

OSCA/OCI'S CASE LAW UPDATE
November 2017

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..... 6

Dissolution of Marriage Case Law..... 7

Interpersonal Violence Injunctions (DV, SV, Dating, Repeat, Stalking) Case Law 13

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

No new opinions for this reporting period.

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

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

State v. Ratliff, __ So. 3d __, 2017 WL 5012996 (Fla. 2d DCA 2017). **AFFIRMED; CONFLICT CERTIFIED**. The State sought review of a postconviction order declaring unconstitutional two life sentences for the crimes of first-degree murder and attempted first-degree murder which defendant committed when he was a juvenile. The State argued that the postconviction court erred by granting relief without considering whether, due to the possibility of parole, defendant's life sentences constituted "de facto" life sentences. The appellate court rejected this argument. Juveniles serving life sentences with parole eligibility are entitled to relief under Miller v. Alabama, 567 U.S. 460 (2012), and Graham v. Florida, 560 U.S. 48 (2010), regardless of whether the juvenile's presumptive parole release date results in the sentence being a "de facto" life sentence. Florida's statutory parole system does not provide for individualized consideration of an offender's status as a juvenile at the time of the offense and therefore it is not sufficient to remedy the constitutional violations discussed in Miller and Graham.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/November/November%2003,%202017/2D16-5322.pdf (November 03, 2017)

Brown v. State, __ So. 3d __, 2017 WL 5162491 (Fla. 2d DCA 2017). **AFFIRMED AND REMANDED WITH DIRECTIONS**. Brown was sentenced for second-degree murder with a firearm to forty years' prison with a twenty-five-year mandatory minimum term based on the jury's finding that he caused the victim's death by discharging a firearm during the offense. The appellate court affirmed the sentence, but because the trial court failed to make written findings regarding Brown's entitlement to a sentence review as required by s. 775.082(3)(a)(5)(c), F.S., the case was remanded for the trial court to make the necessary written findings required by statute.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/November/November%2008,%202017/2D15-5617.pdf (November 08, 2017)

Third District Court of Appeal

C.T. v. State, __ So. 3d __, 2017 WL 5760347 (Fla. 3d DCA 2017). **REVERSED**. At the conclusion of C.T.'s adjudicatory hearing for grand theft of a motor vehicle, defense counsel moved for a judgment of dismissal arguing that C.T. gave a patently reasonable explanation for his possession of the car—he got it from his friend who told him a friend of his who used to sell cars wanted them to "try it out." Moreover, nothing about the car's physical condition indicated it had been stolen. The trial court denied the motion for judgment of dismissal, found C.T. delinquent, withheld adjudication of delinquency, and placed him on probation. The appellate court found

that C.T.'s explanation for his possession of the vehicle was reasonable, exculpatory, and unrefuted by the State. Because the State failed to present sufficient evidence that C.T. knew the car he was driving was stolen, the trial court's order withholding adjudication of delinquency was reversed and remanded with directions to discharge C.T. from probation.

<http://www.3dca.flcourts.org/Opinions/3D17-0980.pdf> (November 29, 2017)

Fourth District Court of Appeal

M.S. v. State, __ So. 3d __, 2017 WL 5899392 (Fla. 4th DCA 2017). **REVERSED AND REMANDED FOR ENTRY OF A JUDGMENT OF DISMISSAL**. Appellant argued that the trial court erred in denying his motion for judgment of dismissal because the State did not present sufficient evidence to support a conviction of disrupting an educational institution. The State showed that the appellant got into a brief fight in the hallway of his school between classes, other students gathered around, and school officials quickly intervened to break up the fight and disperse the students. Because disrupting an educational institution in violation of s. 877.13, F.S., requires specific intent, the State failed to establish that M.S. knowingly disrupted or interfered with his school's administration or functions beyond a de minimis (if any) impact.

