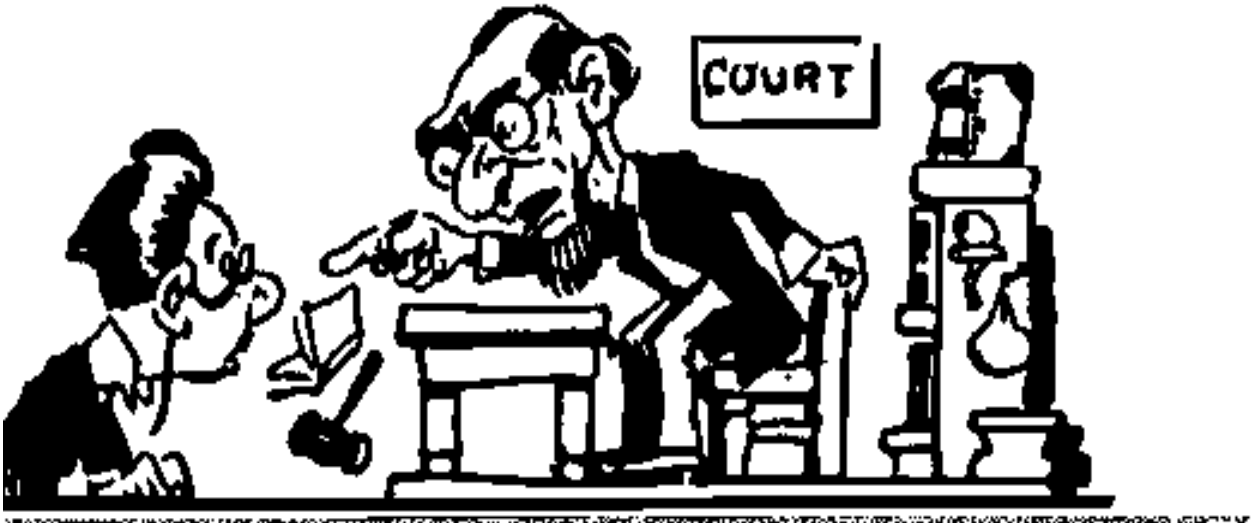
FAMILY LAW
CASE SUMMARIES



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Florida Law Weekly

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I. AGREEMENTS

A. Prenuptial/Postnuptial Agreements

Supreme Court

First District

Second District

TRIAL COURT ERRED IN AWARDING HUSBAND HALF THE APPRECIATED VALUE OF WIFE'S PRE-MARITAL HOME RESULTING FROM CAPITAL IMPROVEMENTS WHERE ANTENUPTIAL AGREEMENT PROVIDED THAT HUSBAND'S INTEREST IN WIFE'S PREMARITAL HOME WAS LIMITED TO ONE-HALF OF THE PRINCIPAL PAYMENTS AND ONE-HALF OF CAPITAL IMPROVEMENTS MADE BY THE PARTIES DURING THE MARRIAGE.

The parties married in 1996. They had two children during the marriage. The Husband is a pool contractor, and the Wife is an accountant. During the marriage, they worked together in the Husband's pool construction business. Before the parties married, they signed an antenuptial agreement. The general purpose and intent of the agreement was to protect each party's premarital assets as separate property. The antenuptial agreement contained a specific provision regarding the Wife's premarital home, which stated that the Wife's home would remain her separate property and that:

> If a petition for dissolution of marriage is filed by either of the parties hereto after the date the parties are married, upon the entry of an order dissolving the marriage of the parties, Fran shall pay to Rudy a sum equal to one-half of all principal payments and any capital improvements made with respect to the House between the date of the marriage of the parties and the date on which a petition for dissolution of marriage was filed.

During the marriage, the parties and their children resided in the wife's premarital home. The parties bought adjacent property and made improvements to both the wife's premarital home and the adjacent property for the benefit and use of the family. In the final judgment of dissolution, the trial court assigned the Wife's premarital home an equity value of $285,000 at the time of the marriage in 1996. The trial court found that the home's equity value had appreciated in the amount of $272,813, giving it an equity value of $557,813 at the time of the dissolution. The trial court then found that "[o]ne half of those capital improvements would be $136,406.50," awarding the Husband that amount in the equitable distribution calculations. The premarital home was awarded to the Wife as a non-marital asset. Both the Husband and the Wife appealed. In her cross-appeal, the Wife argued that the trial court made three errors in the equitable

distribution plan, including the calculated amount of the Husband's interest in her premarital home. The District Court agreed and reversed:

1. "We conclude that the trial court erred in interpreting the antenuptial agreement to provide that the husband is entitled to half of the appreciated value of the property resulting from capital improvements."

