

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
June 2011

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

M.D. v. State, ___ So. 3d ___, 2011 WL 2535336 (Fla. 1st DCA 2011). [DENIAL OF MOTION TO SUPPRESS AND CONVICTION FOR POSSESSION OF GUN ON SCHOOL GROUNDS AFFIRMED 2-1.](#)

Based upon an anonymous tip that the juvenile had carried a gun onto campus three months earlier, the school resource officer asked a school security guard to escort himself and the juvenile to the security office. At all relevant times, the security guard was unaware of the reasons for calling the juvenile to the security office. As a general policy, all students entering the security office were searched. When the juvenile was asked to empty his pockets, he told the guard that he was carrying a lighter against school policy. When the juvenile emptied his pockets, the security guard observed a gun. The juvenile was charged with possession of a gun on school grounds. The juvenile filed a motion to suppress, arguing that the search was unlawful because a probable-cause standard applied because the search was conducted pursuant to an inquiry by the school resource officer. The motion was denied. On appeal, the First District Court of Appeal held that the actions of the school authorities were reasonable. The First District found that allegations of gun possession on school campuses are different from traditional Fourth Amendment cases. Every other District Court in the state has held that a reasonable-suspicion standard was appropriate for searches of students on school grounds by school officials, including resource officers. The United States Supreme Court has held that suspicionless administrative searches of students are proper in certain circumstances. With an administrative search, the warrant and probable cause showing is replaced by the requirement to show a neutral plan for execution; a compelling governmental need; the absence of less restrictive alternatives; and reduced privacy rights. In the instant case, these requirements were found to have been met. Denial of the motion to suppress and the conviction for possession of gun on school grounds was affirmed 2-1 with Judge Hawkes dissenting with an opinion.

<http://opinions.1dca.org/written/opinions2011/06-28-2011/10-3055.pdf> (June 28, 2011).

Second District Court of Appeal

S.P.M. v. State, __ So. 3d ___, 2011 WL 2341393 (Fla. 2d DCA 2011). [AGGRAVATED ASSAULT FINDING AFFIRMED.](#) The juvenile was involved in a “road rage” incident where he wielded a tire iron. The victim testified that he did not feel threatened by the tire iron. The juvenile was adjudicated delinquent of aggravated assault. The Second District Court of Appeal affirmed. Judge Casanueva concurred in the affirmance only and filed an opinion expressing his concern that the binding case law deviated from the plain meaning of the legislature's words in s. 784.011(1), F.S. (2009). Judge Casanueva disagreed with the holding in Sullivan v. State, 898 so. 2d 105 (Fla. 2d DCA 2005), that a reasonable person standard should be applied even in the face of direct, uncontroverted evidence from the victim regarding his subjective state of mind.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2015,%202011/2D10-2415.pdf (June 15, 2011).

A.S. v. State, ___ So. 3d ___, 2011 WL 2279026 (Fla. 2d DCA 2011). **REVOCATION OF PROBATION REVERSED AND REMANDED WHERE THE TRIAL COURT FAILED TO COMPLY WITH FLORIDA RULE OF JUVENILE PROCEDURE 8.165 REGARDING WAIVER OF COUNSEL.** At the juvenile's plea hearing, the trial court asked the juvenile whether she wanted to admit or speak to a lawyer. The juvenile said that she wanted to admit. The trial court conducted a plea colloquy, withheld adjudication, and set a disposition date. At a subsequent hearing, the juvenile told the trial court that she wanted an attorney. At the disposition hearing, counsel represented the juvenile, who did not seek to withdraw the plea. The juvenile appealed the revocation of her probation and her commitment to a moderate-risk residential facility. The Second District Court of Appeal reversed and remanded because the trial court failed to comply with the requirements of Florida Rule of Juvenile Procedure 8.165 regarding the waiver of counsel. The Second District found that even though the trial court asked the juvenile whether she wanted counsel at the plea hearing, it failed to inquire thoroughly as to whether she understood and had the capacity to intelligently choose to waive counsel. Nor did the trial court obtain the required verified written waiver. The trial court's failure to comply with rule 8.165 at the plea hearing constituted fundamental error. Accordingly, the revocation of probation and disposition order was reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2010,%202011/2D09-5118.pdf (June 10, 2011).

Third District Court of Appeal

O.Y. v. State, ___ So. 3d ___, 2011 WL 2555473 (Fla. 3d DCA 2011). **ADJUDICATION FOR THE LESSER INCLUDED OFFENSE OF ASSAULT ON A LAW ENFORCEMENT OFFICER REVERSED BECAUSE THE CHARGING DOCUMENT DID NOT ALLEGE THE ELEMENTS OF ASSAULT, AND ASSAULT IS NOT A NECESSARILY LESSER INCLUDED OFFENSE TO THE CHARGE OF BATTERY ON A LAW ENFORCEMENT OFFICER.** The Third District Court of Appeal found that the State properly confessed error, and the adjudication for count 1 was fundamental error because the charging document did not allege the elements of assault, and assault is not a necessarily lesser included offense to the charge of battery on a law enforcement officer. See V.C. v. State, ___ So. 3d ___, (Fla. 3d DCA 2011). The adjudication was affirmed in all other respects.

<http://www.3dca.flcourts.org/Opinions/3D10-2148.pdf> (June 29, 2011).

T.H. v. State, ___ So. 3d ___, 2011 WL 2500813 (Fla. 3d DCA 2011). **ADJUDICATION FOR ESCAPE REVERSED WHERE STATE FAILED TO PROVE THE JUVENILE WAS BEING TRANSPORTED TO OR FROM ANY SECURE DETENTION FACILITY OR RESIDENTIAL COMMITMENT FACILITY.** Adjudication was withheld and the juvenile was sentenced to community control for escape pursuant to s. 985.721(3), F.S. (2009). The Third District Court of Appeal vacated the disposition and remanded for dismissal. The Third District found that the State properly conceded that the trial court erred in denying the motion for judgment of dismissal because it failed to prove that the juvenile was being transported to or from any secure detention facility or residential

commitment facility as required by s. 985.721(3), F.S. (2009).
<http://www.3dca.flcourts.org/Opinions/3D10-2147.pdf> (June 22, 2011).

