

**OSCA/OCI'S FAMILY COURT CASE LAW UPDATE**  
**July 2009**

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## Delinquency Case Law

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

M.W. v. State, \_\_ So.3d \_\_, 2009 WL 2060118 (Fla. 1<sup>st</sup> DCA 2009). **HABEAS CORPUS PETITION GRANTED WHERE JUVENILE WAS UNLAWFULLY PLACED IN SECURE DETENTION AS A RESULT OF IMPROPER DOUBLE SCORING FOR GUN POSSESSION CHARGE ON THE RISK ASSESSMENT INSTRUMENT.** The juvenile was arrested for possession of a firearm in violation of s. 790.23(1) (b), F.S., which is a second-degree felony. Section 790.23(1) (b), F.S., prohibits persons previously having been found to have committed certain delinquent acts from possessing any firearm, ammunition, or electric weapon or device, or carrying a concealed weapon, including a tear gas gun or chemical weapon or device. The First District Court of Appeal found that the risk assessment instrument (RAI) assesses eight points when the most serious current offense is a second-degree felony. Where the violation involves a youth previously adjudicated or the adjudication withheld for a crime that would be a felony if committed by an adult, the RAI calls for the assessment of 10 points, rather than 8. In the instant case, the juvenile was correctly assessed 10 points. However, a separate category of the RAI addresses the Mandatory Aggravating Circumstance: Illegal possession of a firearm, and assesses 3 additional points when this factor is found to be present. The juvenile was also assessed these 3 points. When combined with the 10 points and a single point attributable to his prior record, the RAI score exceeded the 12 points necessary to justify secure detention. The First District held that the assessment of the additional 3 points amounted to double scoring for the same factor. With the deletion of the additional 3 points, the juvenile's RAI score alone would not have justified secure detention. Accordingly, the petition was granted.

<http://opinions.1dca.org/written/opinions2009/07-17-2009/09-1799.pdf> (July 17, 2009).

### ***Second District Court of Appeal***

A.D. v. State, \_\_ So.3d \_\_, 2009 WL 2194513 (Fla. 2d DCA 2009). **APPELLATE COURT FOUND THAT CONTRIBUTING TO THE DELINQUENCY OR DEPENDENCY OF A MINOR WAS NOT A LESSER-INCLUDED OFFENSE OF FELONY CHILD ABUSE AS CHARGED IN THE DELINQUENCY PETITION.** The juvenile was charged with one count of felony child abuse. The trial court granted the juvenile's motion for a judgment of acquittal but found her guilty of what it ruled was the lesser-included offense of contributing to the dependency of a minor. The Second District Court of Appeal reversed because the finding of guilt was for an offense that was not charged in the delinquency petition and is not a lesser-included of the charged offense. The Second District held that contributing to the delinquency or dependency of a minor is not a category one or category two lesser-included offense of felony child abuse, as charged in the delinquency petition. Accordingly, the case was reversed and remanded.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2024,%202009/2D08-1930.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2024,%202009/2D08-1930.pdf) (July 24, 2009).

*K.R.G. v. State*, \_\_\_ So.3d \_\_\_, 2009 WL 1940814 (Fla. 2d DCA 2009). [JUVENILE COURT REQUIRED TO COMPLY WITH THE STATUTORY REQUIREMENT OF REVOKING THE JUVENILE'S DRIVER'S LICENSE PURSUANT TO S. 322.056\(1\) \(A\) \(1\), F.S. \(2007\)](#). The State appealed a disposition order where adjudication for possession of marijuana was withheld. The State argued that the disposition was illegal because the juvenile court refused to comply with the statutory requirement of revoking the juvenile's driver's license pursuant to s. 322.056(1) (a) (1), F.S., (2007). The Second District Court of Appeal found that s. 322.056(1)(a)(1), F.S., (2007) required the juvenile court to direct the Department of Highway Safety and Motor Vehicles to revoke or withhold issuance of the juvenile's driver's license or driving privilege for a period of not less than 6 months and not more than 1 year on her first-time violation of chapter 893 for possession of marijuana. Accordingly, the Second District reversed the disposition order and remanded the matter to the juvenile court for the entry of an order directed to the Department of Highway Safety and Motor Vehicles as required by s. 322.056(1)(a)(1).

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2008,%202009/2D08-1260.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2008,%202009/2D08-1260.pdf) (July 8, 2009).