https://edca.4dca.org/DCADocs/2016/1754/161754_1709_11292017_08483181_i.pdf

(November 29, 2017)

Fifth District Court of Appeal

Montgomery v. State, __ So. 3d __, 2017 WL 5180744 (Fla. 5th DCA 2017). **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED**. Montgomery was convicted of attempted robbery with a firearm, aggravated assault with a firearm, aggravated battery with a firearm, and attempted felony murder with a firearm for offenses he committed when he was seventeen years old. Montgomery filed two successive Rule 3.800(b)(2) motions to correct sentences seeking resentencing and a juvenile sentencing hearing pursuant to s. 775.082(3)(c), F.S., and for the court to make findings that he was a juvenile offender and entitled to a sentencing review hearing after twenty years in accordance with ss. 921.1401 and 921.1402, F.S. The appellate court agreed that the trial court erred in denying Montgomery's Rule 3.800(b) motions, affirmed his convictions, reversed his sentences, and remanded for resentencing for the attempted robbery with a firearm, aggravated battery with a firearm, and attempted felony murder with a firearm convictions in conformance with ss. 775.082, 921.1401, and 921.1402, F.S. The appellate court held that Montgomery was not entitled to resentencing or a review hearing on the aggravated assault with a firearm conviction. The appellate court also addressed the interplay of the mandatory minimum prison sentences required under s. 775.087(2), F.S., commonly known as the 10-20-Life statute, and the 2014 juvenile sentencing scheme set out in ss. 775.082(3), 921.1401, and 921.1402, F.S., which mandate a review hearing with the possibility of early release. The appellate court held that the mandatory twenty-five-year minimum sentence at issue in this case did not constitute cruel and unusual punishment when applied to a juvenile offender as long as he or she got the mandated judicial review.

<http://www.5dca.org/Opinions/Opin2017/110617/5D14-3615.op.pdf> (November 09, 2017)

Dependency 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

A.S., mother v. Department of Children and Families, __ So. 3d __, 2017 WL 5473564 (Fla. 3d DCA 2017). **CERTIORARI DENIED**. The Third District Court of Appeal denied a petition for a writ of certiorari filed by the mother. The mother sought review of an order directing her to stay away from the maternal grandmother, who was also the permanent guardian of the mother's children. The mother had argued that the trial court reopened the guardianship without notice to her and in violation of s. 39.621(10), F.S. The District Court, however, held that s. 39.621(10) applies when a parent files a motion to reopen a permanent guardianship and does not preclude the trial court from acting *sua sponte* in the children's best interest. Because the mother failed to show that the trial court departed from the essential requirements of the law, the court denied her petition. <http://www.3dca.flcourts.org/Opinions/3D17-2019.pdf> (November 15, 2017)

Fourth District Court of Appeal

E.S., the mother v. Department of Children and Families and Guardian ad Litem Program, __ So. 3d __, 2017 WL 4966896 (Fla. 4th DCA 2017). **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. The Fourth District Court of Appeal affirmed termination of a mother's parental rights based on medical neglect and breach of her case plan. Although the mother argued on appeal that competent, substantial evidence did not support termination of her rights, the District Court held that the record supported the trial court's findings. The court also held that the mother's arguments regarding expert witnesses and opinions from non-experts were not preserved. Finally, the court commended the trial court and affirmed its final judgment. https://edca.4dca.org/DCADocs/2017/2183/172183_1257_11012017_09284141_i.pdf (November 1, 2017)

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

Dowling v. Dowling, __ So. 3d __, 2017 WL 5076906 (Fla. 1st DCA 2017). [CALCULATION OF ALIMONY NECESSARY AFTER TRIAL COURT DISTRIBUTED MARITAL DEBT](#). Former wife appealed a final judgment of dissolution. The appellate court agreed with her that the alimony award should be recalculated, but affirmed the remainder of the judgment without comment. The appellate court found that the trial court's alimony calculation did not take into account its order that former wife be equally responsible for a line of credit debt although the financial affidavits reflected that former husband paid it entirely himself. The effect was to increase former wife's monthly expense and decrease former husband's. Reversed for trial court to reconsider alimony in light of its distribution of the marital debt.

