

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

**Table of Contents**

<b>Delinquency Case Law</b> .....	2
Florida Supreme Court.....	2
First District Court of Appeal .....	2
Second District Court of Appeal.....	3
Third District Court of Appeal.....	3
Fourth District Court of Appeal .....	6
Fifth District Court of Appeal.....	7
<b>Dependency Case Law</b> .....	7
Florida Supreme Court.....	7
First District Court of Appeal .....	7
Second District Court of Appeal.....	8
Third District Court of Appeal.....	9
Fourth District Court of Appeal .....	9
Fifth District Court of Appeal.....	9
<b>Dissolution Case Law</b> .....	10
Florida Supreme Court.....	10
First District Court of Appeal .....	10
Second District Court of Appeal.....	10
Third District Court of Appeal.....	12
Fourth District Court of Appeal .....	12
Fifth District Court of Appeal.....	12
<b>Domestic Violence Case Law</b> .....	13
Florida Supreme Court.....	13
First District Court of Appeal .....	13
Second District Court of Appeal.....	13
Third District Court of Appeal.....	14
Fourth District Court of Appeal .....	14
Fifth District Court of Appeal.....	14

## Delinquency Case Law

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

In Re: Amendments To The Florida Rules Of Civil Procedure - Management Of Cases Involving Complex Litigation, ---So.3d---2009 WL 1473978 (Fla. 2009). [RULES OF COURT AMENDED](#) The opinion disposes of the recommendations of the Task Force on the Management of Cases Involving Complex Litigation, which had recommended amendments to the rules of court procedure. Due to concerns raised by the Family Rules Committee and several judges, the court adopted Family Law Rule 12.201 which excludes family law cases from Rule 1.201 (the complex litigation rule). Similarly, the court amended Family Law Rule 12.100 to exempt family law cases from the civil rule requirement that parties must file a final disposition form with the clerk if the action is settled without a court order or judgment being entered or if the action is dismissed by the parties. Finally, the court adopted Family Law Form 12.928, which is a family law cover sheet. Among other things, the form requires the plaintiff or petitioner to identify all related cases to promote implementation of the goals of the unified family court. The new cover sheet becomes effective January 1, 2010. The court directed that the new rules/forms be published in the Florida Bar News so that comments could be filed within 60 days of the opinion. <http://www.floridasupremecourt.org/decisions/2009/sc08-1141.pdf> (May 28, 2009).

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

J.D.D. v. State, \_\_ So.3d \_\_, 2009 WL 1425216 (Fla. 1<sup>st</sup> DCA 2009). [TRIAL COURT PROHIBITED FROM REVOKING OR ENHANCING PROBATION WITHOUT FIRST DETERMINING THE PROBATIONEE VIOLATED PROBATION](#) The juvenile pled guilty to two counts of lewd and lascivious molestation and one count of lewd and lascivious exhibition. The juvenile was sentenced to probation and released to his mother's custody pending placement with a more adequate caregiver. The juvenile was subsequently placed with a caregiver. Shortly thereafter, the trial court determined that the caregiver was unable to satisfactorily supervise the juvenile. The trial court entered a modified Disposition Order that adjudicated the juvenile delinquent, revoked probation, and resented him to commitment in a high-risk residential program followed by a post-commitment probation. The trial court did not conduct a violation of probation hearing prior to issuing the modified Disposition Order. The First District Court of Appeal found that due process and the protection from double jeopardy prohibited the trial court from revoking or enhancing probation without first determining the probationee violated probation. The First District held that the trial court committed fundamental error by revoking the juvenile's probation and resentencing him without determining he violated the terms of his probation. The trial court's order was reversed and remanded for further proceedings consistent with this opinion.

<http://opinions.1dca.org/written/opinions2009/04-03-2009/08-5093.pdf> (May 22, 2009).

D.F. v. Housel, \_\_ So.3d \_\_, 2009 WL 1424659 (Fla. 1<sup>st</sup> DCA 2009). [SECURE DETENTION FOR DOMESTIC VIOLENCE IN EXCESS OF 48 HOURS, SPECIFICALLY REQUIRES WRITTEN FINDINGS PURSUANT TO S. 985.255\(2\), F.S. \(2008\)](#) The juvenile petitioned for a writ of habeas corpus.