### ***Third District Court of Appeal***

*J.S. v. State*, \_\_\_ So.3d \_\_\_, 2009 WL 1940510 (Fla. 3d DCA 2009). [THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY BASED UPON IMPROPER IMPEACHMENT OF WITNESS](#). The juvenile appealed his adjudication for battery arising out of a scuffle with a fellow student on a school bus. At trial, there was conflicting testimony as to who initiated the altercation. The only witness, other than the combatants, was another student named B.B. B.B. testified that the juvenile initiated the altercation. The testimony apparently contradicted what B.B. told defense counsel in the hallway a few minutes earlier. Defense counsel questioned B.B. about his statements made in the hallway and attempted to impeach the witness. The state objected and the trial court struck the questions and answers. The trial court held the impeachment improper because the defense counsel could not testify about what was said in the hallway. The Third District Court of Appeal held that the trial court erred in concluding that this was improper impeachment because defense counsel was putting herself forward as a possible witness. Whether there was a conflict was a separate question and only arises if the witness contradicts what he or she said to defense counsel. Because the testimony of the combatants was directly contradictory concerning who initiated the fight, the trial court erred in excluding B.B.'s testimony. Accordingly, the Third District reversed and remanded the case for a new trial. <http://www.3dca.flcourts.org/Opinions/3D08-0807.pdf> (July 8, 2009).

### ***Fourth District Court of Appeal***

*J.R.S. v. State*, \_\_\_ So.3d \_\_\_, 2009 WL 1940524 (Fla. 4th DCA 2009). [ADJUDICATION FOR MARIJUANA WAS REVERSED BECAUSE JUVENILE'S MOTION TO SUPPRESS PHYSICAL EVIDENCE SHOULD HAVE BEEN GRANTED FROM THE OUTSET](#). The juvenile was charged with one count of

possession of cannabis and one count of loitering and prowling. The trial court reserved ruling on the juvenile's motion to suppress the physical evidence and statements in order to address the juvenile's other pending charges. Thereafter, a plea conference was held before the court, and the juvenile's motion to suppress was denied without a written order. The court orally acknowledged that the motion to suppress was dispositive in this particular matter. The juvenile entered a plea of no contest to both charges and reserved his right to appeal the denial of his motion to suppress. Two weeks later, the juvenile filed a notice of appeal, challenging the denial of his motion to suppress. Two weeks after that, the trial court issued a written order granting in part and denying in part the juvenile's motion. The court found that the juvenile's arrest for loitering and prowling was invalid and that any evidence incident to the arrest was inadmissible. The juvenile's motion to suppress was granted as to the marijuana and denied as to his statements. The juvenile filed another notice of appeal. The juvenile sought the vacation of his adjudication on the possession of cannabis charge. The Fourth District Court of Appeal found that the trial court should have dismissed that charge after granting his motion to suppress physical evidence. The State argued that the trial court's written order was a nullity because it was entered after jurisdiction had vested with the appellate court. Nonetheless, the Fourth District agreed with the trial court's written order and concluded that the trial court erred in orally denying the juvenile's motion in the first place. The motion to suppress, as it pertained to the physical evidence in this case, should have been granted from the outset. Accordingly, the Fourth District reversed the juvenile's adjudication only as to the possession of cannabis charge. <http://www.4dca.org/opinions/July2009/07-08-09/4D08-2331.op.pdf> (July 8, 2009).

### ***Fifth District Court of Appeal***

No new opinions for this reporting period.

## **Dependency Case Law**

### ***Florida Supreme Court***

Florida Department Of Children And Family Services v. P.E., \_\_\_ So.3d \_\_\_, 2009 WL 2045403 (Fla. 2009) CONSENT FOR FAILURE TO APPEAR PROVISIONS DO NOT REQUIRE THAT DCF PUT ON EVIDENCE ON THE TPR GROUNDS The court reviewed a conflict between the second, third and fifth districts involving the statutory construction of s. 39.801(3)(d), F.S., (2008) which provides for the entry of a parent's implied consent to termination of parental rights upon a parent's failure to personally appear at the adjudicatory hearing. In this case, the mother was properly noticed under the statute, yet failed to appear for the termination of parental rights adjudicatory hearing. The trial court entered an order terminating the mother's parental rights based on the mother's statutory consent to termination resulting from her failure to appear. The trial court also found that termination was in the manifest best interests of the child and was the least restrictive means for protecting the child. On appeal, the mother claimed that despite the trial court's entry of the mother's consent, the Department was required to prove

the grounds for termination alleged in the petition. However, the Second District concluded that once the consent is entered, the Department is not required to present evidence of an additional ground for termination. The Supreme Court agreed and held that when a parent's consent to termination of parental rights is entered under s. 39.801(3) (d), such consent necessarily precludes the parent from objecting to the Department's failure to present evidence to establish the grounds for termination alleged in the petition for termination.

