. Durand, __So.3rd __, 2009 WL 2601788, (Fla. 4th DCA 2009).

IMPUTATION OF INCOME REQUIRES TWO-PART TEST: TERMINATION MUST BE VOLUNTARY; AND UNEMPLOYMENT OR UNDEREMPLOYMENT IS DUE TO LESS THAN DILIGENT EFFORTS OF SPOUSE; AND SPOUSE CLAIMING INCOME SHOULD BE IMPUTED BEARS THE BURDEN OF PROOF.

Former husband appealed final judgment dissolving 40 year marriage on several grounds. Appellate court affirmed trial court's denial of partition and sale of the marital home, finding under the circumstances, that the trial court did equity in awarding the home to former wife, but concluded that the trial court had erred in imputing income to former husband. The appellate court held that imputation of income requires a two-part analysis: the trial court must first determine that the termination was voluntary; and then must conclude that the spouse's subsequent underemployment or unemployment is due to less than diligent efforts on that spouse's behalf. The spouse claiming that income should be imputed bears the burden of showing both employability on the part of the other spouse and availability of jobs. The appellate court concluded that the first prong could not be satisfied because former husband

was terminated without cause and that former wife did not carry her burden with regard to the second. Accordingly, the appellate court reversed and remanded to the trial court.

<http://www.4dca.org/opinions/Aug2009/08-26-09/4D08-3942.op.pdf> (August 26, 2009).

Fifth District Court of Appeal

Lane v. Lane, __So.3rd__, 2009 WL 2338032, (Fla. 5th DCA 2009).

MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES REQUIRED FOR CHANGE IN CUSTODY.

Former wife appealed order of modification providing for rotating custody. Although it observed that the trial court was conscientious in its consideration of the issue and that its conclusion that the child spend more time with former husband was not in error, the appellate court reversed based on its determination that there was neither a material nor substantial change in circumstances warranting a change to rotating custody.

<http://www.5dca.org/Opinions/Opin2009/072709/5D08-2383.op.pdf> (July 31, 2009).

Moore v. Wilson, __So.3rd__, 2009 WL 2474978, (Fla. 5th DCA 2009).

TRIAL COURT VIOLATES DUE PROCESS IF IT DOES NOT PROVIDE NOTICE AND OPPORTUNITY TO BE HEARD; CHANGE IN CUSTODY REQUIRES SUBSTANTIAL CHANGE IN CIRCUMSTANCES AND FINDING THAT CHANGE IS IN BEST INTEREST OF CHILDREN.

Former wife appealed an order of modification providing for rotating custody where neither former spouse pled nor had the opportunity to be heard on whether that would be in the best interest of their children. Appellate court held that the trial court had violated their due process rights by not having granted the former spouses notice and an opportunity to be heard on that issue. Appellate court also held that the order was deficient primarily because it lacked a finding that rotating custody was in the best interest of the children, but also because it lacked a finding of a substantial change in circumstances.

<http://www.5dca.org/Opinions/Opin2009/081009/5D08-1405.op.pdf> (August 10, 2009).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

D.C.J.-S. v. Department Of Children And Families, ___So.3rd___, 2009 WL 2567464 (Fla. 5th DCA 2009). The mother appealed the final judgment terminating her parental rights in a dependency case. The trial court affirmed, stating that although the Department had made reasonable efforts to assist and encourage the mother to successfully complete the terms and conditions of the case plan, the mother was virtually non-compliant. Specifically, she failed to obtain stable housing and employment, failed to submit to random drug/urine screening or participate in drug and alcohol treatment and counseling, refused to sign releases for necessary information, did not complete counseling for victims of domestic violence for herself, nor participate in or assist with counseling for the children. The court also noted that the mother's parental rights to a sibling had previously been involuntarily terminated, and also found that termination of parental rights was in the manifest best interests of the children and that termination of parental rights was the least restrictive means to protect them.

<http://www.5dca.org/Opinions/Opin2009/081709/5D08-4140.op.pdf> (August 20, 2009).