https://edca.1dca.org/DCADocs/2016/2264/162264_1286_11062017_08543495_i.pdf

(November 6, 2017)

Kessinger v. Kessinger, __ So. 3d __, 2017 WL (Fla. 1st DCA 2017). [TRIAL COURT WITHOUT JURISDICTION TO MODIFY CHILD SUPPORT OR CUSTODY AGREED TO IN NEW YORK DISSOLUTION WHERE ONLY PETITIONER AND ONE CHILD OVER 18 LIVED IN FLORIDA](#). Former wife, a resident of Georgia, appealed the trial court's domestication of a 2011 New York dissolution judgment and its decision to resolve child support and custody orders at former husband's request. Concluding the trial court lacked jurisdiction to modify the orders, the appellate court reversed. The New York dissolution judgment incorporated a child custody arrangement with former wife as the primary residential parties of the spouses' three children and a child support arrangement requiring former husband to provide for the children until each turned twenty-one. Former husband moved to Jacksonville, Florida; former wife to Georgia. Section 88.6131, F.S., allows a Florida court to modify out-of-state child support judgments if all parties reside in Florida; s. 88.6111, F.S., allows modifications if the petitioner is not a Florida resident, but the children are. Here, the opposite is true because although one of the children over 18 lived with former husband, the other two children lived elsewhere. As to custody, the trial court was without jurisdiction over the two children over 18, and because the minor resided with former wife in Georgia, Florida was not that child's home state. Reversed with instructions to the trial court to vacate its judgment and dismiss former husband's petition on jurisdictional grounds.

https://edca.1dca.org/DCADocs/2016/1997/161997_1287_11062017_08532284_i.pdf

(November 6, 2017)

Lancaster v. Lancaster, __ So. 3d __ (Fla. 1st DCA 2017). [TRIAL COURT HAS DUTY TO DETERMINE WHETHER CHILD SUPPORT PROVISIONS IN A MARITAL SETTLEMENT AGREEMENT ARE APPROPRIATE BEFORE INCORPORATING THEM INTO JUDGMENT; CHILD SUPPORT IS A RIGHT BELONGING TO CHILD THAT NEITHER PARENT CAN CONTRACT AWAY OR WAIVE; STATUTE OBLIGATES BOTH PARENTS TO SUPPORT CHILD\(REN\)](#). Former wife appealed the final judgment

of dissolution regarding child support; former husband contended that the judgment incorporated a negotiated settlement between the spouses which provided that neither parent would be responsible for paying child support to the other. The appellate court reiterated that a trial court has a duty to determine whether the child support provisions in a marital settlement agreement are appropriate before incorporating them into a final dissolution judgment. Child support is a right belonging to the child which parents cannot contract away or waive. It is a statutory obligation placed on both parents. Here, the trial court concluded that the spouses' agreement that neither would be required to pay child support to the other was in the children's best interest; however, neither the agreement nor the final judgment addressed the children's needs, the spouses' financial circumstances, or other statutory factors relating to child support in s. 61.30, F.S. The appellate court concluded that this "absence of information" left it unable to meaningfully review whether the trial court fulfilled its obligation to assess whether the agreement was in the children's best interests. Accordingly, it reversed and remanded the child support part of the final judgment for further proceedings consistent with its opinion and affirmed the remainder of the judgement.

https://edca.1dca.org/DCADocs/2017/0912/170912_1287_11062017_09042728_i.pdf

(November 6, 2017)