The Court noted that a constructive consent to termination entered pursuant to s. 39.801(3) (d) may be set aside under a three-part test. Under that test, the party seeking to vacate the default must act with due diligence, demonstrate excusable neglect, and demonstrate the existence of a meritorious defense to the termination petition. The Court also noted that motions to vacate such defaults are liberally granted and courts should refrain from determining a termination of parental rights by default when an absent parent makes a reasonable effort to be present at a hearing but is prevented or delayed by circumstances beyond the parent's control. In this case, however, the mother sought to vacate her consent, but the trial court found her testimony was not credible, and the mother did not offer any evidence as to a meritorious defense.

<http://www.floridasupremecourt.org/decisions/2009/sc09-169.pdf> (July 16, 2009).

### ***First District Court of Appeal***

No new opinions for this reporting period.

### ***Second District Court of Appeal***

A.D. v. State, \_\_\_ So.3d \_\_\_\_, 2009 WL 2194513 (Fla. 2d DCA 2009) [FINDING OF GUILT FOR AN OFFENSE THAT WAS NOT CHARGED IN THE PETITION AND IS NOT A LESSER-INCLUDED OFFENSE OF THE CHARGED OFFENSE IS REVERSIBLE ERROR](#) The mother appealed the trial court's order finding her guilty of contributing to the delinquency or dependency of a child, withholding adjudication, and placing her on a term of probation. The mother was charged with one count of felony child abuse, and was found guilty of what the court ruled was the lesser-included offense of contributing to the dependency of a minor. The appellate court reversed because the finding of guilt was for an offense that was not charged in the delinquency petition and is not a lesser-included offense of the charged offense. The appellate court noted that a conviction on a charge not contained in the charging document is considered a denial of due process, and that contributing to the delinquency or dependency of a child is not a lesser-included offense of felony child abuse.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2024,%202009/2D08-1930.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2024,%202009/2D08-1930.pdf) (July 24, 2009).

N.E.R. v. Department of Children and Family Services and Guardian Ad Litem Program, \_\_\_ So.3d \_\_\_\_, 2009 WL 1975940 (Fla. 2d DCA 2009) [FINDING OF DEPENDENCY REVERSED](#) The mother appealed an order that found her two children dependent, but withheld adjudication, and another order that required her to participate in Family Dependency Treatment Court as a result of the dependency and disposition order. The Mother argued, and the Department

conceded, that the Department failed to prove abuse, abandonment or neglect, or imminent risk thereof. Specifically, the record supported the Department's concession that it failed to prove that the Mother's continued chronic and severe use of a controlled substance or alcohol demonstrably adversely affected her children pursuant to s. 39.01(31)(g)(2), F.S., (2008). Therefore, the appellate court reversed.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2010,%202009/2D08-3563.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2010,%202009/2D08-3563.pdf) (July 10, 2009).

A.W.P. SR. v. Department of Children and Family Services, \_\_\_ So.3d \_\_\_\_, 2009 WL 1874088 (Fla. 2d DCA 2009) **MOTION FOR REHEARING AND RELIEF FROM JUDGMENT DENIED** The Father appealed an order denying his motion for relief from judgment and his motion for rehearing in a dependency proceeding. The order in question continued the child's dependency, modified the temporary legal custody of the child, and permitted supervised visitation by the father. The appellate court concluded that it did not have jurisdiction to review a portion of the order, and affirmed the remaining portion of the order. The court noted that orders entered in dependency proceedings after the entry of the order adjudicating dependency and before an order terminating supervision or jurisdiction are not appealable pursuant to Florida Rule of Appellate Procedure 9.130(a)(4). The court also noted that a motion for rehearing does not toll the time for the taking of an appeal.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2001,%202009/2D09-312.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2001,%202009/2D09-312.pdf) (July 1, 2009).