The juvenile argued that the circuit court ordered secure detention without sufficient written findings. The juvenile was arrested on a charge of assault with intent to do violence when, in the presence of law enforcement, he threatened to punch his grandmother in the mouth. The juvenile scored only one point on his Risk Assessment Instrument (RAI), but because his offense was one of domestic violence, he was ordered held in secure detention for twenty-one days at his initial detention hearing pursuant to s. 985.255(2), F.S. (2008). At the hearing, his grandmother, who is his custodial guardian, testified to a specific fear that he would hurt either her or a member of her household if he were released home, and that there was no available respite care. At a review hearing the trial court heard evidence and made oral findings of fact that the victim still had a legitimate fear of additional violence if the child were released back home, and, despite the evidence of possible respite care presented by the child, that no legitimate respite care was available. The First District Court of Appeal found that the trial court's oral findings were supported by competent substantial evidence. However, s. 985.255(2), F.S. (2008) specifically requires written findings. A child may not be held in secure detention under this subsection for more than 48 hours unless ordered by the court. After 48 hours, the court shall hold a hearing if the state attorney or victim requests that secure detention be continued. The child may continue to be held in detention care if the court makes a specific, written finding that detention care is necessary to protect the victim from injury. However, the child may not be held in detention care beyond the time limits set forth in this section or s. 985.26. The State did not dispute that there were no written findings. The First District granted the petition and directed the trial court to either enter a written order in accordance with the statute, or order the juvenile's release from secure detention by 5:00 p.m. on the second business day following the date of issuance of this opinion. Please refer to Westlaw.com for the actual case. Westlaw has this case listed as a 1<sup>st</sup> DCA case, but it appears to a 4<sup>th</sup> DCA case. (May 22, 2009).

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

No new opinions for this reporting period.

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

[L.B. v. State, \\_\\_ So.3d \\_\\_, 2009 WL 1456997 \(Fla. 3d DCA 2009\). DENIAL OF MOTION TO AMEND WITNESS LIST AFFIRMED BECAUSE THE ISSUE WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW AND THE DEFENSE FAILED TO PROFFER WHAT THE EXCLUDED TESTIMONY WOULD HAVE BEEN](#) The juvenile appealed the finding of delinquency for misdemeanor battery after the trial court denied her motion to amend the witness list to add the juvenile's stepfather. After the adjudicatory hearing commenced, defense counsel had invoked the rule of sequestration, and both sides gave their opening statement, the stepfather, who was sitting in the courtroom, announced that he was there when the incident happened. Defense counsel asked to amend the witness list to include the stepfather. Defense counsel was asked whether the stepfather was essential to the defense. Defense counsel responded that "he has information to the defense that corroborates the other defense witnesses." The trial court ruled that the Rule had been invoked and the stepfather had heard the opening statements. Defense counsel replied, "Okay, Your Honor." The Third District Court of Appeal found that the issue was not properly preserved for appellate review. To preserve an issue for appeal, the

litigant must make a timely objection and state a legal ground for that objection. Further, the defense failed to proffer what the excluded testimony would have been. Finally, the Third District rejected the argument that the denial of the motion constituted fundamental error. Therefore, the trial court's finding was affirmed. <http://www.3dca.flcourts.org/Opinions/3D08-1130.pdf> (May 27, 2009).

S.R. v. State, \_\_ So.3d \_\_, 2009 WL 1457006 (Fla. 3d DCA 2009). **THE STATE FAILED TO REBUT THE JUVENILE'S PRIMA FACIE CASE OF SELF-DEFENSE** The juvenile appealed the trial court's denial of her motion for judgment of acquittal arguing that the State failed to rebut her prima facie case of self-defense. The juvenile was charged with battery stemming from an incident with her stepfather. The stepfather came home and the juvenile was arguing with her mother. The stepfather and the juvenile started arguing and yelling at each other. The juvenile was in the hall, the only way to get to the apartment's front door. The stepfather stood between the juvenile and the door. At some point, the juvenile pushed the stepfather out of the way. The stepfather called the police and the juvenile was charged with battery. The juvenile asserted self-defense. The juvenile's motion for acquittal was denied and the juvenile was adjudicated for battery. The Third District Court of Appeal found that once evidence of self-defense is presented, the State must prove beyond a reasonable doubt that the actions were not taken in self-defense to uphold the conviction. Here, the State emphasized that the juvenile purposefully pushed the stepfather. However, this is insufficient to rebut the self-defense claim. Self-defense does not focus on whether the act was purposeful. It focuses on whether the act was done to defend against the imminent use of force against oneself. In the instant case, the testimony showed that the juvenile was aware of prior violent acts by the stepfather. By physically blocking her in the hallway, he made it reasonable for the juvenile to feel threatened, and not unreasonable for her to want to escape the situation by exiting the apartment. The juvenile did not use unreasonable force, in view of the situation. The stepfather was considerably larger than the juvenile. The juvenile's testimony was unimpeached that she reasonably believed this conduct was necessary to defend against the stepfather's capability to strike her. The State did not rebut this claim by any evidence. Other than making room for herself to escape the situation, by pushing the stepfather, the juvenile had no means to withdraw from the situation. The State did not prove beyond a reasonable doubt that the juvenile did not act in self-defense. The motion for judgment of acquittal should have been granted. Accordingly, the adjudication was reversed and remanded with instructions to discharge the juvenile. <http://www.3dca.flcourts.org/Opinions/3D08-1482.pdf> (May 27, 2009).

