

## OSCA/OCI'S FAMILY COURT CASE LAW UPDATE

August 2007 to October 31, 2007

### DELINQUENCY CASE LAW

#### Florida Supreme Court

##### I. First District Court of Appeals

E.K.V. State of Florida, 63 So.2d 91 Fla. 1st DCA 2007). In juvenile proceedings, a child offering no testimony other than his or her own, is entitled to a concluding argument. The recent enactment of § 18.19, Florida Statutes (2006), governing the order of closing arguments applies only to adult criminal cases.  
<http://opinions.1dca.org/written/opinions2007/8-14-07/07-0950.pdf> (August 14, 2007)

K.E.V. Department of Juvenile Justice, 63 So.2d 64 Fla. 1st DCA 2007). K.E. petitioned for a writ of habeas corpus to challenge the validity of her detention, pending the outcome of a juvenile delinquency proceeding. The petition was granted and an order issued directing the Department of Juvenile Justice to release the child. The child in this case had a total score of two points, which is not enough to justify any form of detention without a written statement of clear and convincing reasons. She would have been eligible for detention based on the charge of domestic violence, but only if there had been a finding that secure detention was necessary to protect the victim. Neither order contained a finding that is sufficient to justify detention. Section 85.255 establishes the criteria for detaining a child, pending the outcome of a juvenile delinquency case. A decision to detain a child must be made according to the statutory criteria.”  
<http://opinions.1dca.org/written/opinions2007/8-14-07/07-2915.pdf> (August 14, 2007)

D.S.V. State of Florida, 63 So.2d 40 Fla. 1st DCA 2007). Per Curiam Affirmed. P.C.J. Browning wrote a concurring opinion which states in part, “I concur in the result, as it is based on binding precedent. However, I think the precedent that sanctions a minor’s waiver of his or her *Miranda* rights without the consent of the minor’s parents, legal guardian, or attorney is simply bad law and should be changed. It is a paradox to me that minors, who are unable to legally contract in the State of Florida, except in very limited situations, are authorized to waive their *Miranda* rights.”  
<http://opinions.1dca.org/written/opinions2007/8-21-07/07-0148.pdf> (August 21, 2007)

K.R.V. State of Florida, \_\_\_ So.2d \_\_\_, 2007 WL 2456327, 32 Fla. 1. Weekly 2095 Fla. 1st DCA 2007). Trial court erred by disregarding the recommendation of the Department of Juvenile Justice that Appellant remain on probation. Trial court must not only state its reasons for disregarding the recommended restrictiveness level on the record, the reasons must also be supported by a preponderance of the evidence and

must make reference to the characteristics of the restrictiveness level vis-a-vis the needs of the child. Reversed and remanded for a new disposition hearing. <http://opinions.1dca.org/written/opinions2007/8-31-07/06-5915.pdf> (August 31, 2007)

*L.B.V. State, 2 So.2d*, 2007 WL 2766728, 2 Fla. L. Weekly D2289 Fla. 1<sup>st</sup> DCA (2007). The District Court of Appeal held that the record did not support trial court's finding that juvenile was a "criminal street gang member" as defined by § 74.03(2), Florida Statutes, and thus trial court could not on that ground deviate from recommendation of Department of Juvenile Justice (Department) in disposition of juvenile. A trial court may not deviate from a recommendation of the Department at a juvenile delinquency disposition hearing simply because it disagrees with the recommendation. To deviate from a recommendation of the Department on the disposition of a juvenile, a trial court must identify adequate reasons, grounded in the evidence, for disregarding the recommendation. A trial court may reweigh the same factors the Department considered and come to a different conclusion, but when it does so, it must set forth its reasons in the context of the juvenile's needs. The trial court's findings must refer to the characteristics of the restrictiveness level vis-a-vis the needs of the juvenile, and the trial court must also explain why it reached a different conclusion than the Department and explain the justification for the new restrictiveness level. Section 85.23(2)(a), Florida Statutes (2005) provides that if the court determines that the child was a member of a criminal street gang at the time of the commission of the offense, the seriousness of the offense to the community shall be given great weight." Section 85.23(3)(b) provides that if the court has determined that the child was a member of a criminal street gang, that determination shall be given great weight in identifying the most appropriate restrictiveness level for the child. L.B. committed dealing in stolen property, petit theft, and both while on probation. The Department recommended probation, or low-risk residential placement. Instead, the trial court committed L.B. to a high-risk residential placement based on the trial court's finding that L.B. was a member of a criminal street gang pursuant to chapter 74, Florida Statutes. The juvenile denied current involvement with a street gang. The trial court's finding was based on its observation that L.B. had a tattoo that read "his face and the State's observation that juvenile's pants were eight inches below his drawers". The District Court held that the record did not support the trial court's finding and thus trial court could not on that ground deviate from recommendation of the Department. Nothing indicated that the juvenile resided in or frequented a particular gang's area and associated with known gang members, and pants alone would not show that juvenile adopted a gang's style of dress. See § 74.03(2)(d), Florida Statutes. Case reversed and remanded. <http://opinions.1dca.org/written/opinions2007/9-25-07/07-0818.pdf> (September 25, 2007)

*U.B.V. State, 2 So.2d*, 2007 WL 2890137, 2 Fla. L. Weekly D2400 Fla. 1<sup>st</sup> DCA (2007). Juvenile appealed from an order of restitution following adjudication of delinquency based on charges of burglary and petit theft. The District Court of Appeal found no abuse of discretion in the trial court's decision to order \$27,000 restitution for

the loss of stolen beer and gin, included in the charge of petit theft. However, the trial court erred as a matter of law in awarding restitution for the loss of stolen jewelry which was not mentioned in the charging document citing [Noland v. State, 734 So.2d 464 Fla. 5th DCA 1999](#). The restitution order was reversed and the case remanded with instructions to enter a corrected order of restitution which does not include values for the jewelry. <http://opinions.1dca.org/written/opinions2007/10-05-07/06-5646.pdf> (October 5, 2007)

J.R. v. State, 73 So.2d, 2007 WL 2982044 (Fla. 1<sup>st</sup> DCA 2007). Juvenile, appealed his adjudication of delinquency claiming that the trial court improperly denied his motion for continuance and that the evidence at trial was insufficient to support the trial court's findings of fact. Without reaching the first issue, the District Court reversed appellant's adjudication of delinquency because the evidence at trial was insufficient to support the trial court's findings of fact. Juvenile was originally charged with aggravated assault with a deadly weapon pursuant to § 84.021(1)(a), Florida Statutes (2006). It was alleged that he held a knife to his then-seventeen-year-old girlfriend's throat during a late-night quarrel in April 2007. The State amended the delinquency petition to charge appellant with improperly exhibiting a dangerous weapon pursuant to § 90.10, Florida Statutes (2006). At trial, the State's two eyewitnesses receded from their earlier statements to law enforcement and testified that although appellant wielded a knife during the episode, they could not recall the knife's appearance, characteristics, or dimensions. The victim also testified that appellant did not, as she first told police, hold the knife to her throat and that she was not afraid during the episode. This testimony led the State to drop the charge of aggravated assault. Investigators never found the knife. After a bench trial, the trial court found R. guilty of improper exhibition of a dangerous weapon and sentenced him to a moderate-risk residential program, with one year of probation to follow. The District Court of Appeal noted that whether a weapon is a "dangerous weapon" for the purpose of the improper exhibition statute constitutes a factual question which should be scrupulously reserved for the factfinder. In the instant case, the District Court found that no evidence described appellant's knife, other than testimony that it existed. The knife was never found, and neither of the State's eyewitnesses remembered anything about the knife's appearance, characteristics, or dimensions. Therefore, considered in the most favorable light to the State, the evidence failed to remove the knife from any of the statutory exceptions listed in the definition of "weapon" in § 90.001(13), Florida Statutes (2006) except that of a firearm. No evidence suggests nor infers that the knife in this case was not, in fact, a "plastic knife" or "blunt-bladed table knife," and no evidence provides a metric by which the trial court could have determined whether the knife was a "common pocket knife." Further, the Court observed that the victim testified that appellant did not hold the knife to her throat and the other witness testified that she could not see the knife during the argument and that if it was either on the neck or the arm. Thus, the District Court held that in the absence of a description of the knife and evidence sufficiently describing the manner in which the juvenile wielded it, the State presented no evidence by which the trial judge could possibly have found the knife constituted a "dangerous weapon" which

appellant exhibited in a rude, careless, angry, or threatening manner.” The adjudication of delinquency was reversed and D.R. was discharged.  
<http://opinions.1dca.org/written/opinions2007/10-15-07/07-3200.pdf> (October 15, 2007)

T.L.V. State, No. 2d, 2007 WL 144849 (Fla. 1st DCA 2007).

