

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

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

J.B.J. v. State, __ So.3d __, 2009 WL 1586819 (Fla. 1st DCA 2009). [TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE FOUR-YEAR-OLD VICTIM COMPETENT TO TESTIFY AND IN ALLOWING THE INVESTIGATING OFFICER TO GIVE HEARSAY TESTIMONY IN SEXUAL BATTERY CASE](#) The First District Court of Appeal held that the victim's responses to questions posed prior to trial were insufficient to demonstrate that the victim had a moral sense of the obligation to tell the truth. The only other witness to testify as to the sex act was the victim's six-year old brother. The investigating officer testified as to the brother's statements made to him during his investigation. The officer also testified that the brother told him that the juvenile stated to the brother that if he told anybody, he would no longer let the brother play with his toys. The issue was whether the officer's testimony was admissible hearsay under s. 90.801(2)(b), F.S., as a prior consistent statement offered to rebut the juvenile's counsel's suggestion on cross-examination that the brother had fabricated his testimony based on the improper influence of another twelve-year old. The First District found that the juvenile's counsel had elicited testimony from the brother that the twelve-year old told him that the victim performed a sex act on the juvenile. The juvenile's counsel then suggested that the brother was merely repeating the twelve-year olds allegations, not that the twelve-year old was influencing the brother to testify against the juvenile. Moreover, the brother's account of the crime to the investigating officer was not made prior to the twelve-year olds alleged influence. The First District held that this did not constitute an "improper influence" under s. 90.801(2)(b), F.S. Therefore, the officer's testimony was inadmissible hearsay. Further, the trial court also erred in admitting the hearsay testimony as to the juvenile's threat not to allow the brother to play with his toys. Accordingly, the First District reversed the trial court's delinquency order and remanded for a new trial.
<http://opinions.1dca.org/written/opinions2009/06-09-2009/08-5476.pdf> (June 9, 2009).

Second District Court of Appeal

J.S. v. State, __ So.3d __, 2009 WL 1491717 (Fla. 2^d DCA 2009). [TRIAL COURT ERRED IN ASSESSING COURT COSTS PURSUANT TO S. 775.083\(2\), F.S. \(2006\) WHERE THE ADJUDICATION WAS WITHHELD AND THE ONLY CHARGE WAS A FELONY](#) In an Anders appeal, the juvenile sought review of the trial court's order withholding adjudication and placing him on probation and the imposition of certain court costs. The trial court had assessed court costs of \$50 and \$20 under s. 775.083(2), F.S. (2006). The Second District Court of Appeal affirmed the disposition without comment but remanded with directions to strike the two imposed costs. The Second District found that these court costs may only be assessed when the juvenile is adjudicated delinquent. In the instant case, the adjudication was withheld. Even if the juvenile had been adjudicated delinquent, the \$20 court cost only applied to offenses other than felonies. In the instant case, the juvenile was only charged with a single felony count.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2029,%202009/2D07-4657.pdf (May 29, 2009).

Third District Court of Appeal

B.E. v. State, ___ So.3d ___, 2009 WL 1675720 (Fla. 3d DCA 2009). THE STATE ESTABLISHED THE CORPUS DELICTI FOR CONSTRUCTIVE POSSESSION OF MARIJUANA SO AS TO MAKE THE JUVENILE'S CONFESSION ADMISSIBLE The juvenile appealed the denial of his motion for judgment of acquittal. The sole issue was whether the State established the corpus delicti for the charge of possession of marijuana so as to make the juvenile's confession admissible. The Third District Court of Appeal found that before a confession is admitted, the State has the burden of proving that a crime was committed. However, the State does not have to prove the identity of the defendant as the guilty party. In the instant case, the State's theory was constructive possession of marijuana. The prosecution presented competent, substantial evidence to establish each element of constructive possession of marijuana. Possession of marijuana is a crime. Thus, either the juvenile or the resident of the premises was in constructive possession of the illicit substance. For the purpose of showing corpus delicti, it is immaterial which of the two suspects was guilty of the constructive possession. Accordingly, the Third District held that the State was able to introduce the juvenile's statement acknowledging ownership of the marijuana and the denial of the motion was affirmed. <http://www.3dca.flcourts.org/Opinions/3D08-1132.pdf> (June 17, 2009).

A.M. v. State, ___ So.3d ___, 2009 WL 1564227 (Fla. 3d DCA 2009). THE TRIAL COURT WAS REQUIRED TO USE THE RESULTS OF THE RISK ASSESSMENT INSTRUMENT IN DETERMINING WHETHER THE JUVENILE SHOULD CONTINUE IN SECURE DETENTION The juvenile filed an emergency petition for a writ of habeas corpus. The juvenile was charged with aggravated assault with a firearm and obstruction by resisting a police officer without violence. The trial court initially placed the juvenile in secure detention. At a later hearing, the trial court continued the juvenile's placement in secure detention. The juvenile argued that the risk assessment instrument (RAI) used by the trial court impermissibly added three points for the possession of a firearm by way of double scoring, and that in the absence of written clear and convincing reasons for the juvenile's continued secure detention, the juvenile must be discharged. The State conceded that the RAI score should be scored as a 10 which indicates non-secure or home detention. However, continued secure detention was legal based upon the involvement of a firearm pursuant to s. 985.255(1)(f), F.S. (2008). The Third District Court of Appeal found that s. 985.255(3)(a), F.S. (2008) required the trial court to use the results of the RAI in determining whether the juvenile should continue in secure detention. However, pursuant to s. 985.255(3)(b), F.S. (2008), the trial court could order a more restrictive placement than indicated by the RAI if it stated in writing, clear and convincing reasons for such placement. The Third District held that the trial court failed to provide clear and convincing written reasons. Therefore, the case was remanded with instructions to either immediately release the juvenile from secure detention, or provide, in writing, clear and convincing reasons for the juvenile's continued secure detention. <http://www.3dca.flcourts.org/Opinions/3D09-1494.pdf> (June 4, 2009).

