

OSCA/OCI'S CASE LAW UPDATE
MAY 2018

Baker Act/Marchman Act Case Law 2

Drug Court/Mental Health/Veterans Court Case Law 3

Family Court

Delinquency Case Law 4

Dependency Case Law 8

Dissolution of Marriage Case Law..... 10

Interpersonal Violence Injunctions (DV, SV, Dating, Repeat, Stalking) Case Law 17

Baker Act/Marchman Act Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

L.G. v. State, __ So. 3d __, 2018 WL 2448606 (Fla. 5th DCA 2018). [PETITION FOR WRIT OF HABEAS CORPUS GRANTED](#). Petitioner filed a petition for a writ of habeas corpus seeking immediate release from involuntary confinement under the Baker Act. The petitioner was admitted for involuntary examination under the Baker Act. At a subsequent hearing, the treating physician testified that the petitioner would benefit from ongoing care. The trial court ordered the petitioner to remain for four weeks under a continuance, over the petitioner's objection. The petitioner argued that he was entitled to immediate release because the record did not contain clear and convincing evidence that he was a danger to himself or others. The State conceded error and agreed that the writ of habeas corpus should be granted. Accordingly, the Fifth District Court of Appeal granted the petition for writ of habeas corpus and ordered the petitioner's immediate release. See C.W. v. State, 214 So. 3d 796, 797 (Fla. 5th DCA 2017) (granting habeas corpus petition where trial court involuntarily committed petitioner without clear and convincing evidence that he was a danger to himself or others citing s. 394.467(1)(a), F.S. (2016); In re Lehrke, 12 So. 3d 307, 308–09 (Fla. 2d DCA 2009). <http://www.5dca.org/Opinions/Opin2018/052818/5D18-1718.op.pdf> (May 31, 2018)

Drug Court/Mental Health/Veterans Court Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.

Delinquency Case Law

Florida Supreme Court

Morris v. State, __ So. 3d __, 2018 WL 2146786 (Fla. 2018). **DEFENDANT ENTITLED TO RESENTENCING**. Morris was sentenced as an adult to a thirty-year sentence for attempted felony murder and a concurrent fifteen-year sentence for attempted armed robbery. Morris filed a motion to correct sentencing errors pursuant to Rule 3.800(b) because his sentence did not provide for judicial review. The Court held that because the sentencing court did not make the required findings at Morris's sentencing hearing to comport with chapter 2014-220, Laws of Florida, and Morris's sentence lacks any review mechanism, based upon its precedent in Lee v. State, 234 So. 3d 562, 564 (Fla. 2018), Morris is entitled to resentencing. See also the dissenting opinion which argues that Graham cannot be read as requiring the resentencing of a juvenile nonhomicide offender unless that offender was sentenced to life, or the functional equivalent of life, without an opportunity for early release.

<https://www.floridasupremecourt.org/decisions/2018/sc16-2271.pdf> (May 10, 2018)

First District Court of Appeal

S.S. v. State, __ So. 3d __, 2018 WL 2246566 (Fla. 1st DCA 2018). **AFFIRMED**. PCA with concurring opinion.

https://edca.1dca.org/DCADocs/2017/1894/171894_1284_05172018_12232401_i.pdf (May 17, 2018)

Second District Court of Appeal

Johnson v. State, __ So. 3d __, 2018 WL 2027596 (Fla. 2d DCA 2018). **REVERSED AND REMANDED FOR RESENTENCING**. Johnson was sentenced in 1979 pursuant to s. 39.111(6), F.S. (1978). While the law in 1979 required the sentencing court to make a "suitability determination" regarding the imposition of adult sanctions, it did not require consideration of the individualized factors now required by Miller v. Alabama, 567 U.S. 460 (2012). Johnson moved to correct an illegal sentence pursuant to Rule 3.800(a), and his motion was denied. The appellate court reversed and remanded for resentencing at which Johnson is entitled to the full panoply of rights necessary for resentencing.

https://edca.2dca.org/DCADocs/2017/3122/173122_39_05022018_08381041_i.pdf (May 2, 2018)

D.D. v. State, __ So. 3d __, 2018 WL 2224154 (Fla. 2d DCA 2018). **AFFIRMED IN PART; REVERSED IN PART; REMANDED WITH INSTRUCTIONS**. The finding of delinquency was affirmed without comment, but because no evidence was presented that the stolen item was worth more than \$300, the charge must be reduced to second degree petit theft.

https://edca.2dca.org/DCADocs/2017/0769/170769_114_05162018_08313143_i.pdf (May 16, 2018)

R.C. v. State, __ So. 3d __, 2018 WL 2223635 (Fla. 2d DCA 2018). **REVERSED AND REMANDED FOR JUDGMENT OF DISMISSAL**. The evidence presented at the adjudicatory hearing failed to establish

that the residue on the alleged paraphernalia was a controlled substance. The motion for judgment of dismissal should have been granted.

https://edca.2dca.org/DCADocs/2017/1976/171976_39_05162018_08354087_i.pdf (May 16, 2018)