T.L., a juvenile, was convicted of the criminal offense of grand theft auto. T.L. appealed a restitution order requiring him to pay the owner of the vehicle for damages the vehicle sustained during the theft. The District Court citing B.V. State, No. 2d 808, 808 (Fla. 1st DCA 1994); Fla. R. Juv. P. 8.100 (2005) held that a juvenile is entitled to be present at a restitution hearing unless she waives that right. Because T.L. was not present at the hearing and there was no competent, substantial evidence on the record indicating that he waived his right to be present, the District Court reverse the restitution order and remand with directions that the trial court conduct a new restitution hearing.  
<http://opinions.1dca.org/written/opinions2007/10-30-07/07-1410.pdf> (Oct. 30, 2007)

## II. Second District Court of Appeals

D.B.A.V. State of Florida, No. 2d 406 (Fla. 2nd DCA 2007). Court erred in denying a dispositive motion to suppress. The Florida Stop and Frisk Law, § 901.151(5), Fla. Stat. (Fla. 2006), authorizes a limited search to disclose a dangerous weapon where an officer has probable cause to believe that the detainee is armed with a dangerous weapon. This limited search may not go beyond a patdown of the detainee’s outer clothing. The arresting deputy did not conduct a patdown search but placed his hand directly into the appellant’s pocket. Appellant’s adjudication of delinquency is reversed and remanded with directions that the defendant be discharged.  
<http://www.2dca.org/opinion/August%2010,%202007/2D06-4774.pdf> (August 10, 2007)

I.R.C.V. State of Florida, No. 2d, 2007 WL 2317176, 2 (Fla. 1st Weekly 1950 (Fla. 2nd DCA 2007)). I.R.C. argues that the trial court should have granted the motion to suppress because I.R.C.’s consent to the search “which revealed the cannabis was not voluntary” but was mere acquiescence to police authority. “We reject this argument and affirm the adjudication of delinquency.”  
<http://www.2dca.org/opinion/August%2015,%202007/2D06-777.pdf> (August 15, 2007)

A.S.P.V. State of Florida, No. 2d 211 (Fla. 2nd DCA 2007). Trial court erred in denying A.S.P.’s motion to suppress. The school security officer may have suspected that A.S.P. might be trespassing, however, the evidence did not establish probable cause to believe that A.S.P. had committed the crime of trespass upon school grounds. Although A.S.P. admitted that he was not a student in a direct response to a question from the school security officer, the officer immediately searched A.S.P. before ascertaining whether A.S.P. had any legitimate business on campus. Under these circumstances, we cannot say that probable cause existed to arrest A.S.P. or search him incident to arrest for trespassing on school grounds.

<http://www.2dca.org/opinion/August%2024,%202007/2D06-4279.pdf> (August 24, 2007)

E.A.B. v. State, 64 So.2d 77, Fla. 2<sup>nd</sup> DCA (2007). Juvenile was adjudicated delinquent for obstructing an officer without violence. Juvenile appealed. The District Court of Appeal, held that the police officer did not have a particularized and objective basis for suspecting juvenile was involved in criminal activity at the time he fled vehicle, and thus, juvenile could not be found delinquent on charge of obstructing an officer without violence. Section 43.02, Florida Statutes (2005) makes it a crime to "resist, obstruct, or oppose any officer... in the lawful execution of any legal duty." The issue was whether the police officer was engaged in the lawful execution of a legal duty when E.A.B. fled. The District Court citing D.M. v. State, 681 So.2d 97 Fla. 2<sup>nd</sup> DCA (1996), noted that in order to prove that a defendant is guilty of unlawfully obstructing an officer without violence, the state must establish that the defendant fled with knowledge of the officer's intent to detain him and the officer was justified in making the detention due to his founded suspicion that the defendant was engaged in criminal activity. The District Court concluded that E.A.B.'s delinquency adjudication could stand only if the police officer had a particularized and objective basis for suspecting that E.A.B. was involved in criminal activity. The State presented the testimony of the deputy involved. The deputy testified that on the day in question he responded to a particular intersection to investigate a stolen vehicle that had just occurred. The deputy described this as an area where, based on his experience, a lot of drugs are sold. When he arrived at the intersection, the deputy observed the driver of a truck sounding his horn, flashing his lights, and pointing to a Chevrolet Cavalier. The deputy testified that, to determine "whether they were involved," he activated his lights and siren to make a traffic stop but the Cavalier left the scene. The deputy followed and the Cavalier entered a trailer park and stopped at a dead end. As the deputy approached, he saw the driver and a passenger exit the car. The deputy verbally ordered them to stop, but both ran off. A short time later the passenger, E.A.B., was apprehended by another deputy. The District Court concluded that nothing in the scenario described by the deputy gave him an objective basis for suspecting E.A.B. of criminality. The failure of the car to stop when first directed to do so could not be attributed to E.A.B. because he was not driving it. E.A.B.'s flight from the scene at the trailer park also could not have given the deputy a well-founded, articulable suspicion that he was engaged in criminal activity. There was no evidence that the trailer park was a high crime or drug area. Although the incident began with the deputy's response to a report of a vehicle theft, the state offered no evidence to suggest that the Cavalier was the stolen vehicle, or even that the deputy believed it to be the stolen vehicle. As to the truck driver's actions, no basis for relating the truck driver's behavior to the stolen vehicle report or to any other possible criminality was offered. No evidence was presented regarding the truck driver's reliability or motives. The deputy did not state where the theft supposedly occurred and did not describe the intersection or surrounding area, the level of activity there, or even the time of day. The District Court found that at most, the state's evidence established that the deputy had a mere hunch that the Cavalier he encountered at the intersection

might be involved in some sort of criminal conduct. The deputy's testimony certainly never established that this defendant, as the passenger, knew or should have known that the car was stolen. Therefore, the deputy lacked a reasonable suspicion to believe that F. A. B. was engaged in criminal activity and the deputy was not lawfully executing a legal duty when he ordered F. A. B. to stop. Thus, F. A. B. could not be guilty of obstruction when he filed in defiance of the deputy's order. Adjudication reversed and case remanded for discharge. Warren H. Cobb, Associate Senior Judge, filed a dissenting opinion. <http://www.2dca.org/opinion/September%2026,%202007/2D06-3972.pdf> (September 26, 2007)