### ***Third District Court of Appeal***

I.D. v. Department of Children and Families, \_\_\_ So.3d \_\_\_\_, 2009 WL 2168753 (Fla. 3d DCA 2009) **TERMINATION OF PARENTAL RIGHTS UPHELD** The father appealed a final order terminating his parental rights. Because there was clear and convincing evidence that the father engaged in egregious conduct under s. 39.806(1)(f), F.S., (2008), and sexual abuse, aggravated child abuse and/or chronic abuse under s. 39.806(1)(g), the appellate court affirmed the trial court's order terminating the father's parental rights on the basis of these findings. The trial court's order also found abandonment; however, there was no evidence to support that finding and the appellate court reversed and remanded the case for the trial court to strike that portion of the order. The appellate court also noted that a parent's sexual abuse of a child is egregious conduct and that neither physical evidence nor expert testimony is required to establish sexual abuse or egregious conduct by clear and convincing evidence. The evidence relied upon by the trial court in this case was primarily introduced through the ten year old child who testified at the adjudicatory hearing. The trial court determined that the child understood the difference between the truth and a lie and found her testimony to be credible. The record supported that finding, and the child's testimony was un-rebutted and consistent throughout both direct and cross-examinations. <http://www.3dca.flcourts.org/Opinions/3D08-3307.pdf> (July 22, 2009).

M.H. v. Department Of Children And Families and Guardian Ad Litem Program, \_\_\_ So.3d \_\_\_\_, 2009 WL 2048610 (Fla. 3d DCA 2009) [ORDER GRANTING VISITATION WITH GRANDPARENT AFTER REUNIFICATION QUASHED](#) The child was removed from the mother, found to be dependent, and then reunified with the mother after a few months. At the same time the child was returned to the mother's care, the court entered a visitation order which allowed the paternal grandmother to have visitation. The mother petitioned the Court for a writ of certiorari to review the nonfinal order granting the paternal grandmother of the child unsupervised visitation with the child. The appellate court granted the petition and quashed the order. Section 39.509, F.S., (2008), allows a grandparent visitation when a child has been adjudicated dependent and taken from the physical custody of the parent. However, s. 39.509(4), F.S., (2008) states, "When the child has been returned to the physical custody of his or her parent, the visitation rights granted pursuant to this section shall terminate." Therefore, the appellate court held that the trial court departed from the essential requirements of the law when it ordered visitation with the paternal grandmother once the child was returned to the mother's physical custody. <http://www.3dca.flcourts.org/Opinions/3D09-1829.pdf> (July 10, 2009).

### ***Fourth District Court of Appeal***

C.A. v. Department Of Children And Families, \_\_\_ So.3d \_\_\_\_, 2009 WL 2172511 (Fla. 4<sup>th</sup> DCA 2009) [TERMINATION OF PARENTAL RIGHTS ABATED DUE TO DEATH OF PARENT](#) The father was accidentally killed before his appeal of an order terminating his parental rights as to his daughter could be submitted to the appellate court for a final decision on the merits. The court held that due to the father's death, it was now in the best interests of the child to abate the appeal and relinquish jurisdiction to the trial court to reopen the case. The trial court could then hear any additional relevant evidence to determine the best interests of the child and re-enter a judgment on the petition as to whether in light of his death it was in the child's best interests to enter a final order terminating the father's parental rights. The court explained that the most important concern in TPR cases is the best interests of the child, and TPR proceedings are designed to protect the child and the child's interests. Rather than rendering TPR moot, the death of the father simply raised new issues as to whether termination was in the child's best interests. <http://www.4dca.org/opinions/July2009/07-22-09/4D08-3394%20Corrected%20op.pdf> (July 22, 2009).

Department of Children and Families v. S.E., --- So.3d ----, 2009 WL 1872414 (Fla. 4<sup>th</sup> DCA 2009) [AWARD OF COSTS AND FEES IN DEPENDENCY CASE](#) DCF appealed the trial court's award of fees in favor of the mother, pursuant to s. 57.105, F.S., (2008), following the involuntary dismissal of a dependency action. The appellate court reversed the award of fees in its entirety finding that DCF's verified petition for dependency was always supported by the material facts necessary to establish a claim for dependency. The award of costs under s. 57.041 was affirmed. <http://www.4dca.org/opinions/July2009/07-01-09/4D08-993.op.pdf> (July 1, 2009).