State v. C.W., __ So. 3d __, 2011 WL 2496476 (Fla. 3d DCA 2011). **DIRECT-FILED INFORMATION AGAINST THE JUVENILE WAS PROPERLY FILED AND THE TRIAL COURT ERRED IN TRANSFERRING THE CASE THAT WAS OTHERWISE PROPERLY BEFORE IT.** The State appealed the trial court order transferring jurisdiction of the juvenile's case, in which the State direct-filed an information, to the juvenile division. The charges against the juvenile included a felony criminal mischief count. The Third District Court of Appeal held that the state attorney had discretion to direct-file against the juvenile in adult court. Section 985.557(b), F.S. (2010), provides that the state attorney may file an information against any child who was 16 or 17 years of age at the time the alleged offense, when in the state attorney's judgment and discretion the public interest requires that adult sanctions be considered or imposed. Therefore, the trial court erred in transferring the case that was otherwise properly before it. Accordingly, the transfer order was reversed and remanded.

<http://www.3dca.flcourts.org/Opinions/3D10-2219.pdf> (June 15, 2011).

Fourth District Court of Appeal

A.L.T. v. State, __ So. 3d __, 2011 WL 2200793 (Fla. 4th DCA 2011). **DENIAL OF MOTION TO SUPPRESS WAS REVERSED WHERE THE OFFICER EXCEEDED THE SCOPE OF THE JUVENILE'S CONSENT TO SEARCH.** The juvenile was observed by a police officer sitting on a bicycle. The officer did not see the required markings on the bicycle indicating registration. The officer approached the juvenile for questioning and specifically asked the juvenile if he could "search him for weapons or drugs." The juvenile agreed. During the search, the officer removed and searched a wallet that was found in the juvenile's back pocket. The officer found a Florida identification card belonging to an elderly female, a condom, and a picture of a young woman in the wallet. The juvenile claimed he found the wallet and was planning on returning it, but was afraid of being "hassled" because he had spent forty dollars contained in the wallet. A records check on the address shown on the identification card indicated that a burglary had occurred at the residence six days prior. After approximately thirty minutes, the juvenile was allowed to leave. The officer then turned the investigation over to a detective who issued a probable cause affidavit and a BOLO for the juvenile's arrest. The juvenile was subsequently arrested and interviewed by the detective. The juvenile waived his *Miranda v. Arizona*, 384 U.S. 436 (1966), rights and agreed to speak to the detective without an attorney present. During the interview, the juvenile confessed to the burglary. The juvenile was charged with burglary of a residence and grand theft. The juvenile moved to suppress the victim's driver's license and his confession. The trial court denied the motion. The juvenile pled no contest to the burglary charge, reserving the right to appeal the denial of his motion to suppress. The juvenile argued that the police search exceeded the scope of his consent. On appeal, the Fourth District Court of Appeal held that the trial court erred in denying the juvenile's motion to suppress because the officer exceeded the scope of the juvenile's consent. The juvenile consented to a search of his person for weapons and drugs; he did not give a general consent to search. Despite this, the officer removed the wallet, rifled through the contents, and examined a photograph, condom,

and identification card. These items were neither weapons nor drugs and should not have been inspected. The “typical reasonable person” would have understood the juvenile’s agreement to a search for weapons and drugs to constitute just that: a search for weapons and drugs, not an open invitation to remove all of the contents from one’s wallet. Accordingly, the denial of the juvenile’s motion to suppress was reversed and the trial court was directed to vacate the disposition order. <http://www.4dca.org/opinions/June%202011/06-08-11/4D10-2278.op.pdf> (June 8, 2011).

Fifth District Court of Appeal

L.G. v. State, ___ So. 3d ___, 2011 WL 2581785 (Fla. 5th DCA 2011). **ORDER OF PROBATION WAS AFFIRMED AND REMANDED FOR CLARIFICATION.** The juvenile appealed the trial court’s order incorporating the Department of Juvenile Justice’s community based treatment plan into his probation for lewd and lascivious conduct. The Fifth District Court of Appeal found no reversible error and affirmed. However, the Fifth District remanded for the entry of an order clarifying where the juvenile was to live. The juvenile was required to follow both the psychosexual evaluation recommendations and the community based treatment plan as conditions of his probation. The psychosexual evaluation provided that he remain in the residence of his mother’s cousin, but the community based treatment plan provided that he live with his mother. Accordingly, clarification of the court’s ruling was required. The order was affirmed and remanded for clarification.

<http://www.5dca.org/Opinions/Opin2011/062711/5D10-3854.op.pdf> (July 1, 2011).

K.L.T. v. State, ___ So. 3d ___, 2011 WL 2493700 (Fla. 5th DCA 2011). **THE FIFTH DISTRICT HELD THAT THERE WAS NO PROVISION IN THE JUVENILE RULES OR STATUTES FOR TOLLING JUVENILE PROBATION.** The juvenile sought habeas corpus relief, asserting that his commitment to a high-risk program took place after his probation expired; therefore, the trial court lacked jurisdiction to violate his probation and recommit him. Habeas relief was immediately granted and this opinion followed. The Fifth District Court of Appeal found that prior to the end of the juvenile’s probationary sentence, an affidavit of violation was filed and a warrant issued. The juvenile was not arrested on the violation until after his probationary period would have ended. The Fifth District held that there was no provision in the juvenile rules or statutes for tolling probation, unlike in adult cases. This, coupled with s. 949.01, F.S. (2010), which states that “[n]othing in chapters 947–949 [adult probation and parole statutes] shall be construed to change or modify the law respecting parole and probation as administered by [a] circuit court exercising jurisdiction,” supported the juvenile’s argument that the trial court lacked jurisdiction to violate the juvenile’s juvenile probation and order further commitment. Accordingly, the trial court had no jurisdiction to conduct a violation of probation hearing after the juvenile’s probationary term had expired. Thus, habeas corpus relief was proper and the petition was granted.