E.G. v. State, __ So.3d __, 2009 WL 1531623 (Fla. 3d DCA 2009). **TRIAL COURT SHOULD HAVE ORDERED THE JUVENILE BE BROUGHT TO TRIAL WITHIN TEN DAYS FOLLOWING THE NINETY-DAY SPEEDY TRIAL PERIOD PURSUANT TO FLORIDA RULE OF JUVENILE PROCEDURE 8.090(M)(3)** The State of Florida appealed the discharge of the delinquency petition. At the hearing on the motion to dismiss, the trial court found that pursuant to Florida Rule of Juvenile Procedure 8.090(d) the time period for holding the adjudicatory hearing had expired. The State had requested the trial court to allow the time period provided for in Florida Rule of Juvenile Procedure 8.090(m). The Third District Court of Appeal held that pursuant to Florida Rule of Juvenile Procedure 8.090(m)(3), when the ninety-day speedy trial period expired, the trial court should have ordered the juvenile to be brought to trial within ten days. The order of dismissal was reversed and remanded for further proceedings.
<http://www.3dca.flcourts.org/Opinions/3D08-2053.pdf> (June 3, 2009).

Fourth District Court of Appeal

T.A. v. State, __ So.3d __, 2009 WL 1675870 (Fla. 4th DCA 2009). **PETIT THEFT WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE** The juvenile was charged with grand theft and petit theft after a teacher at a day care center discovered that \$593 was stolen from her purse located in a closet of her classroom. The Fourth District Court of Appeal affirmed the trial court's finding that the juvenile committed grand theft. The Fourth District reversed the trial court's denial of appellant's motion for judgment of dismissal as to the charge of petit theft. The finding of guilt on this charge, which resulted from the juvenile's rummaging through the closet of another teacher, was not supported by competent substantial evidence. Accordingly, the case was remanded with instructions to dismiss the petit theft charge.
<http://www.4dca.org/opinions/June%202009/06-17-09/4D08-2971.op.pdf> (June 17, 2009).

A.L.J. v. State, __ So.3d __, 2009 WL 1606063 (Fla. 4th DCA 2009). **WORKERS' COMPENSATION AND LOST SALES NOT INCLUDED AS PROPERTY DAMAGE FOR THE PURPOSE OF DETERMINING CRIMINAL MISCHIEF CHARGES** The juvenile appealed the denial of his motion for judgment of dismissal on the charge of felony criminal mischief or, in the alternative, a reduction in the charge to a first degree misdemeanor due to the state's failure to prove property damage in excess of \$1,000. The Fourth District Court of Appeal affirmed the denial of the motion for judgment of dismissal without discussion. As to reducing the charge, the Fourth District reversed and remanded for an adjudication of first degree misdemeanor criminal mischief. The juvenile sprayed a large amount of pepper spray into the drive-thru window of a McDonald's restaurant. The manager testified that the restaurant had to be closed for three hours and lost \$1200 in sales, \$200 in food, \$500 for workers' compensation, and \$250 in labor for clean up. In the petition for delinquency, the juvenile was charged with injuring the property of the McDonald's by "impairing or interrupting said business costing one thousand dollars (\$1,000.00) or more, in labor and supplies to restore." The Fourth District Court of Appeal held that the only costs for damages proven by the State were the \$250 for labor costs to clean the restaurant, and the \$200 cost to replace the food which was damaged by the pepper spray. The \$500 for workers' compensation was paid for injuries to the victims, not for property damage. The lost sales of \$1200 cannot be included in the costs to restore the business's operation. Therefore, the State failed to prove allowable property damages exceeding \$1,000.

<http://www.4dca.org/opinions/June%202009/06-10-09/4D08-1682.op.pdf> (June 10, 2009).

K.A. v. State, __ So.3d __, 2009 WL 1606097 (Fla. 4th DCA 2009). **JUVENILE NOT GUILTY OF RESISTING ARREST WITHOUT VIOLENCE BECAUSE THE DEPUTIES WERE NOT EXECUTING A LEGAL DUTY** The juvenile appealed the denial of his motion for judgment of dismissal. The juvenile was found guilty of resisting arrest without violence. The juvenile was at a skating rink that closed for the evening, and there were approximately 600 to 700 people in the parking lot. Deputies were at the rink to assist with crowd dispersement. There was no evidence that any of the people congregating in the parking lot were trespassing, in violation of any curfew, or otherwise engaging in any unlawful activity. One of the deputies testified that based upon his training and experience, he thought a fight was taking place. He and the other deputies approached the crowd to disperse it. As a result, some people began running away. The juvenile began yelling at the crowd "Why are you leaving?" and "Don't leave. They can't do anything about it." The juvenile was advised that if he continued, he would be taken into custody. The juvenile continued and was arrested. The juvenile was ordered to sit in the back of a patrol car. The juvenile refused and insisted that he had done nothing wrong. One of the deputies lowered the juvenile's head and placed him into the patrol car. The Fourth District Court of Appeal found that to support a conviction under s. 843.02, F.S., the state must show: (1) the officer was engaged in the lawful execution of a legal duty; and (2) the action by the defendant constituted obstruction or resistance of that lawful duty. The trial court determined that the juvenile was interfering with the investigation of a disturbance. The Fourth District held that on the night of the incident, there was no evidence of a disturbance. On this basis, the deputies' alleged investigation of a disturbance was no investigation at all. Therefore, the deputies were not executing a legal duty. Further, the juvenile's words did not rise to the level of obstruction. Thus, the juvenile was not guilty of resisting arrest without violence. The State argued that the juvenile could have been lawfully taken into custody for inciting a riot in violation of s. 870.01(2), F.S. (2007) or neglect or refusal to aid peace officers in violation of s. 843.06, F.S. (2007). The Fourth District found that the juvenile's words were not encouraging people to riot, only to stop running away. Additionally, there was no testimony that the juvenile was asked to assist in preserving the peace or for his assistance. The juvenile was only told to stop yelling. Accordingly, the Fourth District reversed and remanded with directions to vacate the juvenile's finding of guilt and placement on probation.