K.W. v. State, \_\_ So.3d \_\_, 2009 WL 1393347 (Fla. 3d DCA 2009). **OFFENSE LEVEL REDUCED FROM FIRST DEGREE PETIT THEFT TO SECOND DEGREE PETIT THEFT BECAUSE STATE FAILED TO ESTABLISH THAT THE MARKET VALUE OF THE STOLEN PROPERTY EXCEEDED \$100** The juvenile appealed the finding of first degree petit theft. While swimming, a bag was stolen from the victims. The victim saw and approached four juveniles who were rifling through the stolen bag. When the group saw the victim, they scattered. The victim caught the juvenile, who had possession of the victim's girlfriend's cell phone. The trial court found that the State failed to establish that the cell phone's value exceeded \$300, but that there was sufficient evidence to conclude that the cell phone was worth in excess of \$100. The Third District Court of Appeal

noted that to establish first degree petit theft, the State was required to prove that the stolen property's value exceeded \$100. Generally value means fair market value at the time of the theft. Where a witness has personal knowledge regarding the stolen property, the value of the property may be established by direct testimony of its fair market value, or alternatively, by establishing the cost minus depreciation, taking into account the stolen property's original cost, the manner in which it was used, its condition and quality, and the percentage by which its value has depreciated. In the instant case, the victim, not the girlfriend, testified about the phone in question. Despite the victim's inability to testify as to the cell phone's value, the trial court determined that the cell phone's value exceeded \$100, based on the victim's testimony and the trial court's own life experiences. The Third District recognized that pursuant to s. 812.012(10) (b), F.S. (2007), even where the value of the stolen property cannot be ascertained, "the trier of fact may find the value to be not less than a certain amount." However, such a discretionary assessment of value is permissible only in those rare cases where the minimum value of an item of property is so obvious as to defy contradiction. The Third District held that this is not such a case and concluded that the trial court erred in finding that the value of the girlfriend's cell phone exceeded \$100. Accordingly, the Third District remanded with instructions to reduce the level of the offense to petit theft in the second degree. <http://www.3dca.flcourts.org/Opinions/3D08-2473.pdf> (May 20, 2009).

S.D. v. State, \_\_ So.3d \_\_, 2009 WL 1211799 (Fla. 3d DCA 2009). **OFF-DUTY POLICE OFFICER PROVIDING SECURITY WAS ENGAGED IN THE LAWFUL PERFORMANCE OF HIS DUTIES** The trial court found that the juvenile committed battery on a law enforcement officer and resisting an officer with violence. The juvenile appealed the denial of her motion for judgment of dismissal. The juvenile argued that the officer was not engaged in the lawful performance of a legal police duty at the time he restrained her. The officer was off-duty and was providing security at an indoor flea market. The officer was wearing his "B" Miami-Dade police officer uniform at the time of the incident. The juvenile was fighting with two other females at the indoor flea market. The officer broke up the fight, escorted the juvenile out of the store, and told her to leave. The juvenile attempted to reenter the store to resume fighting. The juvenile pushed past the officer, prompting him to restrain her. The juvenile then started kicking and punching the officer, who arrested the juvenile. The Third District Court of Appeal found that a police officer can be engaged in the lawful performance of his duties when working an off-duty job. In the instant case, breaking up a fight and separating the combatants was the lawful performance of a legal duty. Likewise, escorting the juvenile off the premises, and preventing her from returning, was also part of that legal duty. The juvenile battered and resisted the officer while performing those legal duties. Therefore, the motion for a judgment of dismissal was properly denied. Decision affirmed. <http://www.3dca.flcourts.org/Opinions/3D08-1256.pdf> (May 6, 2009).

L.P. v. State, \_\_ So.3d \_\_, 2009 WL 1211813 (Fla. 3d DCA 2009). **OFFICER LACKED PROBABLE CAUSE TO SEIZE JUVENILE FOR A CURFEW VIOLATION** The juvenile was adjudicated for possession of cannabis. The juvenile volunteered that he had marijuana after being seized for a curfew violation. The juvenile was a passenger in a vehicle stopped for speeding at 2:00am. The police officer asked the juvenile his age. The juvenile replied he was fifteen years old. Based upon the juvenile's response, the officer determined that the juvenile violated a local curfew

ordinance. The officer ordered the juvenile out of the car. As the officer approached him, the juvenile stated that he had marijuana in his pocket. At the adjudicatory hearing, the juvenile moved to suppress the statement and the evidence arguing that they were the fruits of an unconstitutional seizure. The motion was denied. The juvenile argued that the seizure was unlawful because the officer failed to ascertain the juvenile's reason for being in public after curfew hours and therefore, did not have reasonable grounds to believe that the juvenile had violated the curfew ordinance. The Fourth District Court of Appeal agreed and found that the curfew ordinance contained twelve exceptions. The officer seized the juvenile without determining whether any exception applied. The Fourth District held that without such inquiry by the officer, there could be no probable cause that the juvenile violated the curfew ordinance. Thus, the seizure was unlawful. The Fourth District then examined the facts to determine whether the statement and evidence obtained after the unlawful arrest should be excluded. The Fourth District held that the statement and evidence should be excluded. Accordingly, the trial court's adjudication was reversed and remanded with instructions to proceed without the incriminating statement or the physical evidence.  
<http://www.3dca.flcourts.org/Opinions/3D08-1484.pdf> (May 6, 2009).