Third District Court of Appeal

D.V. v. State, __ So. 3d __, 2018 WL 2031072 (Fla. 3d DCA 2018). **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS THE PETITION**. D.V. was in a car with two other people; he was the sole person in the back seat and he was seated on the passenger side of the car. Officers approached the car and saw a gun in the back seat on the driver's side. D.V. was arrested and charged with being a minor in possession of a firearm. Where contraband is found in a vehicle that is jointly occupied, knowledge of the presence of the contraband and the accused's ability to maintain control over it will not be inferred and must be established by proof. No evidence was presented that D.V. owned the car, or if D.V.'s fingerprints were on the gun. D.V. was cooperative with police and voluntarily provided a DNA sample (the sample was not introduced in evidence). After the state rested, D.V. moved for judgment of dismissal because the evidence presented by the State was insufficient to prove he had actual or constructive possession of the firearm. The trial court denied the motion. The appellate court said, where the State only proved that D.V. was sitting in a jointly occupied vehicle in close proximity to the contraband, the trial court's order denying D.V.'s motion for judgment of dismissal must be reversed.

<http://www.3dca.flcourts.org/Opinions/3D16-1593.pdf> (May 2, 2018)

A.S. v. State, __ So. 3d __, 2018 WL 2122705 (Fla. 3d DCA 2018). **AFFIRMED**. Case was affirmed with a citation to Lopez v. State, 225 So.3d 330, 333 (Fla. 3d DCA 2017) and quoting, "a police officer, consistent with the reasonableness requirement of the Fourth Amendment, may order a passenger to exit a lawfully stopped vehicle and may detain the passenger at the scene during the completion of the traffic stop."

<http://www.3dca.flcourts.org/Opinions/3D17-0514.pdf> (May 9, 2018)

Hernandez v. State, __ So. 3d __, 2018 WL 2224109 (Fla. 3d DCA 2018). **AFFIRMED IN PART; REVERSED IN PART**. Hernandez was resentenced on his first-degree murder conviction as required by Miller v. Alabama, 567 U.S. 460 (2012). On remand, the sentencing court applied Florida's juvenile sentencing laws enacted in 2014. The amended sentencing order again sentenced Hernandez to life in prison without parole on the murder count, but included a right to a review of his sentence after 25 years, as provided by ss. 921.1402(2)(a) and 775.082(1)(b)1, F.S. The sentencing court again also sentenced Hernandez to a consecutive term of imprisonment for 30 years on the attempted murder count. Hernandez made several arguments, but only one was found to have any merit. As to the consecutive 30-year term of imprisonment for attempted murder, the appellate court reversed and remanded for the ministerial step of amending the sentence to provide for a review after 25 years of time served on that sentence.

<http://www.3dca.flcourts.org/Opinions/3D16-0664.pdf> (May 16, 2018)

J.A. v. State, __ So. 3d __, 2018 WL 2422884 (Fla. 3d DCA 2018). **AFFIRMED**. On appeal, J.A. argued that the State did not present sufficient evidence to prove the value of the windshield he damaged to support the charge of first-degree criminal mischief, and argued that the charge should be reduced to second-degree criminal mischief as a result. The amount of damage is an essential element of this offense, so the State must prove the value of the damage with competent, substantial evidence. In this case, the victim testified as to what he was charged and what he actually paid for the repair. Though a receipt was referenced in the testimony, the victim's testimony was not inadmissible hearsay as it did not involve an out-of-court statement, but rather an act in which the victim was a participant.

<http://www.3dca.flcourts.org/Opinions/3D16-2381.pdf> (May 30, 2018)

Fourth District Court of Appeal

Hart v. State, __ So. 3d __, 2018 WL 2049668 (Fla. 4th DCA 2018). **AFFIRMED; CONFLICT CERTIFIED**. The appellate court addressed whether a 30-year prison sentence for a non-homicide offense committed when appellant was a juvenile violates the Eighth Amendment or Graham v. Florida, 560 U.S. 48 (2010). The appellate court found, "There is simply no authority—either constitutional, statutory, or precedential—stating that any 'term-of-years' juvenile offender sentence that does not provide an opportunity for early release, or any sentence exceeding the statutory thresholds in chapter 2014-220, is unconstitutional under Graham and requires resentencing even if the offense was committed prior to chapter 2014-220's effective date." The appellate court went on to say, "In the absence of a Graham violation, there is no clear authority to resentence. To hold otherwise would effectively require resentencing in every 'term-of-years' case or every case where the sentence exceeds the statutory thresholds, no matter when the crime was committed." The appellate court held that in order for a mandated resentencing under chapter 2014-220 to come into play, there must *first* be a Graham violation. Without a clear violation of Graham, there is no requirement for a resentencing under chapter 2014-220. Affirmed and conflict certified.

https://www.4dca.org/content/download/214087/1908731/file/172468_1257_05022018_09331167_i.pdf (May 2, 2018)