Second District Court of Appeal

Cleary v. Cleary, __ So. 3d __, 2017 WL 5012999 (Fla. 2d DCA 2017). **FEE AWARD STRUCK AFTER TRIAL COURT OFFERED NO LEGAL BASIS IN SUPPORT OF FEE.** In 2004, the appellate court reversed and remanded part of the trial court's equitable distribution in Cleary v. Cleary, 872 So. 2d 299 (Fla. 2d DCA 2004). In 2014-2015, the spouses brought the dispute back before the court; in 2016, the trial court rendered a final judgment after evidentiary hearings. That judgment awarded over \$94,000 in fees and costs to former husband—which former wife appealed. Although it found the trial court's judgment "otherwise thorough and detailed," the appellate court noted the absence of the legal basis supporting the award. It reversed the fee award to former husband and instructed the trial court on remand to enter an amended final judgment striking the fee award in favor of former husband.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/November/November%2003,%202017/2D16-4691.pdf (November 3, 2017)

Messing v. Nieradka, __ So. 3d __, 2017 WL 5759043 (Fla. 2d DCA 2017). **TRIAL COURT VIOLATED SPOUSE'S DUE PROCESS RIGHTS BY CONVERTING FINAL HEARING TO EVIDENTIARY HEARING WITHOUT NOTICE AND CONDUCTING IT IN SPOUSE'S ABSENCE.** Former husband appealed a final judgment of dissolution. The appellate court reversed because the trial court violated former husband's due process rights by converting the final hearing to an evidentiary hearing without notice and conducting the final hearing in former husband's absence. Former husband petitioned for annulment six months after the spouses married, alleging that they had separated immediately after the ceremony, had never lived as husband and wife, and had never consummated the marriage. At the final hearing, at which both counsel but neither spouse was present, the trial court requested that the attorneys contact their clients and have them appear at the hearing. Former wife appeared, but former husband did not. Based on her testimony, the trial court rejected the spouses' stipulation to an annulment and proceeded on former wife's *ore*

tenuis motion for dissolution. The appellate court agreed with former husband that once the trial court rejected the stipulation, it should have stopped the hearing and scheduled an evidentiary hearing rather than proceed with an unnoticed hearing with only one spouse present. The appellate court held that: “Blindsiding a party by announcing on the day of the hearing that the court will entertain evidence at a hearing not noticed as an evidentiary hearing is the epitome of a due process violation.” Reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/November/November%2029,%202017/2D16-2027.pdf (November 29, 2017)

Third District Court of Appeal

Kane v. Sanders, __ So. 3d __, 2017 WL 4950027 (Fla. 3d DCA 2017). APPELLATE COURT LACKED JURISDICTION BECAUSE ORDER APPEALED WAS NON-FINAL; PARTY CANNOT BE HELD IN CONTEMPT FOR VIOLATING A COURT ORDER THAT IS NOT CLEAR OR PRECISE AS TO HOW PARTY MUST COMPLY; HERE, PROVISION IN MARITAL SETTLEMENT AGREEMENT WAS AMBIGUOUS. In what the appellate court termed a “high-conflict” case, former wife appealed a post-judgment order holding her in civil contempt and an order on a series of motions. The 2011 final judgment of dissolution incorporated a marital settlement agreement and parenting plan (MSA). “Various disputes” arose over the next three years concerning time with the children and the “right of first refusal” (ROFR) clause in the parenting plan, which escalated following former wife’s remarriage. The ROFR clause provided that if one parent were unable to enjoy time-sharing with the child—for whatever reason—the other parent would be entitled to the right of first refusal to care for the child over a third party; however, it did not provide the amount of time that would trigger that right or which parent would be responsible for the transportation. The appellate court dismissed the appeal of the order on a group of pending motions because it was a non-final order and therefore, it lacked jurisdiction. With regard to the contempt order, the appellate court reiterated that a party cannot be held in contempt for violating a court order that is not clear or precise as to how the party must comply with what the court has ordered. Here, the appellate court concluded that “to the extent” the trial court’s the finding of contempt was based on the ROFR provision, it failed because of the “ambiguous” terms of the provision and the conduct “alleged to have violated it.” Accordingly, the appellate court reversed and vacated the order granting former husband’s motion to compel, for contempt, for sanctions, and for attorney’s fees and costs.