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

R.E. v. State, \_\_ So.3d \_\_, 2009 WL 1393391 (Fla. 4th DCA 2009). **THE EVIDENCE FAILED TO SHOW SPECIFIC INTENT TO CAUSE DAMAGE TO THE PROPERTY OF ANOTHER WHICH IS NECESSARY TO SUPPORT CHARGE OF CRIMINAL MISCHIEF** The juvenile was charged with felony criminal mischief. The trial court denied the juvenile's motion for a judgment of dismissal. At the adjudicatory hearing, a co-defendant testified that he, the juvenile, and another person drove to the area to hog hunt. They did not have permission to go onto the property. After they finished hunting, they wanted to leave by a different route so they would not get caught. However, a fruit loader was blocking the road. The co-defendant started up the fruit loader and attempted to move it out of the way, but the gas pedal got stuck. The co-defendant knocked over some trees in order to prevent the machine from going into a ditch. The co-defendant testified that he was the only one operating the fruit loader. The Fourth District Court of Appeal found that the State did not present any evidence to show that the juvenile had the conscious intent for the co-defendant to drive the fruit loader into the trees. The evidence showed that the juvenile's intent was for the co-defendant to move the fruit loader out of the way. This act, by itself, was not criminal mischief because it was not done with the specific intent to cause damage to the property of another. It was only after the co-defendant started the fruit loader and it malfunctioned that the co-defendant decided to run it into the trees. Therefore, the evidence did not support a conviction for criminal mischief. Thus, the juvenile's conviction and sentence on the criminal mischief charge was reversed.  
<http://www.4dca.org/opinions/May2009/05-20-09/4D08-2099.op.pdf> (May 20, 2009).

D.A. v. State, \_\_ So.3d \_\_, 2009 WL 1311064 (Fla. 4th DCA 2009). **COSTS OF PROSECUTION PURSUANT TO SECTION 938.27(1), F.S. DO NOT APPLY TO JUVENILES ADJUDICATED DELINQUENT** The Fourth District Court of Appeal found that s. 983.27(1), F.S. (2007) provided for the imposition of costs of prosecution in all criminal cases against the convicted person. Section 985.35(6), F.S. (2007) provided that except as the term "conviction" is used in chapter

322, and except for use in a subsequent proceeding under this chapter, an adjudication of delinquency shall not be deemed a conviction; nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication. Therefore, a juvenile who has been adjudicated delinquent has not been “convicted,” and is not a “criminal.” Thus, s. 983.27(1), F.S. (2007), which expressly applied to all “convicted persons” in “criminal cases”, does not apply to a juvenile who has been adjudicated delinquent. Accordingly, the order imposing costs of prosecution on the juvenile was reversed. <http://www.4dca.org/opinions/May2009/05-13-09/4D08-2029.op.pdf> (May 13, 2009).

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

No new opinions for this reporting period.

## **Dependency Case Law**

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

In Re: Amendments To The Florida Rules Of Civil Procedure - Management Of Cases Involving Complex Litigation, ---So.3d---2009 WL 1473978 (Fla. 2009). **RULES OF COURT AMENDED** The opinion disposes of the recommendations of the Task Force on the Management of Cases Involving Complex Litigation, which had recommended amendments to the rules of court procedure. Due to concerns raised by the Family Rules Committee and several judges, the court adopted Family Law Rule 12.201 which excludes family law cases from Rule 1.201 (the complex litigation rule). Similarly, the court amended Family Law Rule 12.100 to exempt family law cases from the civil rule requirement that parties must file a final disposition form with the clerk if the action is settled without a court order or judgment being entered or if the action is dismissed by the parties. Finally, the court adopted Family Law Form 12.928, which is a family law cover sheet. Among other things, the form requires the plaintiff or petitioner to identify all related cases to promote implementation of the goals of the unified family court. The new cover sheet becomes effective January 1, 2010. The court directed that the new rules/forms be published in the Florida Bar News so that comments could be filed within 60 days of the opinion. <http://www.floridasupremecourt.org/decisions/2009/sc08-1141.pdf> (May 28, 2009).