<http://www.5dca.org/Opinions/Opin2011/062011/5D11-987.op.pdf> (June 24, 2011).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

A.H. v. Department of Children and Families, ___ So. 3d ____, 36 Fla. L. Weekly D1246, 2011 WL 2279021 (Fla. 1st DCA 2011). **TERMINATION OF PARENTAL RIGHTS REMANDED FOR AN AMENDED JUDGMENT.**

The First District Court of Appeal reversed a portion of an order terminating parental rights based on the misapplication of section 39.806(1)(d)2, F.S. (2010). The child, A.P., had lived with her parents in Oregon before moving to Florida to live with her maternal grandmother, who died one month later, prompting the Department's involvement. After A.P. disclosed sexual abuse by her father, the Department filed an expedited petition for termination of the father's parental rights. At the hearing, the Department argued for termination because the father met the Oregon qualifications to be classified a sexual predator. The final judgment of termination did find that the father was a sexual predator under section 39.086(1)(d)2, F.S. (2010). On appeal, the court agreed with the father that this determination was erroneous. The appellate court analyzed the text of section 39.806(1)(d)2 and reviewed relevant caselaw, and concluded that the designation of sexual predator must be made by a criminal court during sentencing. No Oregon court had done so and the trial court in the termination of parental rights hearing lacked the authority to make such a designation. However, the appellate court acknowledged other legally sufficient grounds to terminate the father's rights and therefore did not reverse termination of the father's rights. The case was remanded for an amended judgment.

<http://opinions.1dca.org/written/opinions2011/06-10-2011/11-1466.pdf> (June 10, 2011).

Second District Court of Appeal

S.M. v. Department of Children and Family Services, ___ So. 3d ____, 36 Fla. L. Weekly D1370, 2011 WL 2507055 (Fla. 2nd DCA 2011). **CERTIORARI GRANTED.**

The Second District Court of Appeal granted a petition for a writ of certiorari to vacate a nonfinal order in which the trial court had suspended the father's supervised visitation. Because the Department conceded that the trial court had departed from the essential requirements of the law, the appellate court vacated the trial court's order and remanded the case for further proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2024,%202011/2D11-2511.pdf (June 24, 2011).

Third District Court of Appeal

D.M. v. Department of Children & Family Services and Guardian ad litem Program, ___ So. 3d ____, 36 Fla. L. Weekly D1283, 2011 WL 2506044 (Fla. 3rd DCA 2011).

DEPENDENCY ADJUDICATION AFFIRMED; CASE REMANDED FOR CORRECTED ORDER.

The Third District Court of Appeal, without comment, affirmed an adjudication of dependency on an appeal by the mother. However, the appellate court remanded the case for a corrected order. The trial court used the correct law and made sufficient findings regarding both the physical harm to the adjudicated child's half-sister by the mother, and the half-sister's adjudication of dependency. However, the mother's consent regarding the half-sister had been for physical abuse whereas the trial court had referred to neglect. Therefore, the appellate court affirmed the order and remanded the case to the trial court for correction.
<http://www.3dca.flcourts.org/Opinions/3D11-0037.pdf> (June 15, 2011).

Fourth District Court of Appeal

L.K. v. Department of Children and Families, ___ So. 3d ____, 36 Fla. L. Weekly D1251, 2011 WL 2334877 (Fla. 4th DCA 2011). **TERMINATION OF PARENTAL RIGHTS REVERSED.**

The Fourth District Court of Appeal reversed an order terminating a mother's parental rights. The child was sheltered in June, 2009, and the mother was granted weekly visitation. After attending only 2-3 visits, the mother was arrested for narcotics in September, 2009. While incarcerated, the mother consented to dependency. A case plan was accepted and the mother was given several tasks to complete. The mother sent the child cards through the grandfather while she was incarcerated. She attempted to call the Department but was unable to do so because she could only call collect. The mother received updates from the grandfather, including photographs and information on the child. In April, 2010, the Department sought termination of the mother's parental rights, alleging only abandonment as a ground. The mother argued that she had complied with her case plan but the court focused on the attempts at communication with the child. The trial court terminated the mother's parental rights, finding that the mother had failed to make a sufficient effort to establish a relationship with the child. On appeal, the court reviewed the section 39.01(1), F.S. (2010), regarding abandonment, and noted it has two requirements: 1) the parent must have been able to support the child; and 2) the parent failed to establish a relationship with the child. The appellate court also reviewed pertinent caselaw and concluded that the trial court should have considered the mother's attempts at compliance. Although the mother did not make contact with the child, she demonstrated the intent to visit and receive photographs, information, and updates. The court also noted that the mother may have made efforts at compliance with the case plan, and that the trial court's refusal to permit the mother to present her evidence was erroneous. The appellate court therefore reversed termination of parental rights and remanded the case for additional testimony on the mother's attempts to comply with the case plan.

<http://www.4dca.org/opinions/June%202011/06-15-11/4D10-5124.op.pdf> (June 15, 2011).

J.C. v. K.K., ___ So. 3d ____, 36 Fla. L. Weekly D1340, 2011 WL 2462854 (Fla. 4th DCA 2011).

DENIAL OF TERMINATION OF PARENTAL RIGHTS REVERSED DUE TO FAILURE OF TRIAL TO DETERMINE MANIFEST BEST INTERESTS.

The Fourth District Court of Appeal reversed a denial of the termination of the father's parental rights in a case that was appealed by the Department, the GAL, and the child. The child was born in December, 2008, after his mother had tested positive for drugs while pregnant with him. After he tested negative for drugs at birth, the Department filed a dependency petition but