<http://www.3dca.flcourts.org/Opinions/3D17-0148.pdf> (November 1, 2017)

Shaleesh v. Shaleesh, __ So. 3d __, 2017 WL (Fla. 3d DCA 2017). TRIAL COURT HAS MUCH LESS DISCRETION WHEN MODIFYING A CUSTODY ORDER THAN WHEN ESTABLISHING IT; HERE, TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ENTERING ORDER. Former wife appealed a non-final order granting former husband’s motion for a temporary suspension of the spouses’ time-sharing plan concerning their minor child and permitting the child to live with former husband in Miami-Dade County, pending the outcome of a final hearing on former husband’s verified petition for modification of time-sharing and relocation. The appellate court reiterated that to obtain a temporary custody modification, the moving parent must establish that there has been a substantial or material change in circumstances and that modification is in the child or children’s best interest. Here, the trial court conducted a hearing at which former wife was present, and an

in camera interview of the minor child. The appellate noted a trial court has much less discretion when modifying a custody order than in establishing it, but concluded here that the trial court did not abuse its discretion in entering its order.

<http://www.3dca.flcourts.org/Opinions/3D17-2094.pdf> (November 8, 2017)

Martinez v. Golisting.com, Inc, __ So. 3d __, 2017 WL 5617097 (Fla. 3d DCA 2017). **A CONTINUING WRIT OF GARNISHMENT IN CHAPTER 61 PROCEEDINGS IS LIMITED TO ALIMONY OR CHILD SUPPORT; GARNISHMENT IS GOVERNED BY STATUTE AND STRICTLY CONSTRUED.** The appellate court affirmed the trial court's finding that a continuing writ of garnishment was void *ab initio*. For nearly ten years after the dissolution of their marriage, the former spouses remained "embroiled in contentious litigation" over various issues regarding parenting of their children. Ten years after the dissolution, the trial court found former husband entitled to attorney's fees. Three years later, a continuing writ of garnishment was entered against former wife's employer, Golisting.com, Inc. Following an evidentiary hearing, the trial court granted the employer's motion to dissolve and/or dismiss the writ, finding that the continuing writ was void *ab initio*. Noting that garnishment proceedings are governed by statute and thus strictly construed, the appellate court concluded that s. 61.12, F.S., limits the remedy of a continuing writ of garnishment to alimony or child support in proceedings relating to chapter 61, F.S. The fact that the attorney's fees were incurred litigating child-related issues was irrelevant. Affirmed.

<http://www.3dca.flcourts.org/Opinions/3D16-1906.pdf> (November 22, 2017)

Gallerani v. Piquet, __ So. 3d __, 2017 WL 5760260 (Fla. 3d DCA 2017). **VALID PRENUPTIAL AGREEMENTS REQUIRING POST-DISSOLUTION SUPPORT ARE CONTRACTS.** Holding that valid prenuptial agreements requiring post-dissolution support are contracts, and finding that courts have enforced provisions similar to that in the spouses' agreement, the appellate court reversed the trial court's determination that the provision of the spouses' prenuptial agreement was void against public policy. Accordingly, the appellate court remanded for entry of a revised final judgment of dissolution ratifying and enforcing the prenuptial agreement, including the provision at issue.