## ***Fifth District Court of Appeal***

V.J.V. v. Department Of Children And Families, \_\_\_ So.3d \_\_\_, 2009 WL 2025651 (Fla. 5<sup>th</sup> DCA 2009) **CASE PLAN GOAL CHANGE QUASHED** The child sought certiorari review of an order that directed DCF to start the process of sending the Child back to Guatemala, which effectively changed her case plan goal from a permanent planned living arrangement to reunification with her adoptive parents in Guatemala. The child argued that the order violated several clearly established principles of law: 1) the trial court improperly relied on unverified information obtained through ex parte communication with an unidentified witness, 2) the order, which represents a change in the Child's case plan goal and change of custody, is not supported by competent evidence, and the trial court failed to make any specific findings of fact or conclusions of law, and 3) the trial court improperly allowed the Child's immigration status to affect the dependency proceedings. DCF conceded that the trial court departed from the essential requirements of the law in entering the order. The appellate court granted the petition and quashed the order. <http://www.5dca.org/Opinions/Opin2009/070609/5D09-630.op.pdf> (July 10, 2009).

Shuler v. Guardian Ad Litem Program, \_\_\_ So.3d \_\_\_, 2009 WL 1883890 (Fla. 5<sup>th</sup> DCA 2009) **BIOLOGICAL FATHER HAS NO PARENTAL RIGHTS WHEN LEGAL FATHER EXISTS** The biological father appealed the final order placing his biological daughter with DCF for purposes of adoption. At the shelter hearing, the child's mother did not appear; however, her husband appeared and advised the court that he intended to seek a divorce from the mother but that he preferred to maintain his legal rights to the child. The biological father also appeared at the hearing and was advised by the court that notwithstanding the fact that he was the child's biological father, he had no existing legal rights to the child since the child was born during the mother's marriage. A petition for termination of parental rights was later granted after the mother died and the legal father failed to appear at the TPR adjudicatory hearing. The biological father filed a motion to intervene seeking to obtain custody, which the trial court denied. The trial court advised the biological father that paternity could be pursued by filing a separate paternity action. He filed, and paternity was established through DNA testing. The biological father and DCF both argued that the trial court reversibly erred as a matter of law in denying the biological father's paternity petition and directing the child to remain in DCF care for the purpose of adoption. The appellate court disagreed and held that under the facts of this case the trial court was constrained under Florida law to place the child with DCF for adoption. The appellate court explained that the biological father of a child who was born during the mother's intact marriage has no legal rights. He may, however, attempt to adopt the child and, as the biological father he may have some advantage, but he has no parental rights. <http://www.5dca.org/Opinions/Opin2009/062909/5D07-3233.op.pdf> (July 2, 2009).

## Dissolution 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***

Swor v. Swor, \_\_So.3<sup>rd</sup> \_\_, 2009 WL 2059417 (2<sup>nd</sup> DCA, July 17, 2009)

**FINAL JUDGMENTS MAY BE ERRONEOUS ON THEIR FACE IF REQUIRED FINDINGS ARE MISSING; DUE PROCESS IS DENIED IF COURT RULES ON ISSUE IT DID NOT ALLOW PARTIES TO ADDRESS**

Former wife appealed final judgment which granted permanent primary residential custody to former husband; appellate court reversed and remanded. The appellate court held: 1) that the final judgment was erroneous on its face because it did not contain certain required findings of fact; and 2) that the trial court had denied due process to former wife in having ruled on custody after having refused to let the parties address the issue during the hearing. For a trial court to modify a portion of the final judgment without fully litigating the issue and making the required findings is error.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2017,%202009/2D08-3244.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2017,%202009/2D08-3244.pdf) (July 17, 2009).

Wabeke v. Wabeke, \_\_So.3<sup>rd</sup> \_\_, 2009 WL 2032135 (2<sup>nd</sup> DCA, July 15, 2009)

**TRIAL COURT'S FINDINGS RE MODIFICATION MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE TRIAL COURT MUST MAKE SPECIFIC FINDINGS ON FACTORS IN SECTION 61.08(2), F.S.**

Former wife challenged the amount of her alimony award and the trial court's denial of her request to have former husband maintain life insurance to secure the award. Appellate court reversed the alimony award due to the trial court's failure to make sufficient findings of fact to support the award, but affirmed the denial of the request regarding life insurance. Pursuant to the marital settlement agreement incorporated into the final judgment, former husband was to pay former wife rehabilitative alimony for ten years; either party could apply for modification or termination prior to the expiration of the ten year period with that change to take effect at the expiration date. With respect to former wife's request for modification, the appellate court found that while the trial court had made some findings as to her financial resources, that those findings were not supported by competent, substantial evidence, nor had the trial court made specific findings regarding the factors enumerated in section 61.08(2), Florida Statutes.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2015,%202009/2D08-1745.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2015,%202009/2D08-1745.pdf) (July 15, 2009).