T.S.V. State, No. 2d, 2007 WL 3034832 (Fla. 2<sup>nd</sup> DCA 2007). T.S., a juvenile, punched a co-worker in the eye, causing serious injury. T.S. was adjudicated delinquent of aggravated battery following an adjudicatory hearing. On appeal, T.S. conceded that he committed felony battery and argued that the state's evidence was not sufficient to prove aggravated battery. T.S. asked that the adjudication be reversed and reduced to felony battery and that this disposition be adjusted accordingly. T.S. was employed as a dishwasher at a restaurant. The victim, a waitress, was annoyed that T.S. kept leaving his work area. Several times she tried unsuccessfully to have the manager tell T.S. to stop. She herself was also trying to get him to stay in his own work area. At one point T.S. picked up bowls as if to throw them at the victim. In response, she picked up a broom and moved as if to hit him. Instead, she put the broom down and then threw a plastic cup oficed tea at him. He responded by punching her once in the right eye. The ophthalmologist who treated the victim testified that she suffered a fracture of the right orbit (eye socket), requiring reparative surgery, and even after the surgery continued to suffer from double vision and an inability to raise her right eye in its socket. The District Court found that simple battery occurs when one either "[a]ctually and intentionally touches or strikes another person against the will of the other" or "[i]ntentionally causes bodily harm to another person." Section 784.03(1)(a), Florida Statutes (2005). The definition of felony battery recites the first prong of the battery definition and adds the element of causing great bodily harm, permanent disability, or permanent disfigurement. Section 784.041(1), Florida Statutes (2005). Finally, aggravated battery occurs when a person, in committing battery, intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement. Section 784.045(1)(a)(1), Florida Statutes (2005). The mens rea requirement makes aggravated battery a specific intent crime. Aggravated battery can thus be seen as simple battery plus intentionally or knowingly causing great bodily harm, etc., or as felony battery with the added element of intentionally or knowingly causing the great bodily harm, etc. The District Court concluded that the evidence presented at the adjudicatory hearing was sufficient to demonstrate felony battery. The issue is whether T.S., in committing the battery, intended to cause the enhanced level of harm or knew that this level of harm would be caused, such that the specific-intent element of aggravated battery was satisfied. Although there was no verbal argument before T.S. struck the victim, the evidence indicates that the punching of the victim was quick, almost reflexive response to having tea thrown in his face. Further, the state in its brief characterized

T.S.'s reaction was immediate. As such, there was no evidence based on which the court could find that T.S. intended to or knew that he would cause the extent of the injury that resulted. Also, the prosecutor explicitly argued the elements of the lesser offense even though she used the term "aggravated battery." The prosecutor failed to argue whether T.S. intentionally or knowingly caused the level of injury incurred, the specific intent element of aggravated battery. As a result of the lack of evidence demonstrating the specific intent of aggravated battery, the District Court held that the trial court should have adjudicated T.S. delinquent of the lesser offense of felony battery. The case was reversed and remanded for the trial court to reduce T.S.'s adjudication to one of felony battery. <http://www.2dca.org/opinion/October%2019,%202007/2D06-4859.pdf> (October 19, 2007)

A.L.V. State, 2007 WL 120411 (Fla. 2<sup>nd</sup> DCA 2007). Pursuant to [Florida Rule of Appellate Procedure 9.125\(a\)](#), the District Court certified that the final disposition order in this delinquency proceeding was an order of judgment requiring immediate resolution by the Florida Supreme Court. The unresolved issue was who must pay for transcription of digital recordings of juvenile court proceedings in order to complete the appellate record? A legal disagreement as to who is responsible exists between the Twelfth Judicial Circuit Digital Court Recording Office, the Twelfth Judicial Circuit Official Court Reporter, the Twelfth Circuit Court Administrator, and the public defenders of the Tenth and Twelfth Judicial Circuit. Some of A.L.'s proceedings were digitally recorded by Twelfth Judicial Circuit Digital Court Recording. When the assistant public defender representing A.L. filed supplemental designations to the court reporter requesting the transcription and filing of the adjudicatory hearing, the Twelfth Judicial Circuit Official Court Reporter responded by enclosing the CD of the proceedings with the caveat that the public defender is responsible for retaining the transcriptionist. The local court reporting plan requires the Twelfth Circuit Public Defender to deliver the CD provided by the Digital Court Recording Office to the transcriptionist and then provide the finished transcripts to the court and appellate counsel (in this case, the Tenth Circuit Public Defender). The Twelfth Circuit Public Defender maintains that the Twelfth Circuit has created Administrative Order 2006-6-2 to exclude the cost of preparation of written transcripts in juvenile appeals such as this. <http://www.2dca.org/opinion/October%2026,%202007/2D07-2547.pdf> (Oct. 26, 2007)

### III. Third District Court of Appeals

H.T. State, 2007 WL 3010143 (Fla. 3<sup>rd</sup> DCA 2007). H.T. appealed an order withholding adjudication of delinquency, placing him under probation and ordering the payment of recovery costs and attorney fees. H.T. was charged with burglary of an unoccupied structure and petty theft in connection with a break-in at the Middle School. H.T. made inculpatory statements to police both before and after receiving *Miranda* warnings. In his pre-*Miranda* statements, H.T. admitted that he and his companion had broken into the school, popped open a vending machine, and removed money. After receiving *Miranda* warnings, H.T. repeated these admissions, showed the officers where he and his companion entered the school, and pointed out the damaged vending

machine. The officers asserted, in sworn arrest affidavit, that all of H.T.'s pre-Miranda statements were made spontaneously." However, at trial, one of the officer's testimony contradicted this claim. The officer testified that after taking H.T. into custody, but before reading the Miranda warnings, the officer asked H.T. the following question: "What are you doing here?" H.T. responded, "Sorry man, you know, we broke into the school, we don't want to go to jail, and we will never do it again," thereby inculpating himself. This testimony sharply conflicted with the assertion in the sworn arrest affidavit that all of H.T.'s pre-Miranda statements were made spontaneously. Defense counsel objected pursuant to *Richardson v. State*, 246 So.2d 771 (Fla. 1971) arguing that the State had waited until trial to disclose that H.T.'s pre-Miranda statements were made in response to custodial interrogation, and that this late disclosure was a discovery violation. Without conducting a *Richardson* hearing, the trial court overruled the objection on the basis that the State had disclosed the fact that some of H.T.'s admissions were made prior to reading of the Miranda rights. The District Court held that this finding, however, completely misses the point of defense counsel's objection. While defense counsel was put on notice that his client had made statements pre-Miranda, defense counsel relied on the discovery provided by the State reflecting that the statements H.T. made prior to being advised of his Miranda rights were spontaneous. It was during trial that defense counsel learned that, contrary to the discovery he had been provided pre-trial, H.T.'s pre-Miranda statements had not been made spontaneously and were in fact provided as responses to questions posed by law enforcement. Based upon this newly acquired evidence, defense counsel had a good faith, viable motion to suppress H.T.'s statements. As a result, the trial court erred in not conducting a *Richardson* hearing. A hearing was required to determine if the State was aware, prior to the officers' testimony at trial, that despite the representation in the arrest affidavit that H.T.'s pre-Miranda statements were spontaneous, the officer would testify that these statements were made pursuant to custodial questioning by law enforcement. If the inquiry led to a finding that the State was aware of this information prior to trial and failed to disclose it to the defense, then the trial court would have been required to find that a discovery violation occurred, requiring further inquiry regarding willfulness, materiality, and prejudice. Because the trial court failed to conduct the requisite hearing, it was in no position to conclude that no discovery violation had occurred. Because the trial court failed to conduct a *Richardson* hearing, the trial court was in no position to conclude that no discovery violation had occurred. Further, the District Court could not conclude that the trial court's failure to conduct the *Richardson* hearing was harmless error. Thus, the District Court ruled that the trial court's failure to conduct a *Richardson* hearing was reversible error. Case was reversed and remanded for new trial. <http://www.3dca.flcourts.org/opinions/3D07-0873.pdf> (October 17, 2007)

*D.E. v. State*, \_\_\_ So.2d \_\_\_, 2007 WL 3005775 (Fla. 3<sup>rd</sup> DCA 2007). D.E. appeals the trial court's order finding him guilty of carrying a concealed firearm in violation of [F.S. 790.01\(2\)](#) and [775.087, Florida Statutes](#) (2006). D.E. contends that there was insufficient evidence to support the trial court's determination. The District Court held that there was competent, substantial evidence to support the trial court's findings. Lower court's

decision was affirmed. <http://www.3dca.flcourts.org/opinions/3D062667.pdf> (October 17, 2007)

#### IV. Fourth District Court of Appeals

N.S.V. Flowers, 963 So.2d 10 Fla. 4th DCA 2007). Appellant contends that she is being unlawfully detained in secure detention despite risk assessment instrument (RAI) score of zero. The trial court did not give written reasons for ordering N.S.'s more restrictive placement. A trial court is required to provide written reasons if it orders more restrictive placement than indicated by the RAI. Petition for writ of habeas corpus granted.