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

Department of Children and Families v. In the interest of C.W., ---So.3d---, 2009 WL 1425981, (Fla. 1<sup>st</sup> DCA 2009). **PERMANENT PLACEMENT OF A CHILD WITH A FIT AND WILLING RELATIVE AFFIRMED** DCF appealed the trial court's order denying a petition to terminate the parental rights of the mother and placing the child permanently with a grandmother under §39.6231. The court found that it was in the best interests of the child to be placed with the grandmother since the child had a strong relationship with her. The grandmother was unable to qualify as an adoptive placement because of a previous felony conviction. The appellate court found that the trial court's order was based on competent substantial evidence in the record and that there was no basis for reversal. <http://opinions.1dca.org/written/opinions2009/05-22-2009/09-0025.pdf> (May 22, 2009).

D. H. v. Department of Children and Families, ---So.3d ----, 2009 WL 1383344, (Fla. 1<sup>st</sup> DCA 2009). **TERMINATION OF PARENTAL RIGHTS REVERSED** The mother appealed the termination of her parental rights claiming that the trial court erred as a matter of law by denying her motion to disqualify the judge and the appellate court agreed and reversed. The trial judge denied the motion but made statements on the record that constituted grounds for the judge's disqualification on the case. Judges may not address the factual assertions being made in such a motion. They may only determine whether the motion is legally sufficient to make a claim. <http://opinions.1dca.org/written/opinions2009/05-19-2009/08-3082.pdf> (May 19, 2009).

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

N.T. v. Department of Children and Family Services and Guardian Ad Litem Services, --- So.3d -- 2009 WL 1491719 (Fla. 2d DCA 2009). **PERMANENT PLACEMENT REVERSED** The mother appealed the trial court's order granting permanent placement of her daughter to the maternal grandparents and terminating the supervision of the Department of Children and Family Services. Both, the Department and the Guardian Ad Litem (GAL), have conceded that the trial court's use of the best interest standard when determining this placement was erroneous, and the appellate court reversed the decision. Section 39.521(3)(b), Florida Statutes (2008), specifically requires that the child be placed with the non-offending parent "unless the court finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child." The appellate court stated that the child had never been adjudicated dependent as to the Mother and reversed and remanded the case for the trial court to hold a hearing to determine whether placement with the Mother would endanger the health, safety, or well-being of the child. The Court noted that prior to the hearing, the court should first determine whether it even has jurisdiction to determine permanent placement of the child in light of the dependency determination as to the child's father or whether the court's previous dismissal of the last petition for dependency, filed only as to the Mother, would preclude such a determination pursuant to §39.521(1), Florida Statutes. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2029,%202009/2D08-2555.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2029,%202009/2D08-2555.pdf) (May 29, 2009)

A.M. v. Department of Children and Family Services, --- So.3d ----, 2009 WL 1491721 (Fla. 2d DCA 2009). **DEPENDENCY ADJUDICATION REVERSED** The Father challenged the trial court's order adjudicating his child dependent. The Department correctly conceded error because the only evidence presented to support the adjudication of dependency as to the Father was inadmissible hearsay. As such, the evidence presented at trial was insufficient, and the appellate court reversed. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2029,%202009/2D08-6133.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2029,%202009/2D08-6133.pdf) (May 29, 2009).

C.J. v. Department of Children and Families, ---So.3d ----, 2009 WL 1260109 (Fla. 2d DCA 2009). **DEPENDENCY ADJUDICATION AFFIRMED** A mother appealed the trial court's order adjudicating her daughter dependent. The appellate court affirmed the order; however, the court also noted that the Department's actions in the case clearly violated the spirit, as well as the letter,

of the dependency statute. The child was held under a shelter order for more than seven months, rather than the maximum four months provided for by section 39.402, Florida Statutes. In addition to these long delays, the record also showed that while the child was sheltered, the Department actively worked at cross-purposes with the Mother. In fact, testimony regarding the Department's behavior established that the Department was in an adversarial relationship with the Mother, in violation of section 39.001(1)(b)(2), which states that the Department "should engage families in constructive, supportive, and non-adversarial relationships." The trial court's finding, however, that there was a substantial risk of imminent harm to the child was supported by competent, substantial evidence.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2008,%202009/2D08-793.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2008,%202009/2D08-793.pdf) (May 8, 2009).

J.P. v. Department of Children and Families, ---So.3d ----, 2009 WL 1262393 (Fla. 2d DCA 2009). **MATERNAL GRANDMOTHER NOT A PARTY TO DEPENDENCY ACTION** The Father petitioned the court for a writ of certiorari to review the circuit court order that granted the maternal grandmother's motion to intervene as a party. Because a grandparent cannot intervene as a party in a dependency proceeding, the appellate court quashed the circuit court's order that granted the petition. The plain language of the statute does not include grandparents within the definition of a party.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2008,%202009/2D08-5486.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2008,%202009/2D08-5486.pdf) (May 8, 2009).