the child was left by the court with his mother, who was living with her parents. The Department sheltered the child in March, 2009, due to the mother's continuous substance abuse and non-compliance. The father was given supervised visitation. After mediation, the father agreed to case plan tasks of: a) individual and parental counseling; b) a substance abuse evaluation; c) the completion of 10 consecutive negative drug screens; d) supervised visitation; e) a paternity test; f) a demonstration of stable income; g) child support payments; h) a refrain from any violations of law; i) maintained, stable housing; and j) maintained contact with the Department. In addition, the father was required to meet with the case manager at least monthly and notify the Department of changes in phone number or address. The goals of the case plan were reunification/adoption with a goal date of December 4, 2009. The child was adjudicated dependent based on the father's consent. The father failed to complete his case plan and ceased contact with the child after April, 2009. The father also failed to contact the case manager, and the Department could not locate the father. The Department filed a termination of parental rights petition in November, 2009. In April, 2010, the father contacted the Department to seek visitation. Although the father failed to complete his case plan or contact the Department, he had attended drug counseling and parenting classes on his own. At the termination of parental rights hearing, the trial court found that the mother had abandoned the child and that the father had likewise abandoned the child from May, 2009, to April, 2010. The father had also failed to complete his case plan. However, the court only made manifest best interests findings as to the mother. The trial court concluded that termination of the father's rights was not the least restrictive means for protecting the child, given the father's successes. The trial court readjudicated the child and ordered the father to be given a new reunification case plan. On appeal, the court noted the requirements of proving grounds for termination and manifest best interests, as well as that termination were the least restrictive means of protecting the child. The appellate court held that the trial court failed to conduct the statutory analysis of the father as it had for the mother and indeed reviewed the manifest best interest factors itself. The appellate court acknowledged that the analysis was not for an appellate court to conduct in the first instance. Furthermore, the court held that the least restrictive means test was met, with the father's efforts being "too little too late." As a result, the trial court was not supported by competent substantial evidence. Thus, the appellate court reversed the trial court's judgment and remanded the case for further proceedings and permitting the trial court to take additional testimony.

<http://www.4dca.org/opinions/June%202011/06-22-11/4D11-6op.pdf> (June 22, 2011).

Fifth District Court of Appeal

R.L. v. Department of Children and Families, ___ So. 3d ___, 36 Fla. L. Weekly D1359, 2011 WL 2493657 (Fla. 5th DCA 2011). [FATHER'S TERMINATION OF PARENTAL RIGHTS REVERSED.](#)

In a consolidated appeal, the Fifth District Court of Appeal affirmed the termination of a mother's rights to her two children without comment, but reversed termination of the rights of the father of one of the children. Termination of parental rights requires: 1) a statutory ground from Chapter 39; 2) that termination is in the best interest of the child; and 3) that termination

is the least restrictive means of protecting the child; as well as clear and convincing evidence. On appeal, the court noted that the Department appeared to be unaware that the father, J.G., paid support for, and had contact with, his child. J.G. was never offered a case plan and the appellate court opined that reestablishing a parent-child bond may have been unnecessary because the child seemed to react positively to J.G. during visitation. Applying precedent, the appellate court held that the evidence failed to show either that the father was not amenable to remedying deficiencies through services or that visitation was harmful to the child. The appellate court also held that the findings that termination was the least restrictive means of protecting the child and regarding manifest best interest based on § 39.806(1)(b), F.S. (2010), were not supported by substantial competent evidence. The best interest finding was clearly erroneous as to J.G.'s child. The appellate court therefore reversed the order and judgment as to J.G. and remanded the case for further proceedings.

<http://www.5dca.org/Opinions/Opin2011/062011/5D10-1294.op.pdf> (June 22, 2011).

R.L.F. v. Department of Children and Families, ___ So. 3d ___, 36 Fla. L. Weekly D1284, 2011 WL 2416019 (Fla. 5th DCA 2011). **PETITION FOR WRIT OF MANDAMUS DENIED.**

The Fifth District Court of Appeal denied a stepfather's petition for a writ of mandamus to direct the trial court to conduct dependency proceedings, treat the stepfather as a party, and provide him with access to confidential information. The appellate court noted that the record demonstrated that the trial court was already conducting dependency proceedings and treating the stepfather, R.L.F., as a party, rendering the petition moot except as to access to confidential information. The appellate court concluded that the stepfather failed to establish a clear legal right to the information and therefore denied the petition. The appellate court noted the case's factual and procedural history, in both the Florida and Oklahoma courts, as well as the fact that the stepfather had filed a petition for dependency. Although the first two issues were moot, the stepfather was nonetheless denied access to investigative reports from the Department, with the trial court ruling that the stepfather lacked standing to obtain the reports because he was not a parent. On appeal, the court noted that neither § 39.0132(3) nor § 39.202(1), F.S. (2010), include a stepparent as a person entitled to access to records. Thus, R.L.F. had no clear legal right to access to the Department's confidential records. The appellate court therefore denied the mandamus petition.

<http://www.5dca.org/Opinions/Opin2011/061311/5D11-444.op.pdf> (June 17, 2011).

Dissolution Case Law

Florida Supreme Court

In Re: Implementation of Committee on Privacy and Court Records Recommendations—Amendments to the Florida Rules of Civil Procedure; The Florida Rules of Judicial Administration; The Florida Rules of Criminal Procedure; The Florida Probate Rules; The Florida Small Claims Rules; The Florida Rules of Appellate Procedure; and The Florida Family Law Rules of Procedure, ___ So. 3d ___, 2011 WL 2566360, (Fla. 2011).

NUMEROUS REVISIONS TO RULES AND FORMS TO MINIMIZE THE AMOUNT OF UNNECESSARY PERSONAL INFORMATION USED IN COURT-FILED DOCUMENTS.

Numerous revisions were made to the above rules and to the associated forms in an attempt to “minimize the amount of unnecessary personal information included in documents filed with the courts.” The amendments to the rules and forms, which implement recommendations of the Committee on Privacy and Court Records and which were submitted by various committees, will take effect October 1, 2011. There is a 60-day period from the date the opinion issued to submit comments.

<http://www.floridasupremecourt.org/decisions/2011/sc08-2443.pdf> (June 30, 2011).

In Re: Amendments to the Florida Family Law Rules of Procedure, ___ So. 3d ___, (Fla. 2011).

INSTRUCTIONS TO FLORIDA FAMILY LAW RULES OF PROCEDURE FORM 12.996(a) AMENDED IN RESPONSE TO COMMENTS BY DEPARTMENT OF REVENUE.

Upon consideration of comments submitted by Department of Revenue (DOR) regarding Florida Family Law Rules of Procedure Form 12.996(a), adopted September 23, 2010, to implement 2010 legislative amendments, the Court amended the instructions to the form to clarify that orders for immediate income deduction must be paid through the State Disbursement Unit. No other amendments were made to the form.