<http://www.4dca.org/August%202007/08-14-07/4D07-3030.op.pdf> (August 14, 2007)

M.A.V. State of Florida, 964 So.2d 831 Fla. 4th DCA 2007). M.A. petitions for writ of habeas corpus regarding his adjudication for indirect contempt of court. He asks us to quash an order of home detention requiring him to wear an electronic monitor. We grant the petition. The lower court erred in failing to follow 85.19 and rule 8.095 by staying proceedings pending competency evaluation. When the court has reason to believe that the child in delinquency case may be incompetent to proceed, "the court ... must stay all proceedings and order an evaluation of the child's mental condition." [e.s.] 85.19(1), Fla. Stat. (2007).

<http://www.4dca.org/Sept2007/09-19-07/4D07-2888.Corrected%20Opinion.pdf>

(September 19, 2007, corrected opinion).

P.W.V. State of Florida, \_\_\_ So.2d \_\_\_, 2007 WL 210895 Fla. 4th DCA 2007).

The trial court denied a motion to suppress, finding that evidence was obtained during consensual encounter. Based on the record before us we conclude that the encounter between the officer and appellant was a consensual encounter and did not change into an investigatory stop upon the officer asking P.W. for consent to conduct a pat down. Affirmed. <http://www.4dca.org/Sept2007/09-19-07/4D06-4525.op.pdf> (September 19, 2007)

#### V. Fifth District Court of Appeals

K.L.J.V. State of Florida, 963 So.2d 316 Fla. 5th DCA 2007); and D.S.V. State of Florida, 963 So.2d 316 Fla. 5th DCA 2007). Orders affirmed in all respects except for the parts imposing court costs of \$65.00 pursuant to 39.185, Florida Statutes (2006). In light of V.K.E.V. State, 934 So.2d 1276 Fla. 2006), we strike that portion of the orders imposing \$65.00 as additional court costs.

<http://www.5dca.org/Opinions/Opin2007/081307/5D06-3304.op.pdf> and

<http://www.5dca.org/Opinions/Opin2007/081307/5D06-3850.op.pdf> (August 17, 2007)

T.H.V. State of Florida, \_\_\_ So.2d \_\_\_, 2007 WL 2509837 Fla. 5th DCA 2007).

After a thorough plea colloquy, the trial court accepted T.H.'s plea, but sentenced him to a significantly longer probationary period than the one agreed to by T.H. and the State.

When the trial judge did not impose the agreed sentence, *T.H.* moved to withdraw his plea, citing *Goins v. State*, 672 So.2d 304 (Fla. 1996). Although the trial judge's basis for denying *T.H.*'s motion is reasonable, we find it to be inconsistent with the holding in *Goins*. As the State has properly conceded in this case, however, given that *T.H.* entered his plea with a firm agreement from the State as to the sanction to be imposed, the trial court was required to allow *T.H.* to withdraw his plea after imposing the greater sentence. <http://www.5dca.org/Opinions/Opin2007/090307/5D06-1385.op.pdf> (September 7, 2007)

*T.C.E. v. State of Florida*, \_\_\_ So.2d \_\_\_, 2007 WL 736008 (Fla. 5th DCA 2007). *T.C.E.* entered a no contest plea to the charges of robbery, fleeing or attempting to elude an officer, and battery. A pleading indicating the store was the victim of the robbery was opposed to the clerk's not fundamentally defective and since this issue was not raised with the trial court, the argument is rejected. A conviction for robbery does not necessarily preclude a battery conviction even though the battery occurred during the robbery. Affirmed. <http://www.5dca.org/Opinions/Opin2007/091707/5D07-702.pdf> (September 21, 2007)

*E.D. v. State*, \_\_\_ So.2d \_\_\_, 2007 WL 2890133 (Fla. App. 5 Dist.). *E.D.* petitioned for a writ of habeas corpus based upon his claim that he was being detained and secured detention for more than 21 days in violation of *Fla. Stat.* § 85.26(2). On July 25, 2007, *E.D.* was detained on charges of burglary, petit theft and criminal mischief. A trial was set for August 14, 2007. At trial, the State orally requested a continuance because the State was not ready to proceed to trial. The prosecutor simply indicated that he did not have a chance to subpoena witnesses and, therefore, he needed additional time. The trial court granted the motion. *E.D.* filed a Motion to Release the Child from Detention arguing that good cause had not been shown as required by *Fla. Stat.* § 85.26(4). After conducting a hearing, the trial court denied the motion. *E.D.* then filed the petition for writ of habeas corpus. The District Court denied the petition holding that the State established good cause sufficient to allow *E.D.*'s continued detention. When the prosecutor moved for a continuance, he simply indicated that he did not have a chance to subpoena witnesses and that he needed additional time. However, at the subsequent hearing on the motion to release, the trial court indicated that the basis for the earlier continuance was the fact that the property which was subject to the burglary was subject to probate proceedings and the State had difficulty locating and contacting the victim of the crime and accordingly the victim was unavailable for trial on the original trial date. While the transcripts of the earlier hearing does not reveal these facts, defense counsel acknowledged at the later hearing that these facts were indeed the basis for the continuance. The District Court found that the reasons given by the State constituted good cause sufficient to allow *E.D.*'s continued detention. Petition denied. <http://www.5dca.org/Opinions/Opin2007/100107/5D07-2905.pdf> (October 1, 2007)

## DEPENDENCY CASE LAW Florida Supreme Court

### I. First District Court of Appeals

L.P.V. Department of Children and Family Services, 962 So.2d 801 Fla. 3<sup>rd</sup> DCA 2007). Drug use alone is not enough to support a dependency petition based on prospective abuse. "Even when a parent's drug use rises to the level of addiction or mental illness, the Department must demonstrate the nexus between the drug use and the physical, mental, or emotional injury to the children."

<http://www.3dca.flcourts.org/Opinions/3D07-0140.pdf> (August 1, 2007)

G.S.V.B., 9 So.2d 2, 2007 WL 2608520 Fla. 1<sup>st</sup> DCA 2007). Chapter 63 does not require a trial court to enter a final judgment of adoption upon a determination that the persons seeking adoption are fit to rear the child, to the exclusion of other factors that impact the child's best interest and might dictate, in the discretion of the trial court, a disposition other than adoption. <http://opinions.1dca.org/written/opinions2007/9-12-07/06-5264.pdf> (September 12, 2007)

A.B.V. Department of Children and Families, 9 So.2d 2, 2007 WL 166948 Fla. 1<sup>st</sup> DCA 2007). The mother's parental rights were terminated under three grounds, §§ 39.806(1)(b), (1)(c), and (1)(e), Florida Statutes (2006). Competent substantial evidence supported termination of her rights under §§ 39.806(1)(c) & (1)(e) but not under § 39.806(1)(b) for abandonment. The court affirmed termination of parental rights but reversed the portion of the order terminating rights for abandonment and remanded the case for that finding to be stricken from the order.

<http://opinions.1dca.org/written/opinions2007/10-31-07/07-2069.pdf> (October 31, 2007)

### II. Second District Court of Appeals

In re: A.W., Jr. V. Department of Children and Families, 962 So.2d 953 Fla. 2<sup>nd</sup> DCA 2007). TPR could not be based on ground that father engaged in conduct toward child that demonstrated that continued involvement in parent-child relationship threatened child, absent finding that father's continued involvement with child threatened child irrespective of the provision of services. TPR could also not be based on ground that father engaged in egregious conduct absent findings regarding nexus between father's conduct and adverse impact on child.

<http://www.2dca.org/opinion/July%2020,%202007/2D06-3000.pdf> (July 20, 2007)

### III. Third District Court of Appeals

N.L.V. Department of Children and Family Services, 960 So.2d 101 Fla. 3<sup>rd</sup> DCA 2007). Service of the dependency petition on the parent's attorney is not sufficient. Service on a parent must be by personal service or an affidavit of diligent search must be filed.