<http://www.3dca.flcourts.org/Opinions/3D16-1906.pdf> (November 29, 2017)

Fourth District Court of Appeal

Bell v. Broch, __ So. 3d __, 2017 WL 4957424 (Fla. 4th DCA 2017). **AN AGREEMENT AS TO CHILD SUPPORT IS BINDING ON THE SPOUSES, SUBJECT TO THE TRIAL COURT'S DETERMINATION THAT IT IS IN THE CHILD'S BEST INTEREST; NOTICE OF APPEAL WAS PREMATURE BECAUSE FINAL JUDGMENT WAS NOT FINAL; JURISDICTION VESTED ON ISSUANCE OF AMENDED FINAL JUDGMENT; CHILD SUPPORT AWARD ERROR ON THE FACE OF THE JUDGMENT AND CONTRARY TO TERMS OF MARITAL SETTLEMENT AGREEMENT (MSA); JUDGMENT USED SPOUSE'S MONTHLY INCOME AND MSA USED A FIGURE TO BE IMPUTED AS INCOME ANNUALLY TO SPOUSE.** On a motion for rehearing, the appellate court substituted this for its opinion issued in September, 2017. Former wife raised numerous issues in her appeal of a final judgment of dissolution. With the exception of the child support issue, the appellate court affirmed without comment. Following the petition for dissolution, the spouses entered into a marital settlement agreement (MSA) which resolved all matters except for child support, time-sharing, and the parenting plan.

The spouses stipulated to former husband's gross monthly income and to an amount that would be imputed to former wife *annually* beginning September, 2018. The appellate court reiterated that an agreement as to child support is binding on the spouses, subject to the trial court's determination that it is in the child's best interest. The trial court's final judgment awarded former husband 100% of the time-sharing. Because it did not determine child support, an amended final judgment was entered which ordered former wife to pay child support. As the final judgment was not final, former wife's notice of appeal was premature; however, jurisdiction vested upon issuance of the amended final judgment which resolved the child support issue. The appellate court concluded that the trial court's award of child support to former husband was error on the face of the judgment because it conflicted with the terms of the MSA. The trial court used a child support guidelines worksheet which relied on former wife's net monthly income; however, the spouses had agreed to an income that would be imputed annually. Reversed and remanded to resolve the apparent conflict between the amended final judgment and the MSA and to recalculate former wife's child support obligation, if necessary.

https://edca.4dca.org/DCADocs/2016/3563/163563_1708_11012017_09103613_i.pdf

(November 1, 2017)

Del Pino v. Del Pino, __ So. 3d __, 2017 WL (Fla. 4th DCA 2017). TRIAL COURT MAY IMPUTE INCOME FOR ALIMONY PURPOSES; BURDEN OF PROOF IS ON THE SPOUSE SEEKING TO IMPUTE INCOME TO OTHER SPOUSE; IMPUTATION MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; A SPOUSE'S DEFERRAL OF BENEFITS TO A DATE WHEN THEY WOULD BE LARGER IS NOT NECESSARILY A VOLUNTARY REDUCTION IN INCOME, BUT CAN BE VIEWED AS PRUDENT INVESTMENT STRATEGY; APPELLATE COURT DECLINED TO CREATE A BRIGHT-LINE RULE; A TRIAL COURT'S CONSIDERATION OF ELIGIBILITY FOR GOVERNMENT BENEFITS MAY BE PROPER UNDER APPROPRIATE CIRCUMSTANCES. Former wife appealed the final judgment dissolving a long-term marriage between the spouses. The appellate court agreed with her that the trial court erred in holding that for purposes of awarding alimony, income should be imputed to her based on her eligibility for Social Security retirement benefits. The appellate court reversed based on the error and the effect of that imputation on the alimony award to former wife. A trial court may impute income to a spouse who is either voluntarily unemployed or underemployed in determining the spouses' earning abilities, sources of income, and financial circumstances; the burden of proof is on the spouse seeking to impute income to the other spouse, and competent, substantial evidence must support the imputation. Although former wife, at 62, was eligible for Social Security, she testified that she chose to defer receiving benefits until 65, so that her monthly benefit would be \$900 instead of \$640. While Social Security benefits received by a spouse can be considered as income in awarding alimony, the appellate court noted that because former wife was not receiving payments, the deferred benefits were not currently income available to her. The appellate court found no cases directly on point, but cited Moore v. Moore, 619 N.W.2d 723 (Mich. Ct. App. 2000), in support of its conclusion that the trial court's imputation of \$640 monthly to former wife was improper. "*For plaintiff to defer election of pension benefits to a later date when the benefits would be larger should not be viewed as a voluntary reduction in income, but rather as a possibly prudent investment strategy.*" Moore at 725. [Emphasis added by the appellate court.] The appellate court reasoned that if the evidence showed that the Social Security benefits would be the same regardless of when a spouse elected to receive them, and