<http://www.floridasupremecourt.org/decisions/2011/sc10-1468.pdf> (June 16, 2011.)

Crawford v. Barker, ___ So. 3d ___, 2011 WL 2224808 (Fla. 2011).

ABSENT A MARITAL SETTLEMENT AGREEMENT EITHER PROVIDING WHO RECEIVES THE DEATH BENEFITS OR SPECIFYING THE BENEFICIARY, TRIAL COURT SHOULD LOOK TO THE NAMED BENEFICIARY OF A POLICY; AN OWNER SPOUSE MAY CHANGE THE BENEFICIARY AFTER DISSOLUTION OF MARRIAGE; HOWEVER, IF NO CHANGE IS MADE, THE DESIGNATION IN THE SEPARATE DOCUMENT CONTROLS; NAMING A BENEFICIARY OR SPECIFYING THAT A SPOUSE NOT RECEIVE DEATH BENEFITS NEED NOT USE “MAGIC WORDS” BUT MUST BE CLEAR AND UNAMBIGUOUS.

On conflict cert, the Supreme Court considered whether language in a marital settlement agreement (MSA), referring to a beneficiary-designated policy, plan, or account, without stating who receives death benefits or specifying the beneficiary, “trumps” the designation beneficiary made prior to dissolution. The Court held that, absent an MSA either providing who is to receive the death benefits or specifying the beneficiary, the trial court should look to the named beneficiary of the policy; general language in an MSA regarding who is to receive ownership of the policy is not specific enough to override the designation of beneficiary in a separate document. A spouse who is the owner of the policy following dissolution is free to change the beneficiary; however, if no change is made, the designation in the separate document controls. Stating that “magic words are not required,” the Court held that if parties to an MSA want to specify either a particular beneficiary, or that a spouse not receive the death benefits, “this should be done clearly and unambiguously.” (Dissent by Justice Lewis; Justice Perry concurring.)

<http://www.floridasupremecourt.org/decisions/2011/sc09-1969.pdf> (June 9, 2011).

First District Court of Appeal

Nilsen v. Nilsen, __ So. 3d __, 2011 WL 2201181 (Fla. 1st DCA 2011).

TRIAL COURT'S SUPPORT AWARD MUST DIFFERENTIATE BETWEEN CHILD SUPPORT AND ALIMONY; ITS FAILURE TO DO SO LEAVES APPELLATE COURT UNABLE TO DETERMINE WHETHER CHILD SUPPORT GUIDELINES WERE CORRECTLY APPLIED; TRIAL COURT MUST CALCULATE WHAT GUIDELINE AMOUNT IS BEFORE DETERMINING THAT IT IS UNJUST OR INAPPROPRIATE.

Former husband appealed a non-final order establishing temporary alimony and child support. The trial court acknowledged that it had not allocated its support award between alimony and child support. Concluding that the trial court had failed to state the amount it was ordering for child support and had failed to calculate former husband's income as required, the appellate court held that a support award which fails to differentiate between child support and alimony is improper because it leaves the appellate court unable to determine whether the guidelines were correctly applied. Although a trial court may ultimately determine that the guideline amount is either unjust or inappropriate, it must first calculate what that amount is; that determination begins with a calculation of the parties' incomes. The appellate court reversed on the guidelines issue; however, it affirmed the trial court's finding that former husband had the ability to pay the total amount of support ordered, as the record reflected substantial capital assets. It noted that, as a general rule, a trial court may consider capital assets when determining a spouse's ability to pay alimony and concluded in this case that former husband had not preserved that issue for appeal.

<http://opinions.1dca.org/written/opinions2011/06-08-2011/11-0610.pdf> (June 8, 2011).

Second District Court of Appeal

Fuesy v. Fuesy, __ So. 3d __, 2011 WL 2279023 (Fla. 2d DCA 2011).

TRIAL COURT MUST CONSIDER SPOUSE'S CONTRIBUTION TO VOLUNTARY RETIREMENT ACCOUNT IN DETERMINING INCOME FOR CHILD SUPPORT.

Former husband appealed a trial court order which adopted the magistrate's recommendation for modification of support. Due to the trial court's failure to consider former wife's contributions to a voluntary retirement account when determining her income for child support purposes, the appellate court reversed and remanded for recalculation of child support.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2010,%202011/2D09-3788.pdf (June 10, 2010).

Bachman v. McLinn, __ So. 3d __, 2011 WL 2278998 (Fla. 2d DCA 2011).

TRIAL COURT ERRED IN APPLYING 2008 AMENDMENTS TO S. 61.13 TO A 2005 MARITAL SETTLEMENT AGREEMENT AND IN ALLOWING SPOUSE TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE DURING FINAL HEARING OVER OBJECTION; AMENDMENTS DURING HEARING TO CONFORM WITH THE EVIDENCE CANNOT PREJUDICE THE OPPOSING PARTY.

Former wife appealed an order granting former husband's petition for modification but denying her counterpetition; the appellate court reversed. The appellate court held the trial court erred in applying 2008 amendments to s. 61.13, F.S. (2010), to a marital settlement agreement

incorporated into the final judgment of the dissolution of marriage in 2005. It also held that the trial court erred in allowing former husband to amend his pleadings to conform to the evidence during the final hearing over former wife's objection, thus depriving her of an opportunity to prepare for the case presented as opposed to the one pleaded. Amendments to conform with the evidence cannot prejudice the opposing party.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2010,%202011/2D10-2325.pdf (June 10, 2011).

Horton v. Horton, __So. 3d__, 2011 WL 2278993 (Fla. 2d DCA 2011).

INCORRECT NUMERATOR IN TRIAL COURT'S COVERTURE FRACTION; TRIAL COURT ERRED IN CARVING OUT NONMARITAL INTEREST IN MARITAL HOME WHEN ALL FUNDS USED TO PURCHASE IT WERE COMMINGLED WITH MARITAL FUNDS; TRIAL COURT ABUSED DISCRETION IN LIMITING SPOUSE'S REHABILITATIVE ALIMONY TO TUITION; LIVING EXPENSES SHOULD HAVE BEEN INCLUDED.