<http://www.4dca.org/opinions/June%202009/06-10-09/4D08-2283.op.pdf> (June 10, 2009).

D.B. v. State, __ So.3d __, 2009 WL 1606085 (Fla. 4th DCA 2009). **THE TRIAL COURT'S EXPLANATION FOR DEPARTING FROM THE DEPARTMENT OF JUVENILE JUSTICE'S PLACEMENT RECOMMENDATION WERE NOT IN ACCORDANCE WITH THE REQUIRED ANALYSIS SET FORTH BY THE SUPREME COURT IN E.A.R. V. STATE, 4 SO.3D 614 (FLA.2009)** The juvenile pled no contest to possession of ecstasy with intent to sell. In its Pre-Disposition Report, the Department of Juvenile Justice (DJJ) noted the juvenile's lack of previous supervision history with the DJJ, the juvenile's score as a low risk re-offender, and the juvenile's supportive home and educational environment. Based on this information, the DJJ recommended juvenile probation. The trial court departed from the DJJ's recommendation and imposed a moderate-risk residential program. In doing so, the trial court cited the seriousness of the offense and the protection of

the community from such crimes. The Fourth District Court of Appeal held that the trial court's explanation for departing from the DJJ's assessment and recommendation were not in accordance with the required analysis set forth in the Florida Supreme Court's recent decision in E.A.R. v. State, 4 So.3d 614 (Fla.2009). The case was reversed and remanded to provide the trial court an opportunity to enter an order in compliance with E.A.R., or else impose the juvenile probation recommended by the DJJ.

<http://www.4dca.org/opinions/June%202009/06-10-09/4D08-2038.op.pdf> (June 10, 2009).

E.A.R. v. State, __ So.3d __, 2009 WL 1531624 (Fla. 4th DCA 2009). **CASE ON REMAND FROM THE FLORIDA SUPREME COURT** The Fourth District Court of Appeal reversed the sentence imposed by the circuit court and remanded for proceedings consistent with the supreme court's opinion in E.A.R. v. State, 4 So.3d 614 (Fla.2009).

<http://www.4dca.org/opinions/June%202009/06-03-09/4D07-1061.remand.pdf> (June 3, 2009).

D.S. v. State, __ So.3d __, 2009 WL 1531708 (Fla. 4th DCA 2009). **TRIAL COURT ERRED IN APPLYING SERIOUS HABITUAL OFFENDER DESIGNATION TO THE TWO VIOLATION-OF-PROBATION CHARGES WHERE THE UNDERLYING OFFENSES WERE NOT ENUMERATED IN S. 985.47(1)(A), F.S. (2008) AND WERE MISDEMEANORS** The juvenile was charged with robbery, and as a consequence, he was also charged with violating his probation imposed for two prior misdemeanor offenses: second-degree petit theft and battery. The juvenile entered a no contest plea and the trial court adjudicated him delinquent and committed him to a maximum-risk residential program as a serious habitual offender pursuant to s. 985.47, F.S. (2008). The Fourth District Court of Appeal found that although his designation as a serious or habitual offender for the robbery charge was permissible, the trial court erred in also applying that designation to the two violation-of-probation charges where the underlying offenses were misdemeanors and not enumerated in s. 985.47(1)(a), F.S. (2008). Accordingly, the Fourth District reversed the juvenile's violation-of-probation sentences, and remanded for a new disposition.

<http://www.4dca.org/opinions/June%202009/06-03-09/4D08-1157.op.pdf> (June 3, 2009).

Fifth District Court of Appeal

A.S.C. v. State, __ So.3d __, 2009 WL 1636310 (Fla. 5th DCA 2009). **CONVICTION OF DISORDERLY CONDUCT REVERSED BECAUSE OF THE ABSENCE OF EVIDENCE THAT THE JUVENILE WAS TRYING TO INCITE A CROWD OR THAT A CROWD HAD GATHERED AND PRESENTED A SAFETY RISK** The juvenile was charged in a petition for delinquency with disorderly conduct in violation of s. 877.03, F.S. (2007), and with disruption or interference with the lawful administration of an educational institution in violation of s. 877.13, F.S. (2007). At the conclusion of the State's case, the defense moved for a judgment of dismissal based on the failure of the State to prove that the actions and words used by the juvenile constituted a violation of s. 877.03. The trial court denied the motion and the juvenile was found to have committed both of the charged delinquent acts. The Fifth District Court of Appeal held that the trial court erred in denying the motion of dismissal as to the disorderly conduct charge. There was insufficient evidence that the juvenile was trying to incite a crowd or that a crowd had gathered and presented a safety risk. While the juvenile may have been loud and profane, the

record, viewed de novo, was devoid of evidence that her words either incited or were even intended to incite others to breach the peace, or posed an imminent danger to others. Accordingly, the Fifth District affirmed the judgment and sentence with respect to the charge of disrupting an educational institution, but reversed as to the charge of disorderly conduct, and vacated the judgment and sentence as to that charge. The Fifth District remanded for a new disposition hearing.