<http://www.3dca.flcourts.org/Opinions/3D07-0176.pdf> (June 27, 2007)

S.A.V. Department of Children and Family Services, 61 So. 2d 1066 Fla. 3<sup>rd</sup> DCA 2007). Police officer should not have been allowed to testify by telephone in dependency proceeding, because under rule of judicial administration, trial testimony could be taken by telephone only if all parties gave consent, which another did not give. The trial court's error in allowing police officer to testify by telephone was harmless, however, because the dependency proceeding was decided by preponderance of the evidence and even without the officer's testimony, enough evidence was presented to support the finding of dependency. The trial court also properly allowed psychologist to testify regarding the mother's mental health, even though psychologist was not listed as witness, where relief sought by mother's counsel, which was to interview psychologist before he testified, was granted by trial court.

<http://www.3dca.flcourts.org/Opinions/3D07-0597.pdf> (July 25, 2007)

J.V.V. Department of Children and Family Services, 6 So. 2d \_\_\_\_, 2007 WL 2935498 (Fla. 3<sup>rd</sup> DCA 2007). The court affirmed an adjudication of dependency of the mother's child. The court held that the adjudication was supported by competent substantial evidence. The court upheld the trial court's decision to accept a trial witness, Dr. Lambert, as an expert witness. The court further held that Dr. Lambert was permitted to rely on a hospital radiologist's report that an X-ray and CT scan showed a fracture. The court also held that the evidence was sufficient evidence to support the finding by preponderance of evidence that the parents had physically abused the child. <http://www.3dca.flcourts.org/Opinions/3D07-0887.pdf> (October 10, 2007)

#### IV. Fourth District Court of Appeals

Seminole Tribe of Florida v. Department of Children and Families, 59 So. 2d 761 Fla. 4<sup>th</sup> DCA 2007). An Indian tribe attempted to change the placement of a four-year-old child from a medical foster home to that of a tribal foster family pursuant to the Indian Child Welfare Act. Because of the child's premature birth, the child had severe medical conditions. The court held that although ICWA provides a presumption in favor of placement with other tribal members, in this case, the tribal family could not meet the child's unique needs given their unfamiliarity with the child's medical conditions. <http://www.4dca.org/May2007/05-30-07/4D06-3212.op.pdf> (May 30, 2007)

L.R.V.F., 60 So. 2d 336 Fla. 4<sup>th</sup> DCA 2007). Parent was entitled to have an attorney represent them in custody matter resulting from dependency order even after protective supervision was terminated. (The court had retained jurisdiction.) The child was also entitled to participate in the proceedings and state her preference as to which parent she wanted to live with. (Rule 8.255). <http://www.4dca.org/July%202007/07-05-2007/4D06-4003.op.pdf> (July 5, 2007)

W.S.V. Department of Children and Families, 61 So. 2d 1131 Fla. 4<sup>th</sup> DCA 2007). Father's parental rights could be terminated on the ground that he had materially breached his case plan, even though such ground was not alleged as ground for termination in the petition, where such issue was tried by implied consent, in that the

evidence of compliance with the case plan was the central issue at trial without objection. A failure to cite to the exact statutory reference for a ground for termination of parental rights alleged in the petition is not fatal, so long as the substance of the grounds alleged in the pleading. <http://www.4dca.org/August%202007/08-08-07/4D07-382.op.pdf> (August 8, 2007)

K.F.V. Department of Children and Families, 63 So.2d 947 Fla. 4<sup>th</sup> DCA 2007. To modify placements after a child has been adjudicated dependent, there must be competent, substantial evidence in the record that the change of custody is in the best interests of the child. (The child was moved from the mother's home to foster care.) <http://www.4dca.org/Sept2007/09-05-07/4D07-1315.op.pdf> (Sept. 5, 2007)

H.D.V. Department of Children and Families, 64 So.2d 818, Fla. 4<sup>th</sup> DCA 2007. In PR cases, Florida Rule of Juvenile Procedure 8.525(h) does not require a motion for judgment of dismissal to preserve the issue of sufficiency of the evidence for appellate review. The court certified a conflict with the 7<sup>th</sup> DCA regarding this interpretation of the rule. <http://www.4dca.org/Sept2007/09-19-07/4D07-845.op.pdf> (Sept. 19, 2007)

I.Z.V. Department of Children and Families, 65 So.2d 110, 2007 WL 170460 Fla. 4<sup>th</sup> DCA 2007. Placement of a dependent child in a permanent guardianship under 39.6221 was upheld where the trial court complied with the statutory requirements. The mother had not substantially complied with her case plan and there was competent substantial evidence to support the trial court's ruling. <http://www.4dca.org/Oct%202007/10-31-07/4D07-1754.op.pdf> (October 31, 2007)

S.D.V. Department of Children and Families, 65 So.2d 110, 2007 WL 170468 Fla. 4<sup>th</sup> DCA 2007. Reversal of an order terminating parental rights was required where no petition for termination of parental rights had been filed. Although DCF had argued that a petition had to have been filed, it failed to bring anything to the court's attention establishing that no petition was filed but lost. Both 39.802(1), Florida Statutes and Florida Rule of Juvenile Procedure 8.500(a)(1) require initiation of termination of parental rights proceedings by filing a petition. Because no petition had been filed, the trial court's jurisdiction had not been properly invoked. The court reversed the order and remanded for the filing of a petition invoking the court's jurisdiction. <http://www.4dca.org/Oct%202007/10-31-07/4D07-2617.op.pdf> (October 31, 2007)

D.C.V. Department of Children and Families, 65 So.2d 110, 2007 WL 8087464 Fla. 4<sup>th</sup> DCA 2007. The mother appealed an adjudication of dependency which was affirmed. The mother also appealed a requirement that she submit to a psychological evaluation. The court affirmed that requirement but reversed the order because Florida Rule of Juvenile Procedure 8.250(b) requires that the order specify the time, place, manner, conditions, and scope of examination. The court required the trial court to amend the order to remand. <http://www.4dca.org/Oct%202007/10-24-07/4D07-2038.op.pdf> (October 24, 2007)

N.M.V. Department of Children and Families, 964 So. 2d 909, Fla. 4th DCA 2007). The mother appealed the trial court's order placing her child with a fit and willing relative under § 39.6231(3), Florida Statutes (2006). The court held that there was competent substantial evidence to support the trial court's ruling but remanded for the trial court to make the required statutory findings. <http://www.4dca.org/Oct%202007/10-03-07/4D07-783.op.pdf> (October 3, 2007)

#### V. Fifth District Court of Appeals

K.E.V. Department of Children and Families, 958 So. 2d 968 Fla. 5<sup>th</sup> DCA 2007). A parent who has substantially complied with a reunification case plan is entitled to reunification with the dependent child, absent a determination that reunification would be detrimental to the child. If a party or the court concludes that reunification with the offending parent would no longer be appropriate, the proper procedure is to hold an evidentiary hearing and amend the case plan. Once a reunification case plan has been offered, that child ~~goes back to the parent the child was removed from~~ unless the court holds a hearing and a party shows that it is not in the child's best interests to be reunified. <http://www.5dca.org/Opinions/Opin2007/051407/5D06-3294.op.pdf> (May 14, 2007)

### DISSOLUTION OF MARRIAGE CASE LAW

#### Florida Supreme Court

Montello v. Montello, SC06-2072, opinion issued 6/21/07

<http://www.floridasupremecourt.org/decisions/2007/sc06-2072.pdf>

Supreme Court held that Rule 12.525, Family Law Rules of Procedure applies to all cases pending on the date of its enactment. Question before the Court was whether Rule 12.525 or Rule 1.525, Florida Rules of Civil Procedure should apply to a motion for attorney's fees and costs in a dissolution case which was pending on the effective date of Rule 12.525. The case had reached the Court through the 3<sup>rd</sup> DCA having certified that its decision in Montello v. Montello, 937 So. 2d 1154 Fla. 3<sup>rd</sup> DCA 2006 directly conflicted with decisions of the 2<sup>nd</sup> and 5<sup>th</sup> district courts of appeal.