Both parties appealed the final judgment of dissolution of marriage, arguing that the trial court incorrectly calculated both the marital portion of former husband's retirement account and his nonmarital interest in a home owned by the parties. Concluding that the trial court had used an incorrect coverture fraction in calculating the marital portion of the retirement account, the appellate court reversed and remanded. It instructed the trial court to employ a different numerator when recalculating. The appellate court concluded that the trial court erred in carving out a nonmarital interest for former husband in the home because the funds used to purchase it were commingled with marital funds. The appellate court reversed the credit awarded to former husband of equity in the home due to the trial court's failure to justify the unequal distribution; it remanded for equitable distribution. The appellate court held that the trial court had abused its discretion in limiting the rehabilitative alimony award to former wife to her educational expenses; accordingly, it reversed the denial of rehabilitative alimony for her living expenses.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2010,%202011/2D10-2814.pdf (June 10, 2011).

Third District Court of Appeal

Diaz v. Diaz, __So. 3d__, 2011 WL 25557000 (Fla. 3d DCA 2011).

SECTION 61.1301(1)(a) AUTHORIZES AN INCOME DEDUCTION ORDER (IDO) TO COLLECT FEES INCURRED AS A RESULT OF SECURING AND COLLECTING CHILD SUPPORT AND/OR ALIMONY; NOT ALL FEES CAN BE FOLDED INTO AN IDO.

The appellate court interpreted s. 61.1301(1) (a), F.S. (2010), as authorizing an income deduction order to collect attorney's fees incurred as a result of securing and collecting child support and/or alimony; it emphasized that did not mean that any time an action was brought to secure and collect alimony or child support, all fees could be folded into the income deduction order. <http://www.3dca.flcourts.org/Opinions/3D09-2854.pdf> (June 29, 2011).

Orta v. Suarez, __So. 3d__, 2011 WL 2555427 (Fla. 3d DCA 2011).

PARTY SEEKING RELOCATION CARRIES BURDEN OF DEMONSTRATING THAT IT IS IN CHILD'S BEST INTEREST.

Former wife appealed the denial of her petition to relocate to California with the parties' minor child. Although the parties lived in Miami following their marriage, they had always agreed to move to California, the only state where former wife, a Venezuelan educated dentist, could practice without having to re-attend dental school. The trial court found clear and convincing evidence that the former spouses had agreed to move to California and that former husband had reneged when former wife learned that she was pregnant. Reiterating that the parent seeking relocation carries the burden of demonstrating that relocation is in the child's best interest, the appellate court concluded that the trial court's findings of fact demonstrated that former wife "more than satisfied that burden," while former husband had failed to show by a preponderance of the evidence that the proposed relocation was not in the child's best interest. The appellate court found the trial court's denial of relocation inconsistent with its determinations and reversed.

<http://www.3dca.flcourts.org/Opinions/3D10-1675.pdf> (June 29, 2011).

Fourth District Court of Appeal

Glanz v. Glanz, __So. 3d__, 2011 WL 2555424 (Fla. 4th DCA 2011).

LIS PENDENS REQUIRES TITLEHOLDER OF SUBJECT PROPERTY BE MADE A PARTY TO THE PROCEEDINGS.

Former husband sought a writ of certiorari to review an order permitting former wife to file a notice of lis pendens against his office condo when he failed to pay sums due by the final judgment of dissolution. The condo was owned by a separate corporation. Citing its opinion in Marbin v. Cohen, 789 So. 2d 1193 (Fla. 4th DCA 2001), the appellate court held that without the titleholder of the subject property being made a party to the proceedings, there was no legal basis for lis pendens. Accordingly, it granted his petition and discharged the lis pendens.

<http://www.4dca.org/opinions/June%202011/06-29-11/4D11-499.op.pdf> (June 29, 2011).

Smith v. Smith, __So. 3d__, 2011 WL 2555686 (Fla. 4th DCA 2011).

TRIAL COURT'S ORDER COMPELLING DISCLOSURE OF COMMUNICATIONS PROTECTED BY STATUTORY PSYCHOTHERAPIST-PATIENT PRIVILEGE DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW; CERTIORARI GRANTED.

Former wife sought a writ of certiorari after the trial court permitted former husband to obtain her mental health records. Finding that the trial court had departed from the essential requirements of law by entering an order compelling disclosure of communications protected by the statutory psychotherapist-patient privilege and that certiorari was the appropriate way to request review, the appellate court quashed the order that former wife was unable to assert the privilege, and granted her petition for an evidentiary hearing on the question of whether she had placed her mental health at issue so as to abrogate the privilege. If the trial court concluded that her privilege had been waived, it should review her records in camera before releasing them in their entirety to former husband. If the finding were that she did not put her mental health at issue and there was no waiver, then the trial court should consider ordering an independent psychological evaluation. The appellate court cautioned trial courts not to rely on

unsworn statements by attorneys as the basis for making factual determinations; sworn testimony must be provided by witnesses.

<http://www.4dca.org/opinions/June%202011/06-29-11/4D11-354.op.pdf> (June 29, 2011).

Cissel v. Cissel, __So. 3d__, 2011 WL 2462652 (Fla. 4th DCA 2011).

NET RATHER THAN GROSS EARNINGS MUST BE USED IN DETERMINING INCOME; TRIAL COURT SHOULDN'T RELY ON MARITAL STANDARD OF LIVING WHEN CONSIDERING SECTION 61.08 FACTORS IF PARTIES LIVED BEYOND THEIR MEANS.

Following an appeal by both spouses to the final judgment of dissolution of a twenty-two year marriage, the appellate court reversed and remanded because the trial court's findings could not be sustained. Former husband's income was based on gross earnings rather than net, and the trial court incorrectly relied on a marital standard of living in which the parties lived beyond their means when considering the factors enumerated in s. 61.08, F.S. (2010).

<http://www.4dca.org/opinions/June%202011/06-22-11/4D09-3029.op.pdf> (June 22, 2011).

Lustgarten v. Lustgarten, __So. 3d__, 2011 WL 2462688 (Fla. 4th DCA 2011).