<http://www.5dca.org/Opinions/Opin2009/060809/5D08-3996.op.pdf> (June 8, 2009).

B.L.S. v. State, __ So.3d __, 2009 WL 1561816 (Fla. 5th DCA 2009). **TRIAL COURT MISTAKENLY GRANTED THE MOTION TO STRIKE SERIOUS HABITUAL OFFENDER DESIGNATION, HOWEVER, UPON RESENTENCING, THE TRIAL COURT COULD AGAIN IMPOSE THE DESIGNATION** The juvenile challenged his delinquency adjudication for possession of a firearm with serial number altered or removed and the trial court's failure to resentence him after granting his motion to correct sentencing error by striking the serious habitual offender ("SHO") designation. The juvenile argued for the first time on appeal that the trial court erred in denying his motion for judgment of dismissal of possession of a firearm with altered serial number because there was no evidence that he knowingly possessed a gun on which the serial number had been altered or removed. The juvenile's counsel argued that the evidence did not show that the gun was in the juvenile's possession because it was merely found within the perimeter area. However, the juvenile's counsel never raised any question about his client's knowledge of the gun's altered serial number. The Fifth District Court of Appeal found that generally, for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection, exception, or motion below. However, when challenging the sufficiency of the evidence, a contemporaneous objection is not required when the evidence is insufficient to show a crime was committed at all. In the instant case, although there was no direct evidence that the juvenile knew the serial number was altered, viewing the evidence in the light most favorable to the State, a fair inference arises that the juvenile knew the revolver's serial number was altered. Accordingly, the Fifth District Court of Appeal affirmed the adjudication for possession of a firearm with an altered serial number. The juvenile had also been adjudicated for possession of a firearm by a person deemed to have committed a delinquent act and carrying a concealed firearm, but neither was appealed. The trial court adjudicated the juvenile a SHO pursuant to s. 985.47(1)(b), F.S. (2008) and ordered a high-risk placement on the three counts. The juvenile filed a motion pursuant to Florida Rule of Juvenile Procedure 8.135(b)(2), to strike the SHO designation as an improper enhancement for the use of a firearm inherent in the current offenses. The trial court granted the motion. The Fifth District found that since the original SHO designation was based upon subsection 985.47(1)(b), rather than subsection 985.47(1)(a)(14), the trial court mistakenly granted the motion. However, upon resentencing, which is a completely new proceeding, the trial court could again impose the SHO designation. Accordingly, the Fifth District affirmed the juvenile's delinquency adjudication and remanded for a new disposition hearing.

<http://www.5dca.org/Opinions/Opin2009/060109/5D08-2207.op.pdf> (June 1, 2009).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

The Justice Administrative Commission v. Grover, ___ So. 3d ____, 2009 WL ____, 34 Fla.L.Weekly D__ (Fla. 1st DCA 2009) (No. 1D09-1613) **GRANDPARENTS NOT ENTITLED TO APPOINTED COUNSEL**

The Justice Administrative Commission sought a writ of certiorari to quash an order requiring it to pay attorney's fees for court-appointed counsel for an indigent grandmother in a dependency proceeding. Although the grandmother was entitled to participate in the proceedings, she did not qualify for court-appointed counsel at public expense. The court therefore quashed the order directing the Justice Administrative Commission to pay the attorney for representing the grandmother.

<http://opinions.1dca.org/written/opinions2009/06-24-2009/09-1613.pdf> (June 24, 2009).

F.S. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ____, 2009 WL ____, 34 Fla.L.Weekly D__ (Fla. 1st DCA 2009) (No. 1D09-371) **APPEAL DISMISSED** The court concluded that it lacked jurisdiction to review the trial court's denial of the father's motion for reconsideration and rehearing. The court therefore dismissed the appeal. <http://opinions.1dca.org/written/opinions2009/06-19-2009/09-0371.pdf> (June 19, 2009).

E.F. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ____, 2009 WL 1663909, 34 Fla.L.Weekly D__ (Fla. 1st DCA 2009) (Nos. 1D09-0176; 1D09-0332) **TERMINATION OF PARENTAL RIGHTS REVERSED**

The mother and father separately appealed the termination of their respective rights to their children. On appeal the Department conceded error because of the lack of a valid case plan for the father at the time of the adjudicatory hearing. The Department further conceded that the trial court had "confused information" about Another Planned Permanent Living Arrangement under section 39.6241, Florida Statutes. The Department also noted that the mother did not warrant termination of her parental rights alone under section 39.811(6), Florida Statutes and therefore her case should also be reversed. The Guardian ad Litem joined the concession of error. The court therefore reversed the cases and remanded them for further proceedings.

<http://opinions.1dca.org/written/opinions2009/06-16-2009/09-0176.pdf> (June 16, 2009).

B.K. v. Department of Children and Family Services, ___ So. 3d ____, 2009 WL ____, 34 Fla.L.Weekly D__ (Fla. 1st DCA 2009) (No. 1D08-4608) **DENIAL OF HABEAS CORPUS REVERSED**

The father appealed the trial court's denial of his petition for a writ of habeas corpus challenging a permanency order entered February 15, 2008 *nunc pro tunc* November 20, 2006. On appeal, the court determined that the father was neither provided notice for the permanency hearing nor was he present or represented by counsel at the hearing. The court

further noted that the father's counsel was discharged February 9, 2006 *nunc pro tunc* September 28, 2005. The record was confusing as to the identities of the fathers of the siblings in the case. Both were present and represented by counsel at the November 20th hearing. The court concluded by discussing the analogy of habeas corpus to a motion for relief from judgment under Civil Rule 1.540(b). The court reversed and remanded the case for further proceedings.