#### I. First District Court of Appeal

Arnold v. Arnold, 1 D06-5275, opinion issued 10/19/07

[06-5275 ROBIN ARNOLD v. EDWARD S. ARNOLD](http://www.1dca.org/Opinions/Opin2007/101907/1D06-5275.ROBIN.ARNOLD.V.EDWARD.S.ARNOLD)

Appeal by former wife to supplemental final judgment of dissolution in which the trial court failed to take into account the former husband's deferred retirement option program (DROP). The appellate court reversed and remanded for the trial court to include a portion of the former husband's DROP account in determining the equitable distribution of marital assets. The court held that DROP benefits are marital assets under § 1.075(5)(a), FS, which should be taken into account in the equitable distribution.

Avellone v. Avellone, 2006-5219, opinion issued 10/15/07

<http://opinions.1dca.org/written/opinions2007/10-15-07/06-5219.pdf>

In reviewing the trial court's order on clarification of attorney's fees, the appellate court found error in the trial court having subtracted the former wife's retainer from the reasonable attorney's fees and costs she incurred on appeal and was due to recover as the prevailing party in the previous proceeding. The court also found that § 1.16(1), F.S. is irrelevant in cases where the marital settlement agreement contains a prevailing party provision and accordingly, reversed and remanded to the trial court with instructions that the former wife be awarded the full amount of the fees and costs in accordance with the marital settlement agreement.

Owens v. Owens, 1D06-5676, opinion issued 8/31/07

<http://opinions.1dca.org/written/opinions2007/8-31-07/06-5676.pdf>

Challenge by former wife to final judgment of dissolution. In affirming the trial court's order, the appellate court held that the former wife had not properly preserved for appeal her argument that the final judgment was deficient because she had failed to bring that argument before the trial court via a motion for rehearing or by any other avenue available at the trial court level.

Schwartz v. Schwartz, 1D06-5799 and 1D07-173, opinion issued 8/29/07

<http://opinions.1dca.org/written/opinions2007/8-29-07/06-5799.pdf>

The appellate court affirmed the trial court having granted modification of the primary custody of the parties' two children but reversed the denial of recovery of attorney's fees by the former wife. The appellate court found that the trial court had abused its discretion in denying the former wife's request for fees despite a marked difference between the wealth of the two parties and by failing to set forth in its order what factors were considered in determining reasonable fees. Accordingly, the court remanded the case to the trial court with instructions for it to reconsider the request for attorney's fees by the former wife in light of the disparity in income between the parties.

## **II. Second District Court of Appeal**

Esaw v. Esaw, 2D06-1163, opinion issued 10/5/07

<http://www.2dca.org/opinion/October%2005,%202007/2D06-1163..pdf>

Former wife appealed the final judgment of dissolution on the grounds that the trial court's findings were inadequate and that the judgment was fundamentally erroneous; the appellate court affirmed, finding that the former wife had not argued that the inadequacies rendered the judgment fundamentally erroneous or constituted reversible error. The appellate noted that several points in its opinion the absence of a transcript and stated that it was unable to find error by the trial court without a record of the evidentiary hearing and could find nothing in the final judgment to indicate that the trial court had erred in its legal analysis.

Naples v. Naples, 2D06-3421, opinion issued 9/19/07

<http://www.2dca.org/opinion/September%2019,%202007/2D06-3421.pdf>

Case in which the former wife appealed the trial court's dismissal of her motion for contempt and to enforce the alimony owed by the former husband due to its belief that it lacked subject matter jurisdiction. Pursuant to the settlement agreement which was incorporated into the final judgment of dissolution, the former husband was to pay a certain amount of his VA benefits to her until he could arrange for the VA to pay her directly; this agreement was complicated by the relevant provisions of federal law. The appellate court's reversal of the trial court's order was based on its reasoning that the relevant provisions of federal law did not preempt appropriate enforcement of the former husband's obligation of alimony by the trial court. Accordingly, the case was reversed and remanded for the trial court to hear the former wife's motion on the merits and determine any appropriate relief.

Rosmer v. Rosmer, 2D07-211, opinion issued 9/7/07

<http://www.2dca.org/opinion/September%2007,%202007/2D07-211.pdf>

Appeal by former wife of the trial court's order of the denial of her motion to dismiss the dissolution of marriage filed by the former husband on grounds of forum non conveniens, based on her argument that Sweden, rather than Florida, was the proper forum. The appellate court found no error in the trial court's finding that the former wife had failed to show that the former husband's choice of Florida was improper; the appellate court noted that the trial court determined that the home in Sweden was non-marital property.

Buxton v. Buxton, 2D06-5358, opinion issued 9/5/07

<http://www.2dca.org/opinion/September%2005,%202007/2D06-5358.pdf>

Former husband appealed the trial court's denial of his motion to either reduce or terminate his alimony obligation to the former wife based on her 10 year cohabitation with another man; the appellate court reversed and remanded. The appellate court noted that prior to the enactment in 2005 of s. 61.14(1)(b)(1), FS, courts had allowed modification of alimony in cases of the cohabitation of the spouse receiving alimony; pursuant to s. 61.14(1)(b)(1), trial courts may now modify alimony where the receiving spouse has entered into a "supportive relationship" with someone. Factors which must be taken into account by the trial court in discerning such a relationship are itemized in s. 61.14(1)(b)2, FS. In this case, the appellate court disagreed with the trial court's finding that there was not a "supportive relationship" between the former wife and the man with whom she had been cohabitating, and upon finding that such a relationship did exist, remanded the case to the trial court to determine whether the former husband's alimony obligation should be either reduced or terminated.

Shelton v. Shelton, 2D06-1199 and 2D06-1200, opinion issued 8/22/07

<http://www.2dca.org/opinion/August%2022,%202007/2D06-1199.pdf>

Former husband appealed the final judgment awarding former wife her share of the proceeds from sale of the marital home and the order finding him in contempt for

failure to pay child support. The final judgment of dissolution had awarded the marital home to the former husband and ordered that he pay a monthly child support; a subsequent modification of that provision was set aside, leaving the final judgment in effect. The appellate court reversed and remanded, finding error in the trial court having entered an order requiring the former husband to satisfy an obligation which existed only in a stipulation which had been set aside.

Tucker v. Tucker, D06-857, opinion issued 8/15/07

<http://www.2dca.org/opinion/August%2015,%202007/2D06-857.pdf>

Former wife appealed the second amended final judgment of dissolution; the appellate court reversed the equitable distribution of marital assets owing to a lack of competent, substantial evidence to support the trial court's valuation of real property and abuse of discretion by the trial court. The appellate court noted that assets depleted during dissolution proceedings cannot be included within the plan for equitable distribution without showing of marital waste.

Hall v. Hall, D04-2550, opinion issued 8/10/07

<http://www.2dca.org/opinion/August%2010,%202007/2D04-2550.pdf>

Former wife appealed the final judgment of dissolution on grounds the trial court erred in its valuation of real property and abused its discretion in awarding to the former husband a 25% interest in a parcel of non-marital property based on the former husband's marital labor. The appellate agreed and reversed and remanded that portion of the order to the trial court with instructions to refigure what interest the former husband had in the property.

Thyrre v. Thyrre, D06-4021, opinion issued 8/10/07

<http://www.2dca.org/opinion/August%2010,%202007/2D06-4021.pdf>

Former husband appealed the order entered on his petition to modify the final judgment of dissolution; the appellate court affirmed the reduced alimony award to the former wife, but reversed as to the retroactivity of the alimony and the former husband's request to the child support obligation of the wife. Relying on the caselaw that making alimony reduction retro-active to the date of filing the petition for modification is the rule rather than the exception, the appellate court reversed and remanded owing to the trial court's failure to make the reduction retroactive and for its failure to apply child support guidelines where a substantial change in financial circumstances existed.