REQUIREMENT THAT MEDICAL EXPENSES FOR WHICH PAYMENT IS SOUGHT BE REASONABLE AND NECESSARY IS IMPLICIT; WHERE SPOUSE HAS GOOD FAITH BASIS TO QUESTION EXPENSE, HE/SHE CANNOT BE HELD IN CONTEMPT; FAILURE TO PAY REASONABLE EXPENSES WHEN ORDERED IS GROUNDS FOR CONTEMPT.

Former husband appealed a trial court order finding him in contempt for willfully failing to pay the cost of former wife's liver transplant, arguing that the transplant was not "reasonable and necessary" and that his actions were not willful. The original settlement agreement between the parties had provided that former husband would pay former wife's medical insurance coverage and all reasonable and necessary expenses not covered by insurance as long as his alimony obligation existed; pursuant to an amendment to the agreement, former husband would be responsible for all uncovered expenses incurred under the care of a medical professional accepting Medicare assignment. The trial court reasoned that the deletion of "reasonable and necessary" constituted a waiver by former husband to require that all uncovered expenses be reasonable and necessary. After stating that its review was based on a standard of abuse of discretion, the appellate court agreed with former husband that former wife had to prove the transplant was reasonable and necessary and that he had not waived that requirement. It held that it is implicit within a final judgment of dissolution that medical expenses for which payment is sought must be reasonable and necessary; otherwise, a former spouse would be required for the other's unreasonable and unnecessary medical expenses which would be unjust. The appellate court held that, under the circumstances, former husband had a good faith basis to question the transplant; however, it concluded that the trial court's error was harmless due to former wife's demonstration that the transplant was reasonable and necessary. Accordingly, it remanded for vacation of the contempt order and entry of an order requiring former husband to reimburse former wife for the transplant; if he failed to comply, she could file a new motion for contempt.

<http://www.4dca.org/opinions/June%202011/06-22-11/4D09-4404.op.pdf> (June 22, 2011).

Robinson v. Robinson, __So. 3d__, 2011 WL 2462698 (Fla. 4th DCA 2011).

AWARD OF ATTORNEY'S FEES REQUIRES NEED FOR AND ABILITY TO PAY.

Former husband appealed the final judgment of dissolution of marriage on numerous grounds; the appellate court reversed on the award of fees to former wife. Stating that the “touchstone” for award of attorney’s fees is need and ability to pay, the appellate court affirmed the trial court’s finding that former husband had the ability to pay, but found former wife had failed to demonstrate need.

<http://www.4dca.org/opinions/June%202011/06-22-11/4D09-4808.op.pdf> (June 22, 2011).

Mudafort v. Lee, __ So. 3d __, 2011 WL 2200782 (Fla. 4th DCA 2011).

IMPUTATION OF INCOME REQUIRES COMPETENT, SUBSTANTIAL EVIDENCE.

Former wife appealed the amended final judgment of dissolution of marriage; the appellate court agreed that the trial court erred in imputing income to her for child support purposes. Before reaching that issue, the appellate court noted that the 2008 legislative amendments to chapter 61, Florida Statutes, make it clear that there is no presumption for or against either parent or for or against any specific time-sharing schedule; therefore, it is no longer necessary for trial courts to consider any of the factors set forth in Mancuso v. Mancuso, 789 So. 3d 1249 (Fla. 4th DCA 2001). On the issue of imputation on income, the appellate court reiterated that the standard of review is whether the trial court’s determination is supported by competent, substantial evidence. Referring to the two-prong analysis to properly impute income to a party, the appellate court concluded that the trial court erred in finding that former wife was underemployed; accordingly, it remanded to the trial court with instructions to determine her actual income without any imputation. <http://www.4dca.org/opinions/June%202011/06-08-11/4D10-1766.op.pdf> (June 8, 2011).

Konz v. Konz, __ So. 3d __, 2011 WL 2135555 (Fla. 4th DCA 2011).

NO EVIDENCE THAT NONMARITAL ASSETS WERE USED TO BUILD SECOND MARITAL HOME ON SITE OF FIRST ONE OR TO PAY OFF MORTGAGE ON FIRST; BURDEN OF PROOF ON SPOUSE SEEKING NONMARITAL PORTION TO ESTABLISH VALUE; TRIAL COURT MUST EQUITABLY DISTRIBUTE ASSETS AND LIABILITIES.

Former husband argued that the trial court erred in failing to award him a portion of the value of a second marital home built on the same lot as the first after the first was torn down. The first home was owned by former husband at the time of the marriage. There was no evidence that nonmarital assets were used to build the second home or pay off the mortgage on the first. The appellate court held that the burden of proof was on former husband to establish the value of any nonmarital portion of the marital home; here, that was not done. The appellate court agreed with former husband that the trial court failed to sufficiently identify and equitably distribute certain marital assets and liabilities and that its valuation of a house owned by third parties, which had former husband’s name on the warranty deed, was not supported by competent, substantial evidence.

<http://www.4dca.org/opinions/June%202011/06-01-11/4D09-4454.op.pdf> (June 1, 2011).

Sarpel v. Eflanli, __ So. 3d __, 2011 WL 2135575 (Fla. 4th DCA 2011).

FLORIDA IS HOME STATE, IF EITHER CHILDREN HAVE BEEN LIVING THERE FOR 6 CONSECUTIVE MONTHS BEFORE FILING OF PETITION FOR DISSOLUTION OF MARRIAGE, OR IT QUALIFIED AS HOME STATE AT ANY TIME DURING 6 MONTHS BEFORE FILING OF PETITION.

Former wife appealed a custody determination emanating from a final judgment of dissolution of marriage, plus subsequent orders in favor of former husband, which required that she dismiss custody proceedings she had initiated in Turkey. In response to former wife's argument that the trial court lacked subject matter jurisdiction because Florida was not the children's home state, the appellate court stated that the home state, which it referred to as the "touchstone for a court's jurisdiction to make an initial custody determination," is defined as the state where a child lives with a parent or a person acting as a parent for at least six consecutive months immediately prior to commencement of custody proceedings; a temporary absence can be part of this six-month period. It held that in this case, there were two ways for Florida to have qualified as the home state: one, the children must have been living in Florida for six consecutive months before the date of filing of the petition for dissolution; the other, if Florida qualified as the children's home state at any point during the six-month period preceding the filing. Noting that courts have struggled with the apparent conflict between the two, the appellate court held that s. 61.514(1)(a), F.S. (2010), permits the exercise of home state jurisdiction if, at any time during the six months preceding the filing of the custody proceeding, Florida qualified as the child's home state. The appellate court affirmed the trial court's conclusion that it had jurisdiction.