Pedroza v. State, __ So. 3d __, 2018 WL 2434763 (Fla. 4th DCA 2018). **AFFIRMED**. The circuit court denied defendant's motion to correct sentence under Rule 3.800(a) and the appellate court affirmed based on its decision in Hart v. State, 43 Fla. L. Weekly D970a (Fla. 4th DCA May 2, 2018). https://www.4dca.org/content/download/214108/1908875/file/172151_1257_05302018_09185931_i.pdf (May 30, 2018)

Tillman v. State, __ So. 3d __, 2018 WL 2446808 (Fla. 4th DCA 2018). **REHEARING DENIED**. The appellate court denied rehearing and went on to note that as to the sentencing issue, they concluded in Hart v. State, 43 Fla. L. Weekly D970a (Fla. 4th DCA May 2, 2018), that Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), has not been applied to sentences of thirty years or less. Thus, chapter 2014-220, Laws of Florida should not be applied retroactively to an original sentence which does not violate Graham. Although appellant's sentence is thirty-one years, they concluded that it too does not violate Graham and that chapter 2014-220 does not apply.

https://www.4dca.org/content/download/214104/1908839/file/132516_1711_05302018_09074542_i.pdf (May 30, 2018)

Fifth District Court of Appeal

Ruiz v. State, __ So. 3d __, 2018 WL 2067606 (Fla. 5th DCA 2018). **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.** A trial court errs when it modifies a juvenile defendant's sentence to allow for a review hearing without also holding a resentencing hearing under ss. 775.082, 921.1401 and 921.1402, F.S., (2014). The appellate court noted it has previously made similar decisions in Davis v. State, 230 So. 3d 487 (Fla. 5th DCA 2017), and Katwaroo v. State, 237 So. 3d 446 (Fla. 5th DCA 2018).

<http://www.5dca.org/Opinions/Opin2018/043018/5D17-2877.op.pdf> (May 4, 2018)

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Y.G. v. Department of Children and Families, __ So. 3d __, 2018 WL 2066792 (Fla. 1st DCA 2018). **TERMINATION OF PARENTAL RIGHTS REVERSED**. The First District Court of Appeal reversed termination of a mother's rights to her child because the trial court declined to grant her motion to continue the TPR trial. The mother had executed a consent to adoption in favor of the maternal grandfather, after which the department filed an expedited TPR petition. The mother moved to continue the TPR trial which the trial court denied. The day before the TPR trial, the grandfather moved to intervene and to transfer custody of the child. The next day, the grandfather moved to continue the trial to participate in discovery, understand objections to the transfer of custody, and to procure witnesses. The trial court denied the motion as well as the mother's renewed motion to continue. On appeal, the District Court acknowledged the deferential standard that applied to trial courts' rulings on continuances. The court also noted that the trial court was required to hold an evidentiary hearing on the child's best interests relating to the adoption. The parties were not prepared for that hearing at the time of the TPR trial and the trial court abused its discretion in denying the motion to continue. The district court noted that there was little if any prejudice to the parties in granting the continuance. The court therefore reversed the order terminating parental rights and remanded the case for further proceedings.

https://edca.1dca.org/DCADocs/2018/0049/180049_1287_05032018_11204012_i.pdf (May 3, 2018)

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

C.H., the mother v. Department of Children and Families, __ So. 3d __, 2018 WL 2422891 (Fla. 4th DCA 2018). **DEPENDENCY ADJUDICATION REVERSED**. The Third District Court of Appeal reversed an adjudication of a mother's child as dependent because the trial court's findings were not supported by competent substantial evidence. The mother had left the child with the child's maternal aunt, whom the mother knew had a prior case with DCF. That case had closed with the aunt's successful case plan completion and reunification. The department subsequently investigated an abuse report against the aunt about a gun being discharged in the presence of the mother's child and the aunt's own daughter. During the investigation, the children were clean, had no bruises, were well-fed, and were appropriately clothed. The trial court adjudicated the child dependent, finding that the child was at substantial risk of imminent harm because the aunt was an inappropriate caregiver, proven by the gun's discharge in the child's presence. The mother had also failed to inquire into the details of the aunt's own case with the department. On appeal, the District Court noted that the department itself had previously deemed the aunt to be an adequate caregiver or it would not have allowed her to regain custody of her own child.

Following the gun discharge, the department found the child to be clean, fed, dressed, and without bruises. The District Court thus concluded that the trial court's finding that the child was at substantial risk of imminent harm was not supported by competent substantial evidence. The court therefore reversed the child's dependency adjudication.