Riley v. Riley, \_\_ So.3<sup>rd</sup> \_\_, 2009 WL 1975902 (2<sup>nd</sup> DCA, July 10, 2009)

**FACTORS TO BE CONSIDERED IN APPELLATE REVIEW OF MOTION FOR CONTINUANCE** In a long-term marriage of twenty-six years, former husband appealed final judgment of dissolution which approved and incorporated the magistrate's recommended final judgment. With the exception of the portion of the final judgment that dissolved the marriage, the appellate court reversed, holding that while a trial court has broad discretion as to whether to grant a continuance, that discretion is not absolute. Citing Baron v. Baron, 941 So.2<sup>nd</sup> 1233 (Fla. 2<sup>nd</sup> DCA 2006), the appellate court enumerated the factors it considered in determining whether the trial court had abused its discretion in ruling on a motion for continuance. These factors were: 1) whether former husband had suffered injustice from denial of his motion; 2) whether the underlying reason for the motion could have been foreseen or whether it was for delay; and, 3) what injustice would former wife had suffered had former husband's motion been granted. The appellate court concluded that denial of former husband's motion did create an injustice for him, that the record did not reflect that the motion for continuance was made for purposes of delay, and that nothing in the record indicated that former wife would have suffered prejudice or injustice had the motion been granted. Accordingly, the appellate court held that the magistrate had abused her discretion in denying former husband's motion and that the trial court had erred in refusing to hear former husbands timely filed exceptions to the magistrate's report and in failing to impute at least minimum wage to former wife.  
[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2010,%202009/2D08-62.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2010,%202009/2D08-62.pdf) (July 10, 2009).

Teelucksingh v. Teelucksingh, \_\_ So.3<sup>rd</sup> \_\_, 2009 WL 1940796 (2<sup>nd</sup> DCA, July 8, 2009)

**TRIAL COURT MUST ENTER ORDER SETTING CASE FOR TRIAL** Former husband appealed final judgment of dissolution of marriage arguing that the trial court failed to comply with Florida Family Law Rule of Procedure 12.440(a). Former wife's attorney had served notice of a final hearing on former husband (whose attorney had withdrawn) using the date given in a prior court order for a case management conference. Appellate court held that the trial court, not former wife's counsel, was required to enter an order setting the case for trial; accordingly, the appellate court reversed and remanded for a new hearing held in accordance with rule 12.440(a).

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2008,%202009/2D06-3695.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2008,%202009/2D06-3695.pdf) (July 8, 2009).

George v. George, \_\_ So.3<sup>rd</sup> \_\_, 2009 WL 1940822 (2<sup>nd</sup> DCA, July 8, 2009)

**IN AGREEING TO PAY TEMPORARY SUPPORT AS CONDITION FOR BEING GRANTED A CONTINUANCE, FORMER HUSBAND WAIVED RIGHT TO APPEAL PAYMENT OF TEMPORARY SUPPORT** In this appeal to a trial court's interlocutory order, former husband had responded to former wife's notice of hearing by filing a motion for continuance. At a hearing attended by both parties with their counsel, the trial court granted former husband's motion provided that he pays \$1500 per month to former wife which would be revisited after hearing former wife's motion for temporary support. Former husband's attorney stated that although he was not happy with the ruling, he accepted it as a condition of the granting of his client's motion. The trial court's ruling was reduced to writing with an acknowledgement that no evidence was

presented on the issue of temporary support. When former husband argued on appeal that the trial court had erred in granting temporary relief without any evidentiary basis, former wife responded that former husband had agreed to pay the temporary support in exchange for having been granted a continuance and that he had waived his right to appeal. Appellate court agreed, although it noted that generally, temporary alimony awards must be supported by competent, substantial evidence that show one spouse's need for support and the ability of the other to pay.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2008,%202009/2D08-3234.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2008,%202009/2D08-3234.pdf) (July 8, 2009).