<http://www.4dca.org/opinions/June%202011/06-01-11/4D09-4828.op.pdf> (June 1, 2011).

Fifth District Court of Appeal

Morris v. Morris, ___ So. 3d ___, 2011 WL 2268737 (Fla. 5th DCA 2011).

AWARD OF FEES AND COSTS TO ONE SPOUSE SHOULD BE SET OFF AGAINST AMOUNT OWED BY THAT SPOUSE TO THE OTHER DUE TO OVERPAYMENT.

This was a short opinion in which the appellate court agreed with former husband that the award of fees and costs to former wife should have been set off against the amount that she owed him based on his overpayment of alimony.

<http://www.5dca.org/Opinions/Opin2011/060611/5D10-672.op.pdf> (June 6, 2011).

Domestic Violence Case Law

Florida Supreme Court

In Re: Implementation of Committee on Privacy and Court Records Recommendations – Amendments to the Florida Rules of Civil Procedure; The Florida Rules of Judicial Administration; The Florida Rules of Criminal Procedure; The Florida Probate Rules; The Florida Small Claims Rules; The Florida Rules of Appellate Procedure; and The Florida Family Law Rules of Procedure, --- So. 3d ----, 2011 WL 2566387 (Fla. 2011). **FORMS AMENDED**. The family law rules of procedure forms were amended to conform with the amendments to the family law rules. Additionally, the instructions to several of the rules forms and approved forms were

amended to conform to s. 119.071(2)(j)(1), F.S. (2010), which was enacted to protect the confidentiality of victims of domestic violence, sexual battery, aggravated child abuse, aggravated stalking, and aggravated battery.

<http://www.floridasupremecourt.org/decisions/2011/sc08-2443.pdf> (June 30, 2011).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Parrish v. Price, --- So. 3d ----, 2011 WL 2278990 (Fla. 2d DCA 2011). **EX PARTE TEMPORARY INJUNCTIONS UPHELD**. The respondent appealed two temporary injunctions against domestic violence entered against him ex parte; the petitions were filed by his former wife on behalf of the parties' two adolescent children. At the hearing, the respondent moved to dissolve the temporary injunctions, arguing that the petitioner's petitions contained insufficient allegations and were based on hearsay. The court denied his motion and proceeded with the hearing. The petitioner presented her case and rested, but by then the scheduled hearing time had been consumed. The court extended the temporary injunctions until further order and scheduled another hearing for two weeks hence in order for the respondent to present his case. Before the date of the scheduled hearing, however, the respondent elected to appeal the non-final temporary injunctions pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B).

The court held that the petitioner was authorized to petition for the injunctions on behalf of the children. Section 741.30, F.S. (2010) clearly contemplates that children are among those who may invoke the statute's protection from domestic violence, and Florida Rule of Civil Procedure 1.210(b), applicable to all civil cases, provides that a minor cannot sue on his or her own behalf. Rather, suit must be instituted by an appointed representative or a "next friend," such as a parent. Thus, a child's only vehicle for seeking protection under the domestic violence statute is through a petition filed by a next friend or representative. The court also held that the allegations were sufficient to support the temporary injunctions; however, the court offered no opinion on whether permanent injunctions were warranted. The petitions were based almost entirely on hearsay statements the children supposedly made to the petitioner. At the renewed hearing on the permanent injunctions, the court may consider taking testimony from one or both of the children in order to assess the accuracy of the allegations and to determine whether the respondent engaged in violence against his children.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2010,%202011/2D10-3484.pdf (June 10, 2011).

C.K. v. B.B., --- So. 3d ----, 2011 WL 2496670 (Fla. 2d DCA 2011). **INJUNCTION REVERSED**. The mother challenged the trial court's final judgment of injunction for protection against domestic violence entered against her and in favor of the father, who filed on behalf of the parties' eight-year-old daughter. At the hearing on the petition, the father presented no evidence regarding the boyfriend's drug use, verbal abuse, or drug dealing. Although the father alleged that the child was in danger because of drug use by the mother's boyfriend and the mother's neglect, the father presented no evidence regarding the boyfriend's drug use, verbal abuse, or drug

dealing at the hearing, and likewise no evidence of the mother failing to supervise the child. There was some evidence that the mother's behavior was erratic, but the mother's behavior did not provide the reasonable cause necessary to believe that the child was in imminent danger of becoming a victim of domestic violence. Because the record did not establish that the child was the victim of domestic violence or was in imminent danger of becoming a victim of domestic violence at the hands of the mother, the appellate court reversed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2024,%202011/2D10-5175.pdf (June 24, 2011).

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

State v. Shaikh, --- So. 3d ----, 2011 WL 2162051 (Fla. 5th DCA 2011). **MOTION FOR POST CONVICTION RELIEF REVERSED.** The State sought reversal of an order granting the motion of the appellee for post-conviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure. The appellee's motion, his third, was based on the opinion of the United States Supreme Court in *Padilla v. Kentucky*, --- U.S. ----, 130 S. Ct. 1473 (2010), concerning the consequences of inadequate legal advice in connection with the risk of deportation at the time of the entry of a plea. The trial court found that his nolo contendere plea to violation of a domestic violence injunction was involuntary because of the purportedly erroneous advice given to him by his attorney. However, the appellee's plea was entered on October 29, 2007, well before *Padilla* was handed down, and the appellate court held that *Padilla* should not be applied retroactively. Since the appellee was not entitled to relief on his claim, the appellate court reversed the order granting post-conviction relief and remanded the case to the trial court to reinstate the judgment and sentence.

<http://www.5dca.org/Opinions/Opin2011/053011/5D10-2515.op.pdf> (June 3, 2011).