<http://www.3dca.flcourts.org/Opinions/3D18-0291.pdf> (May 30, 2018)

Fourth District Court of Appeal

J.G. v. State of Florida, Department of Children and Families, ___ So. 3d ___, 2018 WL 2434817 (Fla. 4th DCA 2018). **APPEAL DISMISSED**. The Fourth District Court of Appeal dismissed an appeal of an adoption by the biological father, J.G. The department had sheltered the children due to the mother's drug use. Because the children had been born while the mother was married to another man, the mother's husband the children's legal father. However, the court acknowledged the children's relationship with J.G. and placed the children with him as a non-relative placement. The mother and her husband failed to participate in the dependency proceedings and the department filed a TPR petition. J.G. participated in the TPR proceedings but never obtained legal rights. The children subsequently were removed from J.G. due to domestic abuse and were eventually adopted by non-relatives. On appeal of the adoption order, the District Court noted that J.G. never had parental rights, was not a party to the adoption, and had no standing to contest the adoption. The court therefore dismissed the appeal.

https://www.4dca.org/content/download/214114/1908929/file/180090_1701_05302018_09241065_i.pdf (May 30, 2018)

Fifth District Court of Appeal

No new opinions for this reporting period.

Dissolution of Marriage Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Quillen v. Quillen, __ So. 3d __, 2018 WL 2066677 (Fla. 1st DCA 2018). **REVERSED AND REMANDED WITH INSTRUCTIONS TO RESOLVE LATENT AMBIGUITY.** Pursuant to the spouses' consent final judgment (CFJ), former wife's monthly child support obligation of \$500 offset former husband's alimony obligation of the same amount; thus, she was not required to pay child support to him. Based on the "four corners" of the spouses' CFJ, its clear and unambiguous language, and its absence of language providing that the alimony obligation would outlast the child support obligation, the trial court concluded that former husband's alimony obligation terminated once the youngest child reached majority. Appellate court reached the opposite conclusion; the CFJ contained a "latent ambiguity" regarding the continuation of former wife's alimony. Accordingly, it reversed and remanded with instructions for the trial court to permit the spouses to present evidence to resolve the latent ambiguity, and for it to reconsider her supplemental petition and motion.

https://edca.1dca.org/DCADocs/2017/1032/171032_1287_05032018_09555859_i.pdf (May 3, 2018)

Preudhomme v. Preudhomme, __ So. 3d __, 2018 WL 2066839 (Fla. 1st DCA 2018). **TRIAL COURT'S FINDINGS MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; TRIAL COURT MUST BASE ITS DETERMINATION ON PRESENT BEST INTERESTS OF A CHILD.** Appellate court found the trial court's findings regarding custody were supported by competent, substantial evidence, but agreed with former wife that the trial court had engaged in a "prohibited prospective-based analysis" when it set a time-sharing schedule with the spouses' child. A trial court must base its determination on the present best interests of the child, not what the best interests of the child will be in the future.

https://edca.1dca.org/DCADocs/2017/1615/171615_1286_05032018_09570224_i.pdf (May 3, 2018)

Kurtanovic v. Kurtanovic, __ So. 3d __, 2018 WL 2399083 (Fla. 1st DCA 2018). **ALIMONY, INCLUDING RETROACTIVE ALIMONY, MUST BE BASED ON NEED AND ABILITY AND MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; LUMP SUM PAYMENT CANNOT BE ORDERED WITHOUT FINDINGS AS TO NEED AND ABILITY; A TRIAL COURT MAY IMPUTE INCOME WHERE A SPOUSE HAS FAILED TO USE HIS OR HER BEST EFFORTS TO EARN INCOME; TRIAL COURT CANNOT GRANT RELIEF UNREQUESTED; IN ABSENCE OF A SPOUSE'S EXPRESS AGREEMENT THAT HIS OR HER ESTATE SHALL PAY ALIMONY AFTER DEATH, AN ALIMONY AWARD CEASES UPON DEATH OF THE OBLIGOR; PRIMARY CONSIDERATION OF AWARD OF FEES AND COSTS IS FINANCIAL RESOURCES AVAILABLE TO EACH SPOUSE.** Former husband appealed a final judgment of dissolution on numerous grounds. Appellate court found that the trial court erred in: making a mathematical error in its scheme of equitable distribution; requiring former husband to make

a lump sum payment to former wife without ascertaining whether he had the ability to pay the award; requiring former husband to obtain life insurance to secure the alimony obligation without former wife having requested the security; and requiring that the alimony award extend beyond former husband's death. Appellate court found no error in the trial court having imputed income to former husband and affirmed the awards of alimony and retroactive alimony to former wife. Finding that the spouses appeared to be on equal financial footing, appellate court reversed the trial court's award of attorney's fees and costs to former wife. The trial court was instructed on remand to: correct the mathematical error and reconsider the fee award—taking into account the equalization of the spouses' financial resources and incomes.

https://edca.1dca.org/DCADocs/2017/0202/170202_1286_05252018_11564205_i.pdf (May 25, 2018)