<http://opinions.1dca.org/written/opinions2009/06-12-2009/08-4608.pdf> (June 12, 2009).

Second District Court of Appeal

C.V., M.P., and B.P. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2009 WL 1606545, 34 Fla.L.Weekly D___ (Fla. 2nd DCA 2009) (No. 2D08-3616) **CLARIFICATION GRANTED AND FOOTNOTE SENTENCE DELETED**

The court granted clarification and issued an amended opinion that deleted the final sentence in a footnote. In all other respects the opinion was identical to the original April opinion of the court.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/June/June%2010,%202009/2D08-3616rh.pdf (June 10, 2009).

Third District Court of Appeal

P.I. v. Department of Children and Family Services, ___ So. 3d ___, 2009 WL 1675824, 35 Fla.L.Weekly D___ (Fla. 3rd DCA 2009) (No. 3D08-2831) **TERMINATION OF PARENTAL RIGHTS AFFIRMED** The court affirmed termination of the mother's parental rights. The Department filed a petition for termination of parental rights under sections 39.806(1)(c) & (1)(f), Florida Statutes. The mother's two children were placed into shelter care after one of the children was taken to the hospital due to excessive vomiting, which had been going on for a week. The child, A.N., was lethargic and had bruises on his face and body, with the bruises a week old. The child had fluid on the brain resulting from trauma and the brain injury was four to six weeks old. A.N.'s step-father caused the injuries. The mother was aware that he abused A.N. and the mother had left the home thrice because of abuse but returned each time. The step-father had abused A.N. three times before, had hit the mother, and the mother was afraid of him. The mother had a history of mental illness, had attempted suicide, and did not take prescribed medicine because she felt that she did not need them. The mother did not follow up on referrals for services. Like the Department, the Guardian ad Litem recommended termination of the mother's rights. On appeal, the court noted that the trial court's judgment terminating the mother's parental rights was supported by clear and convincing evidence. The record had expert testimony and the mother's own testimony supporting the findings of egregious conduct and that there was no way for the mother to safeguard the children from further abuse. The mother was not even fully aware that what A.N. experienced amounted to abuse. The court noted that under Supreme Court's decision in Padgett v. Department of Health and Rehabilitative Services, 577 So. 2d 565 (Fla. 1991), termination of parental rights was the only alternative to protect the children and that the fact of waiting a month after A.N.'s brain injury to take him to the hospital alone supported termination. The court affirmed termination of parental rights.

<http://www.3dca.flcourts.org/Opinions/3D08-2831.pdf> (June 17, 2009).

M.T. v. Department of Children and Family Services, ___ So. 3d ____, 2009 WL 1606454, 35 Fla.L.Weekly D ___ (Fla. 3rd DCA 2009) (No. 3D09-55) **ADJUDICATION REVERSED AND REMANDED** The trial court erred by not appointing the mother legal counsel to represent her at trial as required by statute. The Department conceded error and the court vacated the order of adjudication and remanded the case for further proceedings.
<http://www.3dca.flcourts.org/Opinions/3D09-0055.pdf> (June 10, 2009).

Fourth District Court of Appeal

C.S. v. Department of Children and Family Services, ___ So. 3d ____, 2009 WL _____, 35 Fla.L.Weekly D ___ (Fla. 4th DCA 2009) (No. 4D08-3950) **DENIAL OF REUNIFICATION REVERSED** The court reversed the trial court's denial of reunification with the mother. The trial court had found that the mother had substantially completed her case plan but denied reunification without making specific findings of fact. On appeal, the court noted six factors required to be addressed and included by the trial court in its written findings of fact. The court noted that even when it is not an abuse of discretion to deny reunification, the court will reverse an order and remand for compliance with the statute if the order fails to address the six factors explicitly.
<http://www.4dca.org/opinions/June%202009/06-24-09/4D08-3950.op.pdf> (June 24, 2009).

Fifth District Court of Appeal

T.R. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 1636341, 34 Fla.L.Weekly D ___ (Fla. 5th DCA 2009) (No. 5D08-4229) **SUMMARY REVERSAL BASED ON CONFESSION OF ERROR** Because of confessed error, the mother's appeal was summarily reversed and the case remanded for further proceedings consistent with sections 39.522 and 39.621, Florida Statutes.
<http://www.5dca.org/Opinions/Opin2009/060809/5D08-4229.op.pdf> (June 8, 2009).

W.B. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 1636344 (Fla. 5th DCA 2009) (No. 5D08-4375) **SUMMARY REVERSAL BASED ON CONFESSION OF ERROR** Because of confessed error, the father's appeal was summarily reversed and the case remanded for further proceedings. <http://www.5dca.org/Opinions/Opin2009/060809/5D08-4375.op.pdf> (June 8, 2009).