Dorsey v. Dorsey, D06-5120, opinion issued 8/3/07

<http://www.2dca.org/opinion/August%2003,%202007/2D06-5120.pdf>

Case in which the appellate court agreed with the former husband's argument that a post-dissolution order requiring him to pay alimony arrears to the former wife was wrong in that it required that those payments come from assets that were exempted from marital assets pursuant to a modified settlement agreement which was incorporated into the final order.

### III. Third District Court of Appeal

Ferraro v. Ferraro, 3D06-1876, opinion issued 10/17/07

<http://www.3dca.flcourts.org/Opinions/3D06-1876.pdf>

Former wife appealed denial of her petition for modification of child support. In affirming the trial court, the appellate court noted that a trial court is bound by factual determinations of a magistrate where those determinations are supported by competent substantial evidence.

Siegel v. Siegal, 3D06-961, opinion issued 10/10/07

<http://www.3dca.flcourts.org/Opinions/3D06-0961.pdf>

Former wife appealed from a final judgment of dissolution which determined that an account titled in the former husband's name was non-marital property. In affirming the trial court, the appellate court noted that pursuant to § 1.075(5)(b)2, FS, non-marital assets are those which are acquired separately by either party by "noninterspousal gift" and that in this case, the monetary gifts to the former husband by his mother were kept in a separate account and not co-mingled with marital funds and therefore remained a non-marital asset.

Berger v. Berger, 3D05-1480, opinion issued 9/26/07

<http://www.3dca.flcourts.org/Opinions/3D05-1480.pdf>

Case which was affirmed in part, reversed in part, and then remanded to the trial court for it to award the former wife 100% of the attorney's fees as a result of the former husband's greater earning capacity.

Paskiewicz v. Paskiewicz, 3D06-660, opinion issued 9/26/07

<http://www.3dca.flcourts.org/Opinions/3D06-0660.pdf>

Appeal by former husband from an order allowing the former wife to relocate with the parties' three children and cross-appeal by former wife of denial of her attorney's fees. Finding no abuse of discretion by the trial court in denying fees, the appellate court affirmed that portion of the order; finding that the trial court had applied an incorrect legal standard, the appellate court reversed on the question of modification of custody and held that a decision to relocate in and of itself does not amount to a substantial change in circumstances to justify a modification of custody. The court noted that a modification of custody requires a substantial change in circumstances, not contemplated at the time of the original award of custody, be shown.

Rivero v. Rivero, 3D06-0481, opinion issued 9/5/07

<http://www.3dca.flcourts.org/Opinions/3D06-0481.rh.pdf>

In affirming the trial court's order, the appellate court held that former husband's Employee Stock Option Plan (ESOP) ceased to be a marital asset upon the dissolution of marriage. Pursuant to the marital settlement agreement, the former wife was entitled to receive one-half of the total value of the ESOP at the time of execution of the agreement, to be paid by the former husband when he either retired or otherwise left

that employment; she was not entitled to receive any dividends or appreciation in the value of the stock because she was awarded a monetary as opposed to an ownership interest in the former husband's plan. The court also rejected the former wife's claim that her inability to speak, read, or write English rendered her unable to understand the provisions of the marital settlement agreement and noted that it was incumbent on her to learn and know the contents of the agreement before signing it.

Riley v. Edwards-Riley, 3D06-1968, opinion issued 8/8/07

<http://www.3dca.flcourts.org/Opinions/3D06-1968.pdf>

Appeal by former husband from final judgment of dissolution which ordered sale of the marital home with distribution of proceeds and award of attorney's fees to the former wife; appellate court reversed due to the trial court having failed to comply with the requirements of Chapter 61, FS in issuing the final judgment. The appellate court held that pursuant to Chapter 61, FS, the trial court must set apart to each spouse that spouse's non-marital assets and liabilities and then distribute between the parties the marital assets and liabilities.

Muller v. Muller, 3D06-2700, opinion issued 8/1/07

<http://www.3dca.flcourts.org/Opinions/3D06-2700.pdf>

Appeal by former husband from final judgment of dissolution which granted former wife's petition to relocate with minor child; appellate court reversed the final judgment because the trial court had abused its discretion by not having relied on competent substantial evidence to support its findings as required by Chapter 61, FS. The court noted that there is no presumption in Florida law with regard to a primary residential parent seeking to relocate, but that § 61.13001(7), FS sets forth the factors the trial court must consider in making its determination of whether or not to allow relocation.

#### **IV. Fourth District Court of Appeal**

Crooks v. Crooks, 4D06-3087, opinion issued 10/17/07

<http://www.4dca.org/Oct%202007/10-17-07/4D06-3087.op.pdf>

Appellate court held in absence of a marital settlement agreement, that § 61.075, FS requires specific written findings as to identifying, valuing, and distributing marital and non-marital assets and liabilities.

Monticello v. Monticello, 4D06-3648, opinion issued 10/17/07

<http://www.4dca.org/Oct%202007/10-17-07/4D06-3648.op.pdf>

Case in which the appellate court remanded to the trial court to allow former wife to present evidence of remote dissipation. Includes references to § 61.075(1)(i), FS regarding dissipation of marital assets.

Mena v. Mena, 4D06-5025, opinion issued 10/10/07

<http://www.4dca.org/Oct%202007/10-10-07/4D06-5025.op.pdf>

Appeal by former husband to an order on modification of child support on children from a prior marriage where the trial court refused to deduct child support on children from

subsequent marriage from the former husband's gross income. In affirming the trial court's order, the appellate court noted that it appeared that the situation in the case before it was similar to that in *Pohlman v. Pohlman*, 703 So. 2d 1121 (Fla. 3<sup>rd</sup> DCA 1997) where the husband and second wife had attempted to manufacture a substantial change in circumstances by attempting to use child support for subsequent children to reduce the obligations owed to children from a prior marriage.

Watt v. Watt, 4D06-720 and 4D06-2352, opinion issued 10/3/07  
<http://www.4dca.org/Oct%202007/10-03-07/4D06-720.op.pdf>

The trial court modified the shared parental obligations, contained in the marital settlement agreement and incorporated into the final judgment of dissolution, to grant to the former wife the ultimate responsibility to make decisions as to the education of the children and the former husband appealed. In affirming the trial court's order, the appellate court found there was competent substantial evidence to support the findings of the lower court. The appellate court noted that shared parental responsibility assumes that the parents can agree on the welfare of their children; when the parents cannot reach an agreement, the trial court can determine that the impasse constitutes a substantial change in circumstances which requires modification.

Gaffney v. Gaffney, 4D06-1074, opinion issued 9/26/07  
<http://www.4dca.org/Sept2007/09-26-07/4D06-1074.op.pdf>

Appeal by former husband of final judgment of dissolution in which the appellate court reversed the award of lump-sum alimony to former wife. In its reversal, the court noted that while retirement pensions are ordinarily considered a marital asset for purposes of equitable distribution, disability pensions are not because they replace future lost income; the trial court must determine what portion of the pension represents disability and whether any portion represents retirement. Only the portion which is found to be retirement is subject to equitable distribution. In this case, the trial court had found that the former husband's disability was not a factor in the amount of monthly benefits he was due to receive, but only went to the fact that he was able to receive them at an earlier date; however, it reasoned that the former husband's designation of the pension as a disability pension had the effect of removing it from assets subject to equitable distribution. The appellate court found this reasoning faulty and remanded to the trial court to award the former wife her portion of the pension.

Levine v. Levine, 4D05-4169, opinion issued 8/8/07  
<http://www.4dca.org/August%202007/08-08-07/4D05-4169.op.pdf>

Case in which the appellate court found that the trial court had abused its discretion in ordering an amount of alimony unsupported by the record and by prohibiting the former wife from moving from the marital home without the consent of the former husband or order of the court.