Stricklin v. Stricklin, __ So. 3d __, 2018 WL 2399335 (Fla. 1st DCA 2018). **ALIMONY AWARD REQUIRES SUFFICIENT FINDINGS AS TO NEED AND ABILITY TO PAY; POST-JUDGMENT ORDER FOR FEES MUST ASSESS SPOUSES' FINANCIAL RESOURCES AT THAT POINT.** Former husband appealed portions of a final judgment awarding former wife durational alimony of \$2,500 per month for 48 months, and finding that she was entitled to an award of reasonable fees and costs. He also appealed a post-judgment order requiring that he make monthly installment payments to former wife's counsel until the unpaid fees of \$19,000 were paid in full. Concluding that the final judgment and the magistrate's report and recommendation on which it was based did not contain sufficient factual findings as to need and ability, appellate court reversed and remanded. It also reversed and remanded the post-judgment order because the order failed to include specific findings to support the award to former wife. Although the report adopted by the trial court contained sufficient findings on the spouses' respective financial resources to support a general award of reasonable fees, the post-judgment award of remaining unpaid fees and costs lacked sufficient findings of fact as to former husband's ability to pay. Appellate court instructed the trial court to make additional findings of fact as to need and ability for the durational alimony and the unpaid attorney's fees.

https://edca.1dca.org/DCADocs/2016/5549/165549_1286_05252018_11544951_i.pdf (May 25, 2018)

Williams v. Sapp, __ So. 3d __, 2018 WL 2437038 (Fla. 1st DCA 2018). **TRIAL COURT VIOLATED SPOUSE'S DUE PROCESS RIGHTS BY REJECTING AND MODIFYING MEDIATION AGREEMENT WITHOUT PROVIDING NOTICE AND AN OPPORTUNITY TO BE HEARD; BLINDSIDING A PARTY BY TAKING EVIDENCE AT A HEARING NOT NOTICED AS AN EVIDENTIARY ONE IS THE "EPITOME" OF A DUE PROCESS VIOLATION; REVERSED AND REMANDED.** Appellate court agreed with former wife that the trial court violated her due process rights by *sua sponte* modifying the spouses' mediation agreement without providing her notice and an opportunity to be heard. The agreement was presented to the trial judge for approval during a brief status conference the day following a lengthy mediation. Neither former wife nor her counsel were present. Instead of approving the settlement, the trial judge reworked it and then entered a final order approving the amended agreement. Former wife moved for rehearing, arguing that the trial court erred in modifying the agreement without the spouses' notice and consent. The trial court denied her motion because she and her counsel had failed to attend "the trial." Appellate court cited its case

of Jackson v. Cty. Elections Canvassing Bd., 204 So. 3d 571,578 (Fla. 1st DCA 2016), (cited in Messing v. Nieradka, 230 So. 3d 392 (Fla. 2d DCA 2017). “Blindsiding” a party by taking evidence at a hearing not noticed as an evidentiary one is the “epitome” of a due process violation. Appellate court noted that former wife did not contest the general rule in Florida that settlement provisions concerning child support, custody, and visitation are subject to review and approval by the trial court based on a child’s best interest. Appellate court held that the rejection and *sua sponte* modification should not have taken place without former wife being given notice and an opportunity to be heard, and that the trial court abused its discretion by denying her request for rehearing; however, it did not address the sufficiency of the evidence supporting the trial court’s rejection and modification of the mediation agreement. Reversed and remanded for the trial court to either approve the mediation agreement as negotiated by the spouses or conduct a properly notice evidentiary hearing.
https://edca.1dca.org/DCADocs/2017/1490/171490_1287_05312018_09433657_i.pdf (May 31, 2018)

Second District Court of Appeal

Morrison v. Morrison, __ So. 3d __, 2018 WL 2169928 (Fla. 2d DCA 2018). **LATENT AMBIGUITY ARISES WHEN CONTRACT LANGUAGE IS CLEAR BUT EXTRINSIC FACT CREATES NEED FOR INTERPRETATION NECESSITATING TAKING OF PAROL EVIDENCE.** Former wife appealed an order denying her motion to enforce the marital settlement agreement (MSA). Appellate court reversed and remanded for further proceedings because: 1) the trial court applied the incorrect legal standard when interpreting the MSA; and 2) resolution of the matter would require consideration of evidence. The MSA provided that former husband would pay former wife specified percentages of the inheritance funds received upon his parents’ deaths; the MSA specifically stated the spouses’ intention was to rely on the inheritance for their later years. Former husband was required to maintain life insurance to secure his obligation until former wife received her portion of the inheritance. Although the spouses anticipated former husband receiving his inheritance in lump sum, he began receiving periodic distributions under the terms of a revocable trust his father had established. Former husband’s refusal to pay any portions of the distributed funds to former wife prompted her to move for enforcement. He countered that because the funds he received were not “inherited,” they were not contemplated by the MSA. The trial court agreed with former husband. Appellate court noted that a latent ambiguity arises when language used in a contract is clear, but an “extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two or more possible meanings.” GE Fanuc Intelligent Platforms Embedded v. Brijot Imaging Sys., Inc., 51 So. 2d 1243, 1245 (Fla. 5th DCA 2011), citing Deni Assocs. of Fla. Inc., v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1139 (Fla. 1998). Appellate court concluded when the MSA referred to inheritance funds received, there was no dispute that the spouses were referring to funds former husband anticipated receiving when his parents died; nor was there any dispute at the time of execution that the spouses did not know how the funds would pass to former husband. The extrinsic fact – the manner in which he received the funds – required an analysis of how the spouses would have structured the MSA had they known that the funds would be received through a trust rather than lump sum; “unfortunately” the trial court did not address this question. Although interpretation of an MSA is generally a question of law, the presence of a latent ambiguity requires the taking of parol

evidence by the trial court to discern the parties' intent. Reversed and remanded for further proceedings consistent with this opinion.