B.B. v. Department of Children and Families, ___ So. 3d ____, 2009 WL _____ (Fla. 5th DCA 2009) (No. 5D09-357) **TERMINATION OF PARENTAL RIGHTS AFFIRMED** The father appealed the termination of his parental rights. The Department sheltered the child at age ten months based on malnutrition and the father consented to dependency. The child was adjudicated dependent and placed with the grandparents. The court approved a case plan with the goal of reunification. After more than a year, the father had failed to substantially comply with his case plan and the trial court granted the Department's petition to terminate the father's parental rights based on section 39.806(1)(e), Florida Statutes. On appeal, the father argued that termination of his rights was not the least restrictive means of protecting the

child because the child could have been placed in a permanent guardianship with the paternal grandparents. But the court noted that the existence of a long-term relative placement does not preclude termination of parental rights. The court further noted that what the least restrictive means test requires is that the Department makes a good faith effort to rehabilitate the parent and reunite the family through a case plan before terminating a parent's rights. The court noted that the father was offered a case plan but failed to substantially comply. That failure along with the finding that termination was in the child's manifest best interests was not challenged on appeal and was also supported by competent substantial evidence. The court affirmed the termination of parental rights.

<http://www.5dca.org/Opinions/Opin2009/062209/5D09-357.op.pdf> (June 22, 2009).

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Owens v. Owens, __So.3rd __, 2009 WL 1589514

PROCEDURAL DUE PROCESS REQUIRES NOTICE AND OPPORTUNITY TO BE HEARD

Former wife appealed trial court's dismissal of her claim for child support arrearages which was entered after former husband filed a motion to dismiss but never served her. Appellate court held that procedural due process requires both fair notice and a real opportunity to be heard and that because in this case, former wife received neither, she was deprived of her basic due process rights. Accordingly, the appellate court reversed and remanded.

<http://opinions.1dca.org/written/opinions2009/06-09-2009/08-5169.pdf> (June 9, 2009).

Frier v. Frier, __So.3rd __, 2009 WL 1586822

FLORIDA RULE OF APPELLATE PROCEDURE 9.130(a)(3)(C)(ii) NOT APPLICABLE IN CASE IN WHICH TRIAL COURT DID NOT ADDRESS WHETHER IT HAD PERSONAL JURISDICTION

Former husband appealed a non-final order denying his motion to dismiss which had challenged the trial court's lack of jurisdiction due to his having filed a similar action in another state. The trial court had recognized that its jurisdiction might be limited due to the other case, and had granted leave to both parties to address issues that either felt fell outside its jurisdiction. Finding that the trial court's order referred only to its subject matter jurisdiction and did not address whether it had personal jurisdiction over former husband, the appellate court held that it did not have appellate jurisdiction under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii).

<http://opinions.1dca.org/written/opinions2009/06-09-2009/09-1141.pdf> (June 9, 2009).

Second District Court of Appeal

Austin v. Austin, __So. 3rd __, 2009 WL 1811811

TRIAL COURT MUST DIRECT HOW MARITAL LIABILITIES ARE TO BE ALLOCATED BETWEEN SPOUSES; MUST ALSO SET FORTH FACTUAL FINDINGS RE VALUATION OF MARITAL ASSET; MARITAL ASSET CANNOT BE AWARDED TO SPOUSE IF DEPLETED DURING PROCEEDINGS ABSENT MISCONDUCT

Former wife appealed final judgment of dissolution of marriage in long-term (38 years) marriage as to the equitable distribution, alimony, and attorney's fees; appellate court reversed and remanded on these issues. The appellate court reiterated that a trial court commits reversible error when it simply directs that marital liabilities are to be equally divided without identifying each specific liability and which spouse is responsible for which debt. With regard to the marital assets, the appellate court termed its review "hampered" by the trial court's failure to provide findings of how it had reached a particular value in the face of conflicting evidence and then held that a trial court cannot award assets to a spouse if those assets were depleted during dissolution proceedings for support and marital expenses in absence of misconduct. With regard to alimony, the appellate court held that there is a presumption in favor of permanent alimony in a long-term marriage and that the trial court must include specific findings of fact in its final judgment; the primary factors to be considered are the financial needs of one spouse and the ability of the other to pay.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/June/June%2026,%202009/2D07-3104.pdf (June 26, 2009).

Perez v. Perez, __So.3rd__, 2009 WL 1811556

TRIAL COURT ABUSES DISCRETION IF TEMPORARY SUPPORT AWARD EXHAUSTS SPOUSE'S MONTHLY INCOME

Former husband appealed temporary awards of exclusive use and possession of marital home to former wife, alimony and child support. Appellate court affirmed award re marital home, but found that the trial court had abused its discretion by having entered a temporary support award that virtually exhausted former husband's net monthly income. In doing so, the appellate court held that while trial courts have discretion to impute income in appropriate circumstances, imputation must be based on competent, substantial evidence.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/June/June%2026,%202009/2D08-2918.pdf (June 26, 2009).

Rogers v. Rogers, __So. 3rd__, 20090 WL 1675921

GENERALLY, STUDENT LOAN DEBT INCURRED DURING MARRIAGE IS MARITAL LIABILITY; TRIAL COURT MUST SET FORTH FACTUAL FINDINGS AND RATIONALE RE UNEQUAL DISTRIBUTION

Former wife appealed final judgment of dissolution of marriage arguing that the trial court had abused its discretion in having made an unequal distribution of marital liabilities and by awarding her only a portion of the attorney fees payable in installments. Appellate court held that the final judgment did not contain factual findings to support either the unequal distribution of debts or the award of attorney's fees and payment plan, nor did it contain the trial court's rationale for the distribution; accordingly, the appellate court reversed and remanded on those issues. The appellate court also noted that, in general, student loan debt incurred during the marriage is a marital liability, which in absence of specific findings supporting an unequal distribution, must be equitably distributed between the parties. The

fact that one spouse may not benefit from the other spouse's education because of the dissolution is not a factor to be considered when allocating marital debt for student loans. With regard to fees, the appellate court held that while a trial court has discretion to allow payment over time, it must set forth some factual basis for imposing a specific payment plan. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/June/June%2017,%202009/2D07-4524.pdf (June 17, 2009).