Gamache v. Gamache, \_\_So.3<sup>rd</sup> \_\_, 2009 WL 1874066 (2<sup>nd</sup> DCA, July 1, 2009)

#### **TRIAL COURT LOSES JURISDICTION RE VISITATION WHEN CHILD BECOMES AN ADULT**

Former husband appealed trial court's refusal to consider child visitation dispute for lack of subject matter jurisdiction because the child had become an adult. Appellate court affirmed, holding that the former couple's son, J., was not a child for purposes of the UCCJEA because he was over eighteen. J. had been described within the final judgment of dissolution as a "special child"; however, the appellate court held that description "is not recognized in statutory or case law as a category by which a person remains a child indefinitely." The appellate court also pointed out that although the record reflected that J. experienced some level of mental incapacity, he had never been declared incapacitated or incompetent, nor had a guardianship for him ever been established; thus, under Florida law, he was a competent, legal adult. The appellate court concluded that the trial court had been correct in its ruling that it lacked jurisdiction.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2001,%202009/2D08-3941.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2001,%202009/2D08-3941.pdf) (July 1, 2009).

### ***Third District Court of Appeal***

Cave v. Rios, \_\_So.3<sup>rd</sup> \_\_, 2009 WL 2031015 (3<sup>rd</sup> DCA, July 15, 2009)

**TRIAL COURT'S ORDER COMES TO APPELLATE COURT CLOTHED WITH PRESUMPTION OF CORRECTNESS; DEPOSITION NOT INTRODUCED INTO RECORD AT TRIAL CANNOT BE PART OF RECORD ON APPEAL; NO MEANINGFUL APPELLATE REVIEW WITHOUT EITHER TRANSCRIPT OR STATEMENT OF EVIDENCE** Former wife appealed the trial court's order denying her petition to modify custody. The amended dissolution of marriage entered June 2001, had awarded shared parental responsibility of the two minor children to the former couple, but had awarded primary residential responsibility to former husband. In October 2007, former wife had filed a petition to modify arguing that there had been a substantial change in circumstances and that modification would be in the children's best interests. Noting that a trial court's order comes to an appellate court "clothed with a presumption of correctness," the appellate court held that: 1) a deposition which is not introduced into evidence at trial is not part of the record on appeal; and 2) no meaningful appellate review can be had where neither a transcript of the trial nor a statement of the evidence as permitted under Florida Rule of Appellate Procedure 9.400(b) (4), has been filed. <http://www.3dca.flcourts.org/Opinions/3D08-2181.pdf> (July 15, 2009).

Gutierrez v. Gutierrez, \_\_So.3<sup>rd</sup> \_\_, 2009 WL 1872344 (3<sup>rd</sup> DCA, July 1, 2009)

**TRIAL COURT'S FAILURE TO RULE ON CLAIM FOR PAST-DUE ALIMONY REQUIRES REMAND**

Appellate court found no error in what it termed a "thorough and well-reasoned order crafted by the trial court" on the issue of former wife's motion to set aside or modify a settlement agreement, but did find that the trial court's failure to rule on former wife's claim for past-due alimony necessitated remand. <http://www.3dca.flcourts.org/Opinions/3D08-1963.pdf> (July 1, 2009).

### ***Fourth District Court of Appeal***

Shinitzky v. Shinitzky, \_\_So.3<sup>rd</sup> \_\_, 2009 WL 2168818 (4<sup>th</sup> DCA, July 22, 2009)

**FUNDS RECOVERED FROM LAWSUIT ARISING OUT OF LOSS OF NON-MARITAL ASSET ARE NON-MARITAL**

Case in which the appellate court affirmed the trial court's rulings regarding the valuation and distribution of assets during a dissolution of marriage proceeding, but noted that funds recovered from a lawsuit for damages arising out of the loss of a non-marital asset were properly considered by the trial court to be a non-marital asset. The appellate court also noted that to determine whether a portion of the recovery is a marital enhancement, the initial value of the lawsuit must be established by competent, substantial evidence. The appellate court concluded in this case, that the trial court had not abused its discretion in finding that the marital funds and effort expended on the lawsuit did not increase the value of the asset. <http://www.4dca.org/opinions/July2009/07-22-09/4D07-4957.op.pdf> (July 22, 2009).

C.A. v. DCF, State of Florida, \_\_So.3<sup>rd</sup> \_\_, 2009 WL 1872616 (4<sup>th</sup> DCA, July 1, 2009)

**DEATH OF A PARTY IN DOM CASE DOES NOT DIVEST TRIAL COURT OF JURISDICTION TO DECIDE OTHER ISSUES SUCH AS DIVISION OF PROPERTY**

DCF case in which the appellate court cited a line of dissolution of marriage cases holding that death of a party does not divest the trial court of jurisdiction to decide remaining issues between the parties such as division of property and other financial matters.