https://edca.2dca.org/DCADocs/2017/3309/173309_39_05112018_08303283_i.pdf (May 11, 2018)

Persaud v. Persaud, __ So. 3d __, 2018 WL 2271523 (Fla. 2d DCA 2018). **IN AWARDING ALIMONY, TRIAL COURT MUST CONSIDER TAX CONSEQUENCES TO BOTH SPOUSES; ABUSE OF DISCRETION IF ALIMONY AWARD DOES NOT MEET NEEDS OF OBLIGEE DESPITE OBLIGOR'S ABILITY TO PAY; UNPAID ALIMONY AWARD CANNOT BE INCLUDED WHEN CALCULATING SPOUSE'S INCOME; TRIAL COURT MUST USE INCOME AVAILABLE TO SPOUSE.** Appellate court withdrew its opinion of February 9, 2018, and substituted this one. Finding merit in former wife's arguments that the trial court erred by: 1) failing to award her adequate retroactive alimony; 2) not considering the tax consequences of her durational alimony award; and 3) erroneously calculating the retroactive child support, appellate court reversed and remanded. An award of retroactive alimony, like other types of alimony, must be based on one spouse's need for it and the other spouse's ability to pay. Appellate court concluded that the "inconsistency" between the trial court's factual findings regarding former wife's need and the amount actually awarded made the retroactive alimony award erroneous. When awarding alimony, a trial court must consider the tax consequences to both obligor and obligee. A trial court abuses its discretion if the award does not meet the needs of the obligee despite the ability of the obligor. Here, the trial court erred in using an unpaid award of retroactive alimony when calculating former wife's income for purposes of determining her retroactive child support obligation. The trial court was instructed on remand to: reconsider the award of retroactive durational alimony; make findings regarding the tax consequences of the prospective award of durational alimony and adjust the award accordingly; and recalculate the obligation using income actually available to former wife during the period in question.

https://edca.2dca.org/DCADocs/2016/0568/160568_114_05182018_08200505_i.pdf (May 18, 2018)

Third District Court of Appeal

Kane v. Kane, __ So. 3d __, 2018 WL 2122802 (Fla. 3d DCA 2018). **FAILURE TO SERVE CONTEMPT NOTICE ON OPPOSING PARTY AND INFORM HIM OR HER OF THE "ESSENTIAL FACTS" OF THE ACTS ALLEGED TO BE CONTEMPTUOUS IN ADVANCE OF CONTEMPT HEARING VIOLATES DUE PROCESS.** Appellate court agreed with former husband that he did not receive proper notice of the contempt hearing; thus, it reversed the contempt judgment and writ of bodily attachment. The 2004 final judgment of dissolution and marital settlement agreement required former husband to pay alimony until 2020. At a contempt hearing in 2016, former husband's counsel told the general magistrate that although an earlier motion for contempt had resulted in a judgment, to his knowledge, there was no other contempt motion pending. Although there was no motion, the magistrate had deemed a letter from former wife, who was representing herself, to be a motion; however, counsel was not able to review the letters at the hearing. After finding former husband in contempt for failure to pay alimony since January 2014, the magistrate recommended a judgment for the unpaid alimony. The trial court entered judgment consistent with the recommendation and issued a writ of bodily attachment to bring former husband before the trial

court within forty-eight hours of arrest. Former husband's motion for rehearing was denied. Reiterating that failure to serve a contempt motion on an alleged contemnor and to inform him or her of the "essential facts" of the acts alleged to be contemptuous in advance of the contempt hearing is a violation of due process, appellate court vacated the orders and reversed and remanded for further proceedings including notice and an opportunity to prepare.

<http://www.3dca.flcourts.org/Opinions/3D16-2471.pdf> (May 9, 2018)