2. "The plain language of the agreement clearly limits the husband's interest in the wife's premarital home to one-half of principal payments and one-half of capital improvements made by the parties during the marriage."

3. "The trial court's calculation erroneously took into consideration the appreciation of the premarital home, which was not contemplated by the terms of the antenuptial agreement."

4. "The husband's benefit regarding the wife's premarital home was limited to one-half of the cost of the improvements and one-half of the amount of the principal payments made during the marriage. Accordingly, we reverse the trial court's finding that the husband was entitled to one-half of the appreciated value of the wife's home."

5. "Additionally, the trial court erred in its finding regarding the premarital value of the wife's premarital home, as argued by the husband on appeal."

6. "The undisputed testimony was that the home was worth $341,000 when the parties married, but the trial court found that the home was worth $375,000 at the time of the marriage. There appears to be no support in the record for the trial court's finding; therefore, we reverse on this matter."

7. "We note that the value of the wife's premarital home is likely irrelevant to the overall equitable distribution plan in light of our conclusion above that the husband has no interest in any appreciated value of the home."

Heiny v. Heiny, 113 So.3d 897 (Fla. 2d DCA 2013)

Third District

Fourth District

Fifth District

B. Marital Settlement Agreements

First District

ERROR FOR TRIAL COURT TO FIND PARTIES' AGREEMENT UNAMBIGUOUS WHERE GENERAL MAGISTRATE AND TRIAL COURT READ THE SAME AGREEMENT AND CAME TO OPPOSITE BUT REASONABLE CONCLUSIONS; WHILE TRIAL COURT PROPERLY RULED PAROL EVIDENCE WAS ADMISSIBLE, IT ERRED IN FAILING TO GATHER NECESSARY PAROL EVIDENCE TO CLARIFY AMBIGUITY.

The parties Final Judgment of Dissolution of Marriage incorporated a Marital Settlement Agreement (MSA) which provided, in pertinent part: "As an equitable distribution of marital

property, not an award of alimony, the Respondent/Husband shall pay or cause to be paid, to the Petitioner/Wife, as a property right from the Respondent/Husband's United States Air Force retirement pay fifty percent (50%) of the Respondent/Husband's net retirement pay. The Petitioner/Wife's right to receive the payments described herein, shall terminate immediately upon the Petitioner/Wife's death." Additionally, in another paragraph of the MSA, the parties waived "any and all claims to any right, title, and interest in the non-marital property of the other except as specifically agreed to" in the MSA.

On April 5, 2011, the Former Husband filed a motion seeking clarification of the Final Judgment and MSA and entry of an enforcement order. He argued that the MSA should be construed so that the Former Wife was entitled only to 50% of his military retirement benefits that accrued during the marriage. The matter was referred to a general magistrate, who held a hearing on the motion. At the hearing, the Former Husband testified that, at the time of the dissolution of the marriage, he held the rank of major and had been on active duty in the military for sixteen years and five months. According to his testimony, he ultimately retired from the military as a colonel on January 31, 2011, with slightly over 28 years of service. The Former Wife's counsel objected to the questioning, asserting that it was an attempt to introduce parol evidence concerning a clear and unambiguous portion of the MSA. The general magistrate sustained the Former Wife's objection and prohibited the introduction of parol evidence.

The general magistrate filed a report and recommended order denying the Former Husband's motion for clarification and an enforcement order. In the report, the general magistrate found that a plain reading of the MSA created a property right in the Former Wife for 50% of the Former Husband's full military retirement benefits. The general magistrate explained that, had the parties intended to limit the Former Wife's share of the Former Husband's military retirement benefits solely to those accruing during the marriage, they could have included such language in the MSA. The magistrate also found that the subject provision of the MSA was not ambiguous and, as a result, parol evidence would not be admissible as to the parties' intent in drafting this provision. The general magistrate considered the Former Husband's motion to be, in effect, a motion to modify a property settlement, which is prohibited under Florida law.