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

V.D.T. v. Department of Children and Families, ---So.3d----, 2009 WL 1457040, (Fla. 3d DCA 2009). **TERMINATION OF PARENTAL RIGHTS AFFIRMED** The court affirmed the termination of parental rights as to the father because the decision was supported by substantial competent evidence on three other grounds. However, the court noted that the trial court should not have relied on §39.806(1)(d)2, Florida Statutes (2007), as a ground for termination of parental rights because the father was in a county jail, not a state or federal correctional institution, and therefore §39.806(1)(d)2 did not apply. <http://www.3dca.flcourts.org/Opinions/3D08-2443.pdf> (May 27, 2009).

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

No new opinions for this reporting period.

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

No new opinions for this reporting period.

## Dissolution Case Law

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

In Re: Amendments To The Florida Rules Of Civil Procedure - Management Of Cases Involving Complex Litigation, ---So.3d---2009 WL 1473978 (Fla. 2009). [RULES OF COURT AMENDED](#) The opinion disposes of the recommendations of the Task Force on the Management of Cases Involving Complex Litigation, which had recommended amendments to the rules of court procedure. Due to concerns raised by the Family Rules Committee and several judges, the court adopted Family Law Rule 12.201 which excludes family law cases from Rule 1.201 (the complex litigation rule). Similarly, the court amended Family Law Rule 12.100 to exempt family law cases from the civil rule requirement that parties must file a final disposition form with the clerk if the action is settled without a court order or judgment being entered or if the action is dismissed by the parties. Finally, the court adopted Family Law Form 12.928, which is a family law cover sheet. Among other things, the form requires the plaintiff or petitioner to identify all related cases to promote implementation of the goals of the unified family court. The new cover sheet becomes effective January 1, 2010. The court directed that the new rules/forms be published in the Florida Bar News so that comments could be filed within 60 days of the opinion. <http://www.floridasupremecourt.org/decisions/2009/sc08-1141.pdf> (May 28, 2009).

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

No new opinions for this reporting period.

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

Abnour v. Abnour, \_\_So. 3d\_\_, 2009 WL 1260163 (Fla. 2<sup>nd</sup> DCA, May 8, 2009).

[UNUSED ANNUAL LEAVE MAY REMAIN NON-MARITAL WHEN IT DOES NOT EXCEED AMOUNT ON ENTERING MARRIAGE; WHEN MARITAL FUNDS ARE USED TO REDUCE MORTGAGE, PAYDOWN IS MARITAL;](#)

[MONEY IS FUNGIBLE AND LOSES SEPARATE CHARACTER ONCE COMMINGLED IN ACCOUNT](#)

Former husband appealed final judgment of dissolution of marriage; appellate court found that the trial court had erred in its classification and valuation of some of the assets and accordingly, reversed and remanded. The appellate court found that the trial court had erred in its ruling regarding former husband's unused annual leave (AL) and sick leave (SL) and held that because the amount of former husband's AL at the time of separation did not exceed the amount on entering the marriage, that it should be set aside as his non-marital property. (The SL hours were found not to be a marital asset due to the absence of a provision for payment of unused SL for retiring civil servants.) The appellate court found the trial court's reasoning with regard to former husband's savings plan—that the entire appreciation of the plan during the marriage was marital property subject to equitable distribution—was correct, but concluded that the trial court had relied on incorrect numbers which necessitated recalculation. The appellate court also agreed with the trial court's reasoning that a home acquired by a spouse prior to marriage and titled in his or her name is a non-marital asset but that when marital funds are used to reduce the outstanding balance on the mortgage, the paydown is a marital asset; however, the appellate court found that the trial court had erred in its calculation of the

paydown by relying on a date prior to either the date of filing of the petition for dissolution or the date it determined former wife had moved out of the marital home. With regard to former husband's E\*Trade cash account, the appellate court reiterated that money is fungible and once commingled, loses its separate character; the fact that the account may be titled in one spouse's name does not ensure that it will be that spouse's non-marital property if both marital and non-marital funds are commingled in the account. Following a lengthy analysis of former husband's life insurance policy, the appellate court concluded that the trial court had erred in finding that the entire cash surrender value of former husband's life insurance policy was a marital asset.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2008,%202009/2D07-2319.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2008,%202009/2D07-2319.pdf) (May 8, 2009).

Figueruelo v. Figueruelo, \_\_ So. 3d \_\_, 2009 WL 1260325 (Fla. 2<sup>nd</sup> DCA, May 8, 2009).

**ERROR TO ORDER SPOUSE TO PAY FEES WITHOUT MAKING FINDINGS RE NEED AND ABILITY TO PAY** Appellate court found error in the trial court having ordered former husband to pay former wife's attorney fees without having made the requisite factual findings of need and ability to pay.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2008,%202009/2D07-5546.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2008,%202009/2D07-5546.pdf) (May 8, 2009).