“absent some other compelling reason,” the benefits could be considered a voluntary reduction in income, but if the evidence showed that a spouse chose to defer in order to receive larger benefits, then absent evidence to the contrary, such decision could be considered as a “prudent investment strategy and thus not subject to imputation.” Here, the appellate court found no “bad faith” in former wife’s decision, rather a “rational reason” for postponing receiving benefits. Opining that its intent was not to create a rule precluding imputation of income based on eligibility for government benefits, as a “bright-line rule” would hinder a trial court’s discretion, the appellate court stated that in appropriate circumstances, a trial court’s consideration of eligibility for government benefits for imputation of income or other determinations might be proper. Here, it was not. Reversed and remanded for reconsideration without adding former wife’s unpaid benefits into calculation of her imputed income for purposes of establishing an alimony award.

https://edca.4dca.org/DCADocs/2016/3736/163736_1708_11012017_09123105_i.pdf

(November 1, 2017)

Ramos v. Ramos, __ So. 3d __, 2017 WL 5899857 (Fla. 4th DCA 2017). **ONLY THE ENHANCED VALUE OF A PREMARITAL ASSET SHOULD BE EQUITABLY DISTRIBUTED; A DISSIPATED ASSET SHOULD NOT BE INCLUDED IN DISTRIBUTION IN ABSENCE OF A SPECIFIC FINDING OF MISCONDUCT; ORDERING A SPOUSE TO MAINTAIN LIFE INSURANCE TO SECURE AN OBLIGATION REQUIRES A FINDING IT IS NECESSARY AND AFFORDABLE FOR THE SPOUSE.** Former husband appealed the final judgment of dissolution, arguing that the trial court erred in several respects, including classifying his vending machines and truck as marital assets for purposes of equitable distribution, incorrectly valuing his coin collection, and ordering him to maintain life insurance to secure his child support obligation. The appellate court agreed and reversed. Former husband argued that the vending machine business was exempt from equitable distribution because he had started the business ten years prior to the marriage and that its value had decreased over the course of the marriage. He contended that the value of the coin collection had decreased during the course of the marriage as well. The appellate court held that the trial court erred in classifying former husband’s business as marital. Because it was a premarital asset, only the enhanced value during the marriage should have been distributed. Here, there was no enhanced value; thus, no part of it became a marital asset subject to equitable distribution. Because the coin collection had been used during the dissolution proceedings, the trial court erred in including it as a dissipated without a specific finding of misconduct. With regard to the insurance, the appellate court agreed with former husband that the trial court erred in ordering him to obtain life insurance to secure his obligation without explaining the necessity for it or ascertaining whether he had the ability to pay for it.

https://edca.4dca.org/DCADocs/2016/4028/164028_1709_11292017_08531040_i.pdf

(November 29, 2017)

Smith v. Smith, __ So. 3d __, 2017 WL 5899858 (Fla. 4th DCA 2017). **TRIAL COURT FAILED TO FIND THAT SPOUSE HAD ABILITY TO PAY AMOUNT OF ARREARAGES.** Both spouses appealed the final judgment of dissolution. The appellate court affirmed on all issues with the exception of the arrearages. Former husband fell into arrears in child support after a six-month period of hospitalization. Neither spouse challenged the trial court’s reduction in prospective child support

payments; however, former husband appealed the imposition of arrearages. The appellate court found the trial court erred in ordering former husband to make arrearage payments in the same amount as the temporary relief payments without first making a finding that former husband had the ability to pay that amount. Reversed and remanded.