Koch v. Koch, 4D07-927, opinion issued 8/8/07  
<http://www.4dca.org/August%202007/08-08-07/4D07-927.op.pdf>

Former wife petitioned for a writ of certiorari where the trial court had overruled her objection to the former husband seeking to obtain treatment records and other confidential medical information pertaining to her. In granting her petition and quashing the order denying her protection, the appellate court referred to its earlier ruling in *Attorney Ad Litem for D.K.V. Parents of D.K.*, 780 So.2<sup>nd</sup> 301 (Fla.4<sup>th</sup> DCA 2001), that a party in a dissolution proceeding does not waive confidentiality of mental health treatment by requesting custody.

#### V. Fifth District Court of Appeal

*Trisotto v. Trisotto*, 5D06-1724, opinion issued 9/21/07

<http://www.5dca.org/Opinions/Opin2007/091707/5D06-1724.pdf>

Former husband appealed several post-dissolution orders. In affirming the trial court's denial of the former husband's downward modification of alimony, the appellate court reiterated that an order to show modification, former spouse must show substantial change in circumstances, not contemplated at the time of the dissolution. Although the appellate court affirmed the amount of alimony arrears determined by the trial court, it noted that Rule 2.615(d)(1), Family Law Rules of Procedure requires that contempt orders contain a finding that the former spouse has willfully failed to comply with alimony obligations despite being financially able to do so; here, the trial court had erred by failing to make that finding.

*Olsen v. Olsen*, 5D06-1819, opinion issued 9/14/07

<http://www.5dca.org/Opinions/Opin2007/091007/5D06-1819.op.pdf>

Former husband appealed an order which reduced, but did not eliminate, his alimony obligation upon retirement. On finding that the trial court had miscalculated the former wife's expenses, the appellate court reversed and remanded for the trial court to recalculate her income and expenses and reconsider the question of reduction or elimination of alimony. Both the appellate and trial courts referred to language from *Pimm v. Pimm*, 601 So.2<sup>nd</sup> 534 (Fla. 1992), regarding situations when retirement of one former spouse has the effect of placing the other in "peril of poverty."

*Barrett v. Barrett*, 5D06-2103 and 5D06-2955, opinion issued 8/31/07

[5D06-2103 & 5D06-2955 Barrett v. Barrett](http://www.5dca.org/Opinions/Opin2007/082007/5D06-2103&5D06-2955Barrettv.Barrett.pdf)

Appeal by former husband of orders granting injunctions against him for breach of marital settlement agreement; the appellate court found that the trial court had erred by failing to follow the requirements of Rule 1.610, Florida Rules of Civil Procedure when it entered the temporary injunction without notice, and by converting the temporary injunction into a permanent one at a status conference.

*Trepp v. Trepp*, 5D06-3465, opinion issued 8/24/07

<http://www.5dca.org/Opinions/Opin2007/082007/5D06-3465.op.pdf>

Former wife appealed final judgment of dissolution which denied her request for permanent periodic alimony; the appellate court found that the trial court had abused its discretion by failing to reserve jurisdiction to award permanent alimony. Citing

Canakariv. Canakariv, 82 So. 2<sup>nd</sup> 1197 (Fla. 1980), the appellate court noted that while a trial court is not required to equalize the financial position of the former spouses, it should ensure that neither one passes from prosperity to misfortune.

Heard v. Heard, 5 D06-2910, opinion issued 8/10/07

<http://www.5dca.org/Opinions/Opin2007/080607/5D06-2910.op.pdf>

The former spouses agreed to a marital settlement agreement, incorporated into the final judgment of dissolution, which provided for a lower amount of child support than what the guidelines would have required; the former wife then sought relief from the final judgment, arguing that she did not have the authority to contract away the minor child's right to the amount of support required by the guidelines. In affirming the trial court's dismissal of her motion for relief, the appellate court noted that the former wife had had access to all material information and that the child had been represented throughout the proceedings by a guardian ad litem who had specifically approved the marital settlement agreement.

## **DOMESTIC VIOLENCE CASE LAW**

### **Florida Supreme Court**

#### **I. First District Court of Appeals**

#### **II. Second District Court of Appeals**

Seffernick v. Meriwether Ex rel. Meriwether, 60 So. 2d 351, (Fla. 2<sup>nd</sup> DCA 2007).

Evidence that another injured herself and grabbed at the child in an attempt to take him away from father did not support finding of domestic violence warranting issuance of an injunction for protection against domestic violence. Other remedies, such as dependency or paternity action with temporary custody order would have been appropriate. <http://www.2dca.org/opinion/July%2006,%202007/2D06-4585.pdf> (July 5, 2007)

Oettmeier v. Oettmeier, 60 So. 2d 902, (Fla. 2<sup>nd</sup> DCA 2007). Competent, substantial evidence did not support finding that wife had an objectively reasonable fear of imminent domestic violence at the hands of husband, as required for issuance of injunction for protection against domestic violence. The danger feared must be imminent and the rationale for the fear must also be objectively reasonable.

<http://www.2dca.org/opinion/July%2020,%202007/2D06-5540.pdf> (July 20, 2007)

Smith v. Smith, 64 So. 2d 217 (Fla. 2<sup>nd</sup> DCA 2007). The husband's right to due process was violated when the trial court did not permit him to call his witnesses or to testify himself prior to the court entering a permanent injunction.

<http://www.2dca.org/opinion/August%2024,%202007/2d06-3353.pdf> (August 24, 2007)

Tejeda-Soto v. Raimondi, 30 So.2d \_\_\_, 2007 WL 1206454 (Fla. 2<sup>nd</sup> DCA 2007). After a non-evidentiary hearing, the trial court issued four final judgments of injunction for Protection Against Repeat Violence to protect the Petitioners from the Respondents. The DCA reversed and remanded for an evidentiary hearing and stated that “to satisfy the constitutional and statutory imperative of due process, at an injunction hearing, the parties must have an opportunity to prove or disprove the allegations made in the complaint.” <http://www.2dca.org/opinion/October%2026,%202007/2D06-3107.pdf> (October 26, 2007)

### III. Third District Court of Appeals

Jones v. Ryan, 30 So.2d \_\_\_, 2007 WL 2915029 (Fla. 3<sup>rd</sup> DCA 2007). In these consolidated cases, two men sought habeas corpus relief based upon their confinement as a result of being found in civil contempt of court for failure to comply with the trial court’s order in final judgments for injunctions in domestic violence cases. The 3<sup>rd</sup> DCA noted that the last orders issued by the trial court found each respondent to be in civil contempt of court and sentenced each to incarceration without containing a purge provision. Without this provision, the contempt orders were criminal rather than civil, and required that the contemnors be afforded the same constitutional due process protections afforded criminal defendants. <http://www.3dca.flcourts.org/Opinions/3D07-2429.pdf> (October 5, 2007)

State v. Delama, 30 So.2d \_\_\_, 2007 WL 3008593 (Fla. 3<sup>rd</sup> DCA 2007). The trial court lacked authority to deny the State’s request to issue a rule to show cause pursuant to the Florida Rules of Criminal Procedure 3.840 against the victim in a domestic violence case that refused to testify. A strong dissent disagreed, claiming that neither the Rules of Criminal Procedure nor well-established contempt jurisprudence required the trial court to issue a rule to show cause. The dissent also noted that sound public policy mandates discretion under the circumstances of this case and urged Florida to adopt a rule similar to California’s which specifically exempts victims of sexual assault and domestic violence from incarceration if they refuse to testify. <http://www.3dca.flcourts.org/Opinions/3D07-1361.pdf> (October 17, 2007)

### IV. Fourth District Court of Appeals

#### V. Fifth District Court of Appeals

Dudley v. Schmidt, 963 So.2d 297 (Fla. 5<sup>th</sup> DCA 2007). Attorney’s fees cannot be awarded in a domestic violence injunction case. <http://www.5dca.org/...ions/Opin2007/080607/5D06-3821.op.pdf> (August 10, 2007)