<http://www.4dca.org/opinions/July2009/07-01-09/4D08-3394.op.pdf> (July 1, 2009).

### ***Fifth District Court of Appeal***

Fuller v. Fuller, \_\_So.3<sup>rd</sup> \_\_, 2009 WL 20171139 (5<sup>th</sup> DCA, July 17, 2009)

**IN DETERMINING CUSTODY, TRIAL COURT MUST EVALUATE FACTORS IN SECTION 61.13(3), F.S.**

Former wife appealed final judgment of dissolution arguing that the trial court had erred in having awarded primary custody of the couple's three-year-old son to former husband and in the amount of income it had to her. Former husband conceded that the amount of imputed income was not supported by competent, substantial evidence; appellate court concluded that the custody award was unsupported as well. Appellate court held that in making its initial determination of custody, a trial court must evaluate the factors set forth in section 61.13(3), Florida Statutes, and decide what residential arrangements would be in the child's best interests.

<http://www.5dca.org/Opinions/Opin2009/071309/5D08-3211.op.pdf> (July 17, 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***

Harman v. State, \_\_\_ So.3d \_\_\_\_, 2009 WL 1874083 (Fla. 2d DCA 2009) **ORDER DENYING EXPUNGEMENT OF RECORDS REVERSED** The petitioner appealed an order denying his petition to expunge the records of criminal justice agencies and the official records of the circuit court. The appellate court concluded that the trial court erred in denying the petition and reversed. The procedure to expunge judicial records and non-judicial criminal history records is governed by Florida Rule of Criminal Procedure 3.692 and s. 943.0585, F.S. (2008). Although the petitioner satisfied these requirements, s. 943.0585 gives the trial court the discretion to deny expunction if there is a good reason for denial based on the facts and circumstances of the individual case. In this case, the trial court denied the petition based on its finding that the charged offense was serious and its finding that Mr. Harman previously had been accused of a domestic violence offense, however, the appellate court found that this was an abuse of discretion. The seriousness of the offense, standing alone, is insufficient to support the denial of the petition. The trial court also abused its discretion by basing the denial on a previous domestic violence offense because there was no evidence presented at the hearing to support this finding.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2001,%202009/2D08-915.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2001,%202009/2D08-915.pdf) (July 1, 2009).

Moschiano v. State, \_\_\_ So.3d \_\_\_\_, 2009 WL 2059433 (Fla. 2d DCA 2009) **ORDER OF REVOCATION MUST BE IN WRITING** Appellant appealed the revocation of an order that amended and reinstated his term of probation for domestic violence aggravated battery, a second-degree felony. The appellate court concluded that the circuit court erred by failing to render a written order of revocation. The case was remanded so the trial court could enter an order of revocation which specifies the conditions that the circuit court found the appellant had violated.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/July/July%2017,%202009/2D08-4904.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/July/July%2017,%202009/2D08-4904.pdf) (July 17, 2009).

### ***Third District Court of Appeal***

No new opinions for this reporting period.

### ***Fourth District Court of Appeal***

Roberts v. State, 10 So.3d 1209, (Fla 4<sup>th</sup> DCA 2009) **HABEAS CORPUS PETITION GRANTED** This opinion replaces the opinion released June 26, 2009. The petitioner filed a habeas corpus petition seeking release from his detention following a decision by the magistrate to deny release on bond. He had been arrested for aggravated battery with a deadly weapon, criminal mischief and violation of an injunction for protection from domestic violence. Upon arrest, no bond was set. At a first appearance hearing, the presiding judge held him without bond on each count on the grounds that he was a danger to the community. This finding came after the prosecutor told the judge that petitioner had a prior conviction for loitering and for shooting/throwing a deadly missile. The prosecutor also told the court that petitioner's offenses violated an injunction previously entered. The appellate court granted the petition and remanded the case for further bond proceedings because the prosecutor did not move for pretrial detention pursuant to Florida Rule of Criminal Procedure 3.132, and the magistrate failed to consider whether there were any conditions of release which could reasonably protect the community from risk of physical harm. <http://www.4dca.org/opinions/June%202009/06-30-09/4D09-2376.op.pdf> (June 30, 2009).

### ***Fifth District Court of Appeal***

No new opinions for this reporting period.