Bajcar v. Bajcar, __ So. 3d __, 2018 WL 2223745 (Fla. 3d DCA 2018). **INDIRECT CRIMINAL CONTEMPT PROCEEDINGS REQUIRE STRICT ADHERENCE TO RULE 3.840; CRIMINAL CONTEMNORS AFFORDED SAME CONSTITUTIONAL DUE PROCESS PROTECTIONS AS CRIMINAL DEFENDANTS; HERE, TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF THE LAW; WRIT OF CERTIORARI GRANTED; WRIT OF BODILY ATTACHMENT QUASHED.** Former husband petitioned for a writ of certiorari seeking relief from the trial court's writ of bodily attachment issued for his failure to comply with previous court orders. Appellate court granted the petition and quashed the writ because the trial court failed to comply with the procedural requirements for indirect criminal contempt proceedings and deprived former husband of due process protections. The spouses, both citizens of Poland, were involved in a dissolution and custody dispute in Poland. When former wife took the child, also a Polish citizen, to Miami on a visitor visa, former husband alleged that she had "absconded" with their child. The Polish court entered an order acknowledging the child's residence in the U.S., and granting former husband visitation rights, which allowed former husband to take the child back to Poland with the proviso that he return the child to his home in the U.S. on a specified date in August. Former wife refused former husband his visitation rights and requested the trial court modify the order. The magistrate determined that there was no basis for the Florida courts to modify the Polish order. After former wife's motion to vacate was denied, former husband took the child to Poland. In November, with former husband and the child still in Poland, former wife filed an emergency motion for contempt and enforcement. Former husband did not appear at the hearing on the contempt motion; however, his counsel appeared by phone. The trial court entered the writ of bodily attachment at the conclusion of the hearing. Concluding that the writ issued by the trial court constituted an indirect criminal contempt order, appellate court reiterated that criminal contemnors are entitled to the same constitutional due process protections afforded to criminal defendants. Indirect criminal proceedings require strict adherence to Florida Rule of Criminal Procedure 3.840. Here, that was not done. Appellate court held that the trial court departed from the essential requirements of the law, resulting in irreparable harm. Accordingly, appellate court granted the petition and quashed the writ.

<http://www.3dca.flcourts.org/Opinions/3D17-2726.pdf> (May 16, 2018)

Fourth District Court of Appeal

Bellows v. Bellows, __ So. 3d __, 2018 WL 2127757 (Fla. 4th DCA 2018). **TRIAL COURT MUST MAKE REQUISITE FINDINGS OF FACT WHEN AWARDING ALIMONY; IT IS ERROR TO INCLUDE DEPLETED ASSETS IN ABSENCE OF FINDING OF MISCONDUCT.** Former wife appealed an amended final judgment of dissolution. Appellate court affirmed in part and reversed in part. The durational alimony award was reversed because the trial court failed to make the requisite statutory findings of fact. The trial court's distribution of the "valueless" Charles Schwab account was

reversed because it is error to distribute depleted assets in absence of a finding that the dissipation resulted from misconduct. Appellate court affirmed the remainder of the judgment and instructed the trial court on remand to make the required findings as to alimony, omit the Schwab account from its scheme of equitable distribution, and adjust the distribution accordingly.

https://www.4dca.org/content/download/202401/1799490/file/163745_1708_05092018_08571503_i.pdf (May 9, 2018)

Fazio v. Fazio, __ So. 3d __, 2018 WL 2230657 (Fla. 4th DCA 2018). **AMBIGUOUS PROVISION WITHIN MSA REMANDED FOR EVIDENTIARY HEARING.** At issue was a provision within a marital settlement agreement (MSA) for equitable distribution of former husband's pension which the trial court concluded was "clear and unambiguous," but which appellate court found to be ambiguous. Accordingly, it reversed and remanded for the trial court to hold an evidentiary hearing for the spouses to present evidence as to the meaning of the provision. The MSA allowed the spouses to retain retirement plans held in their names except that it entitled former wife to 50% of the marital portion of former husband's FRS pension. The marital portion was defined as the amount from the date of the marriage through the date of filing the petition. At the time of their marriage, former husband was employed by the Tamarac Police Department. When it was absorbed by the Broward County Sheriff's Office (BSO), the spouses cashed out the Tamarac pension; thus, it was not absorbed into the FRS account. During their marriage, the spouses used marital funds to purchase an enhancement to the FRS pension for the years that former husband worked in Tamarac. At issue was how the provision applied to this enhancement. Former wife contended that the entire pension was marital because the enhancement was purchased with marital funds; former husband countered that the purpose of the provision was to divide the pension 50/50 *except* for the enhancement. [Italics in opinion]. Appellate court had previously remanded Fazio v. Fazio, 181 So. 3d 585 (Fla. 4th DCA 2016), for the trial court to rule on whether there was an ambiguity in the provision, and if so, to conduct an evidentiary hearing. Finding the provision to be clear and unambiguous, the trial court awarded former wife 50% of the entire FRS pension. Appellate court disagreed, concluding that the provision was ambiguous because it was "fairly susceptible" to more than one construction. If the MSA had intended to split the FRS pension 50/50 it would have said that rather than referring to the marital portion. Accordingly, appellate court remanded for the trial court to hold an evidentiary hearing during which extrinsic evidence could be considered to determine the meaning of the provision.

https://www.4dca.org/content/download/202968/1805152/file/171562_1709_05162018_09210035_i.pdf (May 16, 2018)

Davis v. Davis, __ So. 3d __, 2018 WL 2246786 (Fla. 4th DCA 2018). **TRIAL COURT FAILED TO MAKE ORAL OR WRITTEN FINDINGS AS TO CHILDREN'S BEST INTERESTS, PATERNITY, ALIMONY, AND DISTRIBUTION OF SPOUSE'S BUSINESS; REMANDED.** Appellate court agreed with former wife that the trial court erred by failing to make findings as to: 1) whether the time-sharing schedule of the two agreed biological children was in their best interests; 2) the paternity of two other children; 3) distribution of former husband's automotive business; and 4) alimony. Concluding that the trial court never made any findings in the hearing or in its written order as to: the agreed biological children's best interests; the paternity of two other children born during the marriage,

one while former husband was incarcerated and the other during a period of separation; whether former husband's business was a marital asset, despite this being an issue at trial, and alimony, appellate court reversed and remanded.