Third District Court of Appeal

Vigo v. Vigo, __So.3rd__, 2009 WL 167535

PERMANENT, PERIODIC ALIMONY SHOULD NOT BE AWARDED IN SHORT TERM MARRIAGES

Former husband appealed amended final judgment of dissolution of marriage arguing that the trial court had abused its discretion in two issues: one, through its finding that he had intended to gift one-half interest in the couple's condominium to former wife and then awarding her lump sum alimony equal to one-half of the equity in the condo; and two, by awarding permanent, periodic alimony to former wife. Appellate court found that the trial court had not abused its discretion either in concluding, based on the testimony and evidence presented, that former husband intended to deliver a one-half interest in the condo to former wife, or in ordering lump sum alimony to achieve equitable distribution after having found former husband was capable of paying it. Appellate court agreed with former husband, however, on the second point and found that the trial court had abused its discretion by awarding permanent, periodic alimony in a short-term (seven and one-half years) marriage and in absence of any genuine inequity created by the dissolution; accordingly, it reversed the award of permanent, periodic alimony and remanded to the trial court for consideration of rehabilitative alimony.

<http://www.3dca.flcourts.org/Opinions/3D08-1303.pdf> (June 17, 2009).

Knight v. Knight, __So.3rd__, 2009 WL 1606094

TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO SPOUSE WITH ABILITY TO PAY

Appellate court reversed trial court's award of attorney's fees to former wife based upon its finding that she had the present ability to pay her own attorney's fees.

<http://www.3dca.flcourts.org/Opinions/3D08-0195.pdf> (June 10, 2009).

Cobo v. Sierralta, __So.3rd__, 2009 WL 1456951

SUFFICIENT EVIDENCE MUST BE PRESENTED TO OVERCOME PRESUMPTION OF VALID MARRIAGE; PURPOSE OF FEE AWARD IS TO ENSURE SIMILAR ACCESS TO COUNSEL

Former wife appealed a final judgment which annulled her marriage to former husband and awarded him custody of their eight-year-old daughter; appellate court reversed and remanded for two reasons. One, former husband failed to present sufficient evidence to overcome the presumption of a valid marriage between himself and former wife; and two, the trial court's failure to award temporary attorney's fees to litigate the issues deprived former wife of a meaningful opportunity to defend. In its holding, the appellate court reiterated that the purpose of a fee award in dissolution actions is to ensure that the former spouses have similar access to counsel as opposed to one having an unfair advantage due to the financial status of

the parties. The appellate court also noted that section 61.13, Florida Statutes, expressly requires consideration by the trial court of a number of factors when it determines custody. <http://www.3dca.flcourts.org/Opinions/3D08-0616.pdf> (May 27, 2009).

Cooper v. Cooper, __So.3rd__, 2009 WL 1457024

SANCTIONS AGAINST FORMER WIFE VACATED

Following former wife's motion for clarification, the appellate court withdrew its opinion of April 15, 2009 and issued this. Former wife had appealed two final orders resulting from post-judgment motions concerning the visitation provisions of the final judgment of dissolution of marriage. The final judgment had imposed sanctions against former wife and her attorney, jointly and severally; based upon its conclusion that the record did not reflect that former wife had been involved in the actions leading to the sanctions, the appellate court vacated that portion of the final judgment as to former wife.

<http://www.3dca.flcourts.org/Opinions/3D08-2051.pdf> (May 27, 2009).

Fourth District Court of Appeal

Yeakle v. Yeakle, __So.3rd__, 2009 WL 1766616

STIPULATION IS BINDING ON THE TRIAL COURT AS WELL AS THE PARTIES

Both former husband and wife appealed various aspects of final judgment of dissolution of marriage; appellate court reversed on two. Pursuant to stipulation, former husband pledged to "make his best efforts" to assume the mortgage on the marital home and have former wife's name removed from the mortgage; however, the trial court ordered former husband to be solely responsible for the mortgage and ordered the lender to permit former husband to assume the mortgage. Former wife argued that the trial court changed the stipulation; appellate court agreed, holding that the trial court had deprived former wife of the ability to enforce the provision that former husband employ his best efforts to remove her from the note and mortgage. The appellate court reiterated that a stipulation binds the court as well as the parties and should not be disturbed in absence of ambiguity or a need for clarification or interpretation. On the second point, the appellate court citing Posner v. Posner, 988 So.2d 128 (Fla. 4th DCA 2008), held that the trial court had abused its discretion by assessing amounts against former wife that were cumulatively excessive.

<http://www.4dca.org/opinions/June%202009/06-24-09/4D08-2012.op.pdf> (June 24, 2009).

Bengisu v. Bengisu, __So.3rd__, 2009 WL 1531808

TEMPORARY SUPPORT AWARD TO FORMER WIFE IN EXCESS OF FORMER HUSBAND'S MONTHLY INCOME ABUSE OF DISCRETION

Former husband appealed non-final trial court awarding former wife temporary child support and alimony. After commenting that temporary relief awards are among the areas in which trial judges have the broadest discretion, the appellate court held that the trial court had abused its discretion in awarding monthly support to former wife in an amount which was more than former husband's monthly income without competent, substantial evidence that his actual monthly income exceeded his stated monthly income and that the trial court had also failed to make specific findings with regard to the income it had imputed to former husband.