The Former Husband filed Exceptions to the general magistrate's report. In its final order, the trial court ruled that the general magistrate's report and recommendation was contrary to the law and evidence. The trial court found that the MSA was unambiguous. The trial court ruled that the general magistrate was thus correct in stating that parol evidence is not permitted to alter the terms of the MSA, but was incorrect in disallowing parol evidence to clarify and enforce the correct amount of creditable time used in calculating the Former Wife's portion of the Former Husband's retirement benefits. The trial court read the MSA as creating in the Former Wife a property right to only 50% of the Former Husband's retirement benefits as a division of marital property. Because the MSA includes a specific waiver of each parties' claims to the others' non-marital property, the trial court concluded that the Former Wife was entitled only to 50% of the Former Husband's retirement benefits that accrued during the marriage. The court rejected the general magistrate's contrary interpretation and ruled that, under a plain reading of the MSA in light of Florida law, the Former Wife was required to include specific language in the MSA to allow her to have access to the Former Husband's retirement benefits accumulated after the dissolution. The trial court denied a motion for rehearing and the Former Wife timely appealed the final order. The District Court reversed:

1. "The general magistrate, the trial court, and the parties agree that paragraph XV is not ambiguous and that it should be construed and applied according to its plain language. As to the question of what paragraph XV's allegedly plain language means, the consensus vanishes."

2. "The Former Wife argues in favor of the general magistrate's report, which recommended that the MSA's plain language indicates the Former Wife is entitled to half of the Former Husband's full retirement benefits, including those portions solely attributable to post-dissolution contributions and enhancements in rank."

3. "Conversely, the Former Husband offers the trial court's final order as the correct interpretation, where the trial court held that the general magistrate misapplied Florida law by attempting to make a post-dissolution equitable distribution of non-marital assets, that only the portion of retirement accumulated during marriage is a marital asset, and that the coverture formula is the proper mechanism for tabulating the Former Wife's rightful share of the Former Husband's retirement benefits."

4. "There were no factual findings in either the general magistrate's report or the trial court's final order. Rather, both tribunals' examinations and conclusions of law, as well as both parties' arguments, focused on the proper interpretation of paragraph XV of the MSA."

5. "While [an earlier case] affirms the principle that parties to a dissolution action may agree to dispose of assets in ways that a trial court would not be able to on its own, and that judges may enforce such agreements when incorporated into final judgments, [that] principle is not squarely implicated here."

6. "The [earlier] court was persuaded that 'the very phrasing of the agreed-upon distribution formula confirms that it was intended to be applied only upon receipt of monthly retirement benefit payments . . . made obvious by the formula's specific incorporation of the former wife's then-unknown monthly retirement benefit payment as a factor in its computation.' . . . In the case at hand, the parties included no formula for computing the Former Wife's share of the Former Husband's retirement benefits. Nor is there any language in the MSA that unequivocally sets the date from which the Former Wife's right to 50% of the Former Husband's retirement benefits is to be calculated."

7. "In the case under review, both the general magistrate and the trial court erred in holding that the MSA was unambiguous. The fact that each read the same document and came to opposite, but equally reasonable conclusions, confirms the document's latent ambiguity. Therefore, the trial court was correct in ruling that parol evidence was admissible."

8. "Despite recognizing the necessity of parol evidence to 'explain, clarify or elucidate' the ambiguity of the retirement distribution in paragraph XV, however, the trial court failed to gather any parol evidence . . . Absent such evidence, it is impossible to render an accurate and just determination of the case."

Toussaint v. Toussaint, 107 So.3d 474 (Fla. 1st DCA 2013)

TRIAL COURT DID NOT ERR IN ENTERING ORDER ENFORCING PARTIES' AGREEMENT BY REQUIRING FORMER HUSBAND TO PAY FORMER WIFE A STIPULATED SUM OF MONEY FOR HIS FAILURE TO OBTAIN REFINANCING ON MARITAL HOME WITHIN TIME AGREED TO BY PARTIES WHERE CONTRACT PROVISION SETTING DAMAGES FOR DELAY IN PERFORMANCE IS NOT VOID AS A MATTER OF LAW, MERELY VOIDABLE; BECAUSE MARITAL SETTLEMENT AGREEMENT IS MERELY VOIDABLE, JUDGMENT INCORPORATING AGREEMENT, WHICH FORMER HUSBAND NEITHER APPEALED NOR ATTEMPTED TO MODIFY OR VACATE, IS NO LONGER SUBJECT TO COLLATERAL ATTACK