Kaaa v. Kaaa, \_\_ So. 3d \_\_, 2009 WL 1260147 (Fla. 2<sup>nd</sup> DCA, May 8, 2009).

**CONFLICT CERTIFIED BETWEEN 1<sup>ST</sup> AND 2<sup>ND</sup> DCA ON TREATMENT OF PASSIVE APPRECIATION OF NON-MARITAL REAL PROPERTY WHEN MARITAL FUNDS ARE USED TO PAY DOWN MORTGAGE**

Former wife appealed the trial court's denial of her claim to a portion of the passive appreciation in former husband's non-marital real property, even though the outstanding balance on the mortgage was paid down with marital funds throughout the parties' 27 year marriage. Concluding that the trial court had correctly applied Mitchell v. Mitchell, 841 So. 2d 564 (Fla. 2<sup>nd</sup> DCA 2003), the appellate court certified conflict between its holding in Mitchell and that of the First District in Stevens v. Stevens, 651 So. 2d. 1306 (Fla. 1<sup>st</sup> DCA 1995), on the issue of treatment of passive appreciation of non-marital real property whose indebtedness is paid down with marital funds.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2008,%202009/2D08-276.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2008,%202009/2D08-276.pdf) (May 8, 2009).

Coyle v. Coyle, \_\_ So. 3d \_\_, 2009 WL 1260038 (Fla. 2<sup>nd</sup> DCA, May 8, 2009).

**NOT FOCUSING ON BEST INTEREST OF CHILD IN RELOCATION PROCEEDINGS IS ERROR**

Former husband appealed final judgment of dissolution of marriage allowing former wife to relocate from Florida to New York with their child; appellate court found that the trial court had erred in evaluating former wife's request to relocate as required by section 61.13001(7), Florida Statutes (2007); and accordingly, reversed. The appellate court also found that the trial court had erred in focusing on how relocation would improve the quality of life of former wife rather than the life of the child.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2008,%202009/2D08-2216.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2008,%202009/2D08-2216.pdf) (May 8, 2009).

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

No new opinions for this reporting period.

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

Rose v. Rose, \_\_ So.3d \_\_, 2009 WL 1212121 (Fla. 4<sup>th</sup> DCA, May 6, 2009).

**NO AMBIGUITY IN MARITAL SETTLEMENT AGREEMENT RE TERMINATION OF CHILD SUPPORT; SECTION 743.07(2), F.S. DOES NOT REQUIRE CONTINUED SUPPORT OF CHILD WHO REACHES MAJORITY AS SENIOR IN HIGH SCHOOL** Pursuant to the marital settlement agreement (MSA)

entered into by the parties and incorporated into the final judgment of dissolution of marriage, former husband agreed to pay child support for each minor child until the occurrence of the first of several specified events in the life of that child, one of which was reaching majority.

Prior to one daughter turning 18 while a senior in high school, former wife moved for modification to require former husband to continue paying support until her graduation. The trial court found that the daughter attaining majority in high school constituted a substantial change in circumstances not contemplated when the parties entered into the MSA; however, the appellate court found this reasoning to be erroneous and held that the MSA was not ambiguous. The parties had agreed that whichever of the five specified events in the life of each child happened first would terminate support and reaching majority was one of the five events. The appellate court also held that section 743.07(2), Florida Statutes, does not require a parent to continue to support a child who reaches majority in the last year of high school.

<http://www.4dca.org/opinions/May2009/05-06-09/4D08-582.op.pdf> (May 6, 2009).

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

Forster v. Forster, \_\_ So.3<sup>rd</sup> \_\_, 2009 WL 1159186 (Fla. 5<sup>th</sup> DCA, May 1, 2009).

**TRIAL COURT'S FAILURE TO MAKE FINDINGS PER SECTION 61.081(1), F.S. IS ERROR**

In dissolution case in which parties divorced, remarried, and divorced again three months later, former wife alleged that she had been induced by fraud to remarry so that former husband could avoid an alimony award entered after a default during the first dissolution proceeding.

The trial judge found fraud and elected to treat both marriages as a continuous one, which the appellate court held, was within his discretion; however, the appellate court found error when it appeared that the trial judge had simply reinstated the original alimony award without regard to the parties' financial positions at the time of trial in the second proceeding. The appellate court also held that the trial court's failure to make findings as required by section 61.081(1), Florida Statutes, regarding the net income of the parties, their standard of living during the marriage, former wife's need for and former husband's ability to pay alimony, constituted reversible error.

<http://www.5dca.org/Opinions/Opin2009/042709/5D07-3515.op.pdf> (May 1, 2009).