<http://www.4dca.org/opinions/June%202009/06-03-09/4D08-5117.op.pdf> (June 3, 2009).

Fifth District Court of Appeal

Simmons v. Simmons, __So.3rd__, 2009 WL 1815243

HEARING SHOULD BE HELD WHEN EXCEPTIONS TO MAGISTRATE'S REPORT ARE TIMELY FILED

Reversal by appellate court due to trial court's failure to hold a hearing on former husband's timely filed exceptions to the magistrate's report before entering the final judgment; remanded to the trial court for hearing on the exceptions.

<http://www.5dca.org/Opinions/Opin2009/062209/5D08-2138.op.pdf> (June 22, 2009).

Riley v. Lien, __So.3rd__, 2009 WL 1703268

AS FINDER OF FACT, MAGISTRATE CAN REJECT TESTIMONY HE OR SHE DISBELIEVES

Appeal by former husband to trial court's order denying his objections to findings of general magistrate; appellate court held that as the finder of fact, a magistrate can reject testimony that he or she disbelieves.

<http://www.5dca.org/Opinions/Opin2009/061509/5D08-2635.op.pdf> (June 19, 2009).

Lovell v. Lovell, __So.3rd__, 2009 WL 1636274

RESTRICTIONS ON VISITATION MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; VISITATION SCHEDULES MUST BE CLEAR; PLAN FOR REHABILITATIVE ALIMONY MUST BE DETAILED

Former husband appealed final judgment of dissolution on number of grounds; appellate court reversed on several. Finding the trial court's ruling forbidding former husband's current wife (referred to by the trial court as "the paramour"), to be in the children's presence during visitation to be unsupported by competent, substantial evidence, the appellate court reiterated that such restrictions will only be sustained if the record contains competent, substantial evidence. As to other issues, the appellate court held that lack of clarity in a summer visitation schedule necessitates remand; similarly, a plan for rehabilitative alimony that needs to be "fleshed out" will be remanded. With regard to rehabilitative alimony, the appellate court reiterated that it cannot be awarded absent a rehabilitative plan which must be presented by the spouse seeking it; that spouse must also demonstrate a need for the alimony and the other spouse's ability to pay. With regard to attorney's fees, the appellate court noted that the financial needs of the requesting spouse need to be factored in with the financial ability of the paying spouse. Noting that the purpose of section 61.16, Florida Statutes, is to ensure that each spouse will have similar access to competent counsel, the appellate court held that attorney's fees should not be awarded to a spouse who has received assets sufficient to pay his or her own fees without diminishing their standard of living or depleting their assets.

<http://www.5dca.org/Opinions/Opin2009/060809/5D08-12.op.pdf> (June 8, 2009).

Wales v. Wales, __So.3rd__, 2009 WL 1636299

AWARD FOR SUPPORT ARREARAGES NEITHER SUPPORTED BY RECORD NOR EXPLAINED BY TRIAL COURT SUBJECT TO BEING VACATED

Former husband appealed final judgment of dissolution of marriage in long-term marriage. Appellate court found that a monthly amount awarded to former wife for "support arrearages" for period between September 2006 and October 2007 was neither supported by the record

nor explained by the trial court in its final judgment; accordingly, the appellate court instructed the trial court to vacate that portion of its judgment.

<http://www.5dca.org/Opinions/Opin2009/060809/5D08-3752.op.pdf> (June 8, 2009).

Arcot v. Balaraman, __So.3rd__, 2009 WL 1561599

ACTUAL, NOT ESTIMATED, INCOME IS USED WHEN CALCULATING RETROACTIVE CHILD SUPPORT

Appellate court withdrew its earlier opinion and substituted this in a case in which both spouses appealed the amended final judgment of dissolution of marriage on several grounds. Appellate court reiterated that the parties' actual income, not estimated income, must be used when calculating an award of retroactive child support; trial court should determine actual income earned by the former spouses during the time of arrearage and utilize that amount in calculating retroactive support. With regard to retroactive support, the appellate court also found that former wife was entitled to interest prospectively on the amount of the retroactive support from the date the court determined the arrearage and ordered payment; therefore, it instructed the trial court on remand to award interest at the statutory rate on unpaid child support. The appellate court also found that the trial court had erred by not having established a schedule which would allow the minor child to celebrate major religious holidays with the parents on an alternating basis with as little impact on the school schedule as possible.

<http://www.5dca.org/Opinions/Opin2009/060109/5D07-1989.op.pdf> (June 1, 2009).

French v. French, __So.3rd__, 2009 WL 1508416

TRIAL COURT ERRED IN CONFIRMING MAGISTRATE'S REPORT WITH ERRORS ON ITS FACE

Former wife appealed final judgment of dissolution arguing that the trial court erred in refusing to consider a miscalculation re her monthly expenses resulting in denial of alimony to her in a long-term (26 years) marriage. Although the magistrate had found that former husband had the ability to pay alimony, the magistrate concluded, based on his erroneous calculations, that former wife had no need for it. The appellate court noted that the miscalculations pointed out by former wife to the trial court were plain on the face of the magistrate's report; thus, it was error for the trial court to refuse to consider her challenges to the calculations as untimely filed. Reasoning that the trial court should have discovered the errors on its own when it reviewed the magistrate's report and should have concluded that the magistrate's determination of monthly expenses was not supported by competent, substantial evidence, the appellate held that the trial court erred in confirming the magistrate's report.

<http://www.5dca.org/Opinions/Opin2009/052509/5D08-2793.2.op.pdf> (May 25, 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

No new opinions for this reporting period.