The parties' marriage was dissolved in a final judgment entered on May 30, 2008. One part of the mediation agreement, which was incorporated in the final judgment, related to the sale of the marital home: the Former Husband would retain sole ownership but pay the Former Wife half of the home's equity. The agreement also required the Former Husband to "refinance the mortgage and home equity loan on the marital home within 90 days" and the Former Wife would concurrently provide a special warranty deed. When the Former Husband failed to complete the refinancing, the Former Wife moved for the Former Husband to comply with this requirement and for contempt if he did not do so in a timely manner. Just prior to the April 5, 2010 hearing on the matter, the parties resolved their dispute and reduced it to writing in a supplemental agreement. Therein, the Former Husband agreed to either refinance the home or ensure the Former Wife had no liability on the line of credit by June 5, 2010. The agreement also provided: "If [Former Husband] does not have [Former Wife] removed from liability on the HELOC on or before June 7, 2010, he agrees to pay a penalty in the amount of $1,500.00 per week, or $214.28 per day." The prevailing party would be entitled to attorneys' fees if a dispute arose under the supplemental agreement, which was eventually submitted to the court. A supplemental judgment was entered on June 7, 2010.

The Former Husband undertook to refinance the home, but was unsuccessful. He eventually paid in full the home equity line of credit on October 26, 2010, which was approaching five months after the refinancing deadline of June 7, 2010. The Former Wife then moved to enforce the supplemental final judgment, seeking an award against the Former Husband in the amount of $31,285.68 in accrued penalties (plus interest and attorneys' fees) for the time it took him to pay off and remove her from the line of credit. The Former Husband argued that the penalties were unenforceable, but the trial court found this argument "disingenuous" and entered judgment in the amount of $29,999.20, which is the daily penalty at the rate of $214.28 for 140 days, plus interest and attorneys' fees. The Former Husband appealed, contending that the provision of the marital settlement agreement requiring him to compensate the Former Wife for delays in the refinancing amounted to a penalty and could not be enforced. The District Court affirmed:

1. "A contract provision setting damages for delay in performance is not void as a matter of law . . . At most, a provision such as this would render the contract voidable."

2. "We need not decide whether the provision at issue is a valid liquidated damages clause or whether it is invalid as a penalty, because an agreement that is merely voidable is not subject to collateral challenge once it has been incorporated into the final judgment."

3. "Here, the Former Husband did not appeal the judgment nor did he seek to modify or vacate it. Instead, he attempted to raise the issue as a defense to an action to enforce the judgment by contempt."

4. "Because the marital settlement agreement is merely voidable, the judgment incorporating the agreement is no longer subject to collateral challenge."

Note: the concurring/dissenting opinion of Judge Makar opines that, "The penalty clause in the supplemental agreement imposing $1500 weekly fines is invalid under Florida law, which has long made such monetary sanctions verboten" and that, ""While our state jurisprudence allows the imposition of liquidated damages as a remedy for breaching an agreement, it is deemed unlawful to compel the payment of penalties for having done so." The dissent further points out that, "No court in Florida has addressed whether the enforcement of an illegal penalty clause in a marital settlement agreement incorporated into a judgment can be collaterally attacked. Courts around the country are split."

Palmer v. Palmer, 109 So.3d 257 (Fla. 1st DCA 2013)

TRIAL COURT PROPERLY CONSIDERED PAROL EVIDENCE TO DETERMINE CONSTRUCTION OF LANGUAGE OF SETTLEMENT AGREEMENT WHERE AGREEMENT WAS AMBIGUOUS; TRIAL COURT ERRED IN FAILING TO AWARD WIFE PREJUDGMENT INTEREST ON AMOUNTS DUE TO HER.

The Former Wife filed a motion to enforce the terms of a Marital Settlement Agreement (MSA) that was incorporated in the Final Judgment of Dissolution of Marriage. Under the MSA, the Former Husband was required to pay the Former Wife 30% of "any bonuses he receives" in 2004, and 20% of any bonuses received each year thereafter as long as his alimony obligation persisted. Resolution of the case was largely determined by what the parties meant in using the terms "bonus" and "receives" in the MSA. The MSA did not specify whether the Former Wife's share of the Former Husband's bonuses were to be calculated from his gross or net bonus. The Former Wife argued that "bonus" referred to the gross, pre-tax compensation the Former Husband was paid by his employer, and that "receives" meant the gross, pre-tax bonus earned by the Former Husband. By calculating her share from the net bonuses, the Former Wife argued that the Former Husband had significantly underpaid her. The Former Husband argued, on the other hand, that "bonus" referred to his net, after-tax remuneration, and that "receives" related to the money that actually reached his pocket, because he did not "receive" the amounts withheld from his bonus, which were transferred directly to the government.