Hudson-McCann v. McCann, \_\_\_ So. 3<sup>rd</sup> \_\_\_, 2009 WL 1159188 (Fla.5<sup>th</sup> DCA, May 1, 2009)(NO. 5D07-3728)

**COMPETENT, SUBSTANTIAL EVIDENCE REQUIRED FOR AWARD OF PRIMARY RESIDENCE OF CHILD AND FOR IMPUTATION OF INCOME; TRIAL COURT MUST MAKE FINDINGS RE NEED AND ABILITY TO PAY FEES** Former wife appealed final judgment of dissolution on several grounds including: award of primary residence of the child to former husband; imputation of income; establishment of child support based on the imputed income; and payment by each party of his or her own attorney's fees and costs. Concluding that the trial court's finding that it was in the child's best interest for the father to be designated as primary residential parent was supported by competent, substantial evidence, the appellate court affirmed on that issue; however, it found the income imputed to former wife was not supported by competent, substantial evidence, and accordingly, reversed. This reversal resulted in remand of the child support issue for reconsideration and recalculation. The appellate court also found the trial court had erred in its failure to make findings regarding the comparative needs and abilities of each spouse to pay his or her attorney's fees and reversed on this ground as well.  
<http://www.5dca.org/Opinions/Opin2009/042709/5D07-3728.op.pdf> (May 1, 2009).

## **Domestic Violence Case Law**

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

In Re: Amendments To The Florida Rules Of Civil Procedure - Management Of Cases Involving Complex Litigation, **RULES OF COURT AMENDED** ---So.3d----, 2009 WL 1473978 (Fla. 2009). The opinion disposes of the recommendations of the Task Force on the Management of Cases Involving Complex Litigation, which had recommended amendments to the rules of court procedure. Due to concerns raised by the Family Rules Committee and several judges, the court adopted Family Law Rule 12.201 which excludes family law cases from Rule 1.201 (the complex litigation rule). Similarly, the court amended Family Law Rule 12.100 to exempt family law cases from the civil rule requirement that parties must file a final disposition form with the clerk if the action is settled without a court order or judgment being entered or if the action is dismissed by the parties. Finally, the court adopted Family Law Form 12.928, which is a family law cover sheet. Among other things, the form requires the plaintiff or petitioner to identify all related cases to promote implementation of the goals of the unified family court. The new cover sheet becomes effective January 1, 2010. The court directed that the new rules/forms be published in the Florida Bar News so that comments could be filed within 60 days of the opinion. <http://www.floridasupremecourt.org/decisions/2009/sc08-1141.pdf> (May 28, 2009).

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

No new opinions for this reporting period.

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

Tacy v. Sedlar, --- So.3d ----, 2009 WL 1260341 (Fla. 2d DCA 2009). **ORDER MODIFYING A FINAL JUDGEMENT OF INJUNCTION REVERSED** The respondent appealed an order modifying a final

judgment of injunction for protection against domestic violence that added the parties' teenaged daughter as a protected party and ordered the respondent to have no contact whatsoever with the child. The preexisting injunction did not include a determination concerning the parties' child and the petitioner did not seek to modify the final judgment of injunction for reasons related to her own protection. The appellate court reversed because the evidence was not sufficient to support the relief granted by the trial court. The petitioner established no conduct on the part of the respondent that demonstrated domestic violence as related to the parties' child. In fact, the petitioner testified that she was not scared of the respondent; she simply did not want him to have any involvement with the parties' child. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2009/May/May%2008,%202009/2D08-3101.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/May/May%2008,%202009/2D08-3101.pdf) (May 8, 2009).

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

Sagaro v. Diaz, --- So.3d ----, 2009 WL 1212069 (Fla. 3<sup>rd</sup> DCA 2009). **DENIAL OF INJUNCTION AFFIRMED** A father appealed an order denying his petition, on behalf of his minor daughters, for a permanent injunction for protection against domestic violence. The appellate court affirmed because the claims of evidentiary error were not properly preserved in the trial court and did not constitute fundamental error. <http://www.3dca.flcourts.org/Opinions/3D08-2593.pdf> (May 6, 2009).

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

D.F. v. Housel, --- So.3d ----, 2009 WL 1424659 (Fla. 4<sup>th</sup> DCA 2009). **MINOR'S DETENTION REQUIRES WRITTEN FINDING** A minor child petitioned the court for a writ of habeas corpus, seeking release from secure detention, after being arrested for an act of domestic violence. He scored only one point on his Risk Assessment Instrument (RAI), and did not meet detention criteria, but because his offense was one of domestic violence, he was ordered held in secure detention for twenty-one days. The appellate court granted the petition and directed the trial court to either enter a written order in accordance with §985.255(2), Florida Statutes, which requires written findings, or order the child's release from secure detention. Pursuant to the statute, written finding would have to state that respite care for the child was not available, or that it was necessary to place the child in secure detention in order to protect the victim from injury. Westlaw has this case listed as a 1<sup>st</sup> DCA case, but it appears to a 4<sup>th</sup> DCA case. (May 21, 2009).

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

No new opinions for this reporting period.