https://edca.4dca.org/DCADocs/2017/0190/170190_1708_11292017_08541968_i.pdf

(November 29, 2017)

Fifth District Court of Appeal

Brady v. Brady, __ So. 3d __, 2017 WL 5180738 (Fla. 5th DCA 2017). **SPOUSES' NET INCOMES, NOT GROSS, ARE USED TO DETERMINE NEED AND ABILITY FOR ALIMONY; REQUIREMENT TO MAINTAIN INSURANCE TO SECURE AN OBLIGATION REQUIRES NECESSITY PLUS FINDING THAT INSURANCE IS AFFORDABLE TO SPOUSE; AWARD OF FEES MUST BE BASED ON REASONABLE HOURLY RATE AND REASONABLE NUMBER OF HOURS EXPENDED; SIMPLY AWARDED THE AMOUNT CHARGED BY ATTORNEY IS AN ABUSE OF DISCRETION.** Former wife appealed final judgment of dissolution on several grounds, including the permanent periodic and retroactive alimony awarded to former husband, the requirement that she maintain life insurance to secure her alimony obligation, and the attorney's fees awarded to former husband. The appellate court agreed with former wife that the trial court erred in basing the alimony award on the spouses' gross incomes rather than net and instructed the trial court on remand to determine the spouses' net income and then determine whether former husband had the need for alimony and whether former wife had the ability to pay. The appellate court also agreed with former wife that the trial court erred in requiring that she maintain life insurance to secure her obligation without making findings as to the necessity for the requirement, as well as her insurability and her ability to afford the cost of the insurance. The appellate court concluded that the trial court abused its discretion in ordering former wife to pay attorney's fees without making findings as to a reasonable hourly rate or reasonable number of hours expended. Simply awarding an amount charged by an attorney without additional findings of fact is an abuse of discretion. The appellate court instructed the trial court that if it awarded fees on remand, it must make the required factual findings to support the award. The appellate court found that the trial court had not abused its discretion in its scheme of equitable distribution, but had made a mathematical error in the equalizing payment which required correction on remand.

<http://www.5dca.org/Opinions/Opin2017/110617/5D17-1370.op.pdf>

(November 9, 2017)

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

No new opinions for this reporting period.

Third District Court of Appeal

A.S. v. Department of Children and Families, __ So. 3d __, 2017 WL 5473564 (Fla. 3d DCA 2017). [WRIT OF CERT. DENIED](#). A grandmother who was the permanent guardian of her minor grandchildren petitioned and was awarded an injunction for protection against domestic violence against the children's mother. The court entered a Stay Away Order in the permanent guardianship case, rather than in the domestic violence matter; the mother petitioned for a writ of certiorari to quash the trial court's order, claiming that she wasn't given proper notice. The appellate court denied the writ of certiorari and noted that the mother had failed to demonstrate a departure from the essential requirements of law that cannot be remedied on direct appeal. <http://www.3dca.flcourts.org/Opinions/3D17-2019.pdf> (November 15, 2017)

Fourth District Court of Appeal

Vitale v. Holmes, __ So. 3d __, 2017 WL 4958787 (Fla 4th DCA 2017). [SUMMARY DENIAL OF STALKING PETITION REVERSED](#). The petitioner filed for injunction against stalking and cited five occurrences of harassment and stalking. The court summarily denied the petition and the petitioner appealed. The appellate court reversed, holding that the trial court was required to hold a hearing or otherwise provide an explanation of the deficiencies in the petition prior to denying it. https://edca.4dca.org/DCADocs/2017/1462/171462_1709_11012017_09241276_i.pdf (November 1, 2017)

Fifth District Court of Appeal

No new opinions for this reporting period.