https://www.4dca.org/content/download/202970/1805170/file/171644_1709_05162018_09243242_i.pdf (May 16, 2018)

Sealy v. Sealy, __ So. 3d __, 2018 WL 2230758 (Fla. 4th DCA 2018). **TRIAL COURT CANNOT GIVE REMEDY WHICH EXCEEDS THAT OF SETTLEMENT AGREEMENT.** Former wife appealed a trial court order directing that she and former husband split the proceeds of the sale of their marital home. Appellate court reversed because the trial court's remedy exceeded the remedy provided for in the spouses' mediated settlement agreement. Appellate court found that the trial court had correctly identified what was at issue: a provision within the settlement agreement which gave former husband the right to have the house sold or to refinance the house in his name and buy former wife out for 50% of the equity, if she failed to refinance the mortgage within six months of dissolution; however, it erred in determining that former husband would be entitled to 50% of the proceeds of a forced sale. Appellate court concluded that the 50% language in the settlement agreement applied only to the option in which former husband refinanced the home and bought out former wife's interest. It affirmed the trial court's forced sale of the home, but reversed the grant of 50% of the sale proceeds to former husband, and remanded for an evidentiary hearing to determine entitlement to the sale proceeds under the settlement agreement.

https://www.4dca.org/content/download/202969/1805161/file/171631_1708_05162018_09221091_i.pdf (May 16, 2018)

Fifth District Court of Appeal

Carson-Grayson v. Grayson, __ So. 3d __, 2018 WL 2370452 (Fla. 5th DCA 2018). **RULING ON MOTIONS AT A SCHEDULING CONFERENCE VIOLATED SPOUSE'S DUE PROCESS.** Appellate court agreed with former wife that she was denied due process when the trial court ruled on motions at a hearing that was noticed as a scheduling conference. Former husband noticed two motions seeking to transfer former wife's interest in property to him for a full hearing in July; he then filed a second notice setting a short hearing in June for the purpose of setting a time to hear the motions in July. The trial court ruled on both motions at the June scheduling conference; former wife did not attend. Because the July hearing remained on the docket, former husband re-noticed for a hearing on a different matter. When former wife arrived at the July hearing, the trial court refused to address the property questions as they had already been resolved. Appellate court held that the trial court's failure to provide former wife with any notice that the merits of the motions would be determined at the June conference required reversal and a new hearing.

<http://www.5dca.org/Opinions/Opin2018/052118/5D17-2381.op.pdf> (May 25, 2018)

Interpersonal Violence Injunctions (DV, SV, Dating, Repeat, Stalking) Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Jenkins v. Goodman, __ So. 3d __, 2018 WL 2373114 (Fla 2d DCA 2018). **RESPONDENT CAN SEEK RELIEF UNDER FLORIDA RULES**. After a final judgment of injunction for protection against domestic violence was entered against him, the respondent appealed, but did not allege grounds that establish reversible error. However, he may be able to seek relief from judgment under Florida Family Law Rule of Procedure 12.540(b) which allows for relief due to clerical errors or mistakes etc. Rather than relinquish jurisdiction for the trial court to consider those grounds, the court affirmed without prejudice to the respondent to file a motion for relief from judgment under Rule 12.540(b) within thirty days.

https://edca.2dca.org/DCADocs/2017/0877/170877_65_05252018_08245452_i.pdf (May 25, 2018)

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Molina v. Valenzuela, __ So. 3d __, 2018 WL 2230106 (Fla. 4th DCA 2018). **STALKING INJUNCTION DISMISSED BECAUSE MOOT**. The petitioner filed for an injunction against stalking, and the court denied a temporary injunction but set the matter for hearing. The court heard the evidence and entered an injunction against stalking that was in effect until December 29, 2017. The respondent appealed, but the injunction had expired, and the court issued an order show cause why the appeal wasn't moot. The respondent answered and requested a ruling on the appropriateness of the court's actions and so the public records reflect that none of her actions violated Florida law. The court noted that there are three exceptions to the mootness rule: (i) questions of great public importance; (ii) when issues are likely to recur; and (iii) where collateral legal consequences affecting the rights of a party flow from the issue in the case. In the instant case, the court held that none of the three exceptions apply. The court further explained that although the respondent did not raise the issue, the third mootness exception does apply when the injunction is for protection against domestic violence, because collateral consequences flow from this type of injunction, such as the prohibition on owning a firearm. The appeal was dismissed as moot.

https://www.4dca.org/content/download/202974/1805206/file/172379_1701_05162018_09310681_i.pdf (May 16, 2018)

Fifth District Court of Appeal

No new opinions for this reporting period.