The trial court heard testimony and argument from both parties as to their intent in drafting the MSA. The trial court also looked to the parties' conduct following their divorce. After weighing all the evidence, the trial court found that the parties intended that the Former Wife's share of the Former Husband's bonuses be deducted from his net bonus. Evidence to support the trial court's finding included testimony that the Former Wife took the checks provided to her without protest for many years, and evidence that for at least two of the years the Former Wife was in possession of documentation as to the Former Husband's gross and net bonus amounts, as well as the check representing her additional alimony.

There was also competent substantial evidence that the Former Husband underpaid the Former Wife $23,140.85 in additional alimony. Additionally, the record reflected that the Former Husband received a $65,000 bonus in 2006 from which he should have paid the Former Wife $8,710, although he actually paid her nothing. The trial court ordered the Former Husband to pay

the Former Wife $31,850.85, the sum of these two amounts. The trial court did not elaborate in its Final Order as to why it was declining to award any prejudgment interest to the Former Wife.

The Former Wife appealed the trial court's Final Order awarding her $31,850.85 in additional alimony, but declining to award her prejudgment interest or attorney's fees. The District Court affirmed the additional alimony award, but reversed on the issue of prejudgment interest:

1. "Although the MSA appears straightforward and clear after initial reading, the parties' conflicting interpretations indicate an unanticipated ambiguity . . . Therefore, the trial court acted appropriately in looking to parol evidence to determine the proper construction in accord with the parties' original intent."

2. "[I]t can reasonably be inferred that she could have ascertained how her additional alimony was being calculated relatively easily, and object to the method if she thought it did not comport with her understanding of the MSA."

3. "There was also competent substantial evidence that the Former Husband underpaid the Former Wife $23,140.85 in additional alimony."

4. "The record also reflects that the Former Husband received a $65,000 bonus in 2006 from which he should have paid the Former Wife $8,710, although he actually paid her nothing."

5. "[W]e affirm the trial court's interpretation of the MSA, as well as the amount of the additional alimony awarded to the Former Wife."

6. "The fact that the trial court awarded the Former Wife an amount she was owed from the Former Husband's bonuses indicates that she had a right to the amounts she was underpaid each year."

7. "Accordingly, we conclude that the trial court erred in failing to grant the Former Wife prejudgment interest on her additional alimony award."

Conway v. Conway, 111 So.3d 925 (Fla. 1st DCA 2013)

WHERE STIPULATED FINAL JUDGMENT PROVIDED THAT HUSBAND'S CHILD SUPPORT OBLIGATION WOULD TERMINATE OR DECREASE ONLY WHEN THERE ARE NO MINOR CHILDREN REMAINING, TRIAL COURT ERRED IN FINDING THAT AMBIGUITY AS TO WHETHER CHILD SUPPORT WAS SUBJECT TO TERMINATION OR REDUCTION AS TO EACH CHILD OR AS TO ALL THREE WAS A LATENT ONE; TRIAL COURT ERRONEOUSLY FOUND PAROL EVIDENCE WAS REQUIRED TO DETERMINE INTENT AND, ABSENT SUCH TESTIMONY, PROVISION CONSTITUTED UNALLOCATED CHILD SUPPORT AWARD, REQUIRING A DENIAL OF MODIFICATION PETITION.

The trial court entered a jointly-stipulated final judgment of dissolution in 2005. At the time of the divorce, the parties had three minor children, ages 4, 8, and 12. Included in the final judgment was a provision for child support which stated that the support obligation would terminate or decrease "only when there are no minor children because of one of the following events has occurred with regard to the minor children: (a) the death of the child; (b) attainment of her 18th birthday, or up to her 19th birthday so long as the child is in fact dependent, between the ages of 18 and 19, still in school, and performing in good faith with a reasonable expectation of graduation before the age of 19; (c) the valid marriage of the child; (d) a lawful entry of the child into the military service of the United States of America for a continuous period of time of one

year or more; (e) the child becoming self-supporting by permanent and full-time employment, exclusive of holidays and vacation; or (f) further order of this Court."

In April 2011, the oldest child reached age 18, and she graduated from high school at the end of May 2011. The Husband filed his modification provision on June 1, 2011, seeking a downward modification. He followed his petition with a motion for summary judgment. The Wife opposed both the petition and summary judgment motion, claiming that the support award provided that the Husband was obligated to pay the entire $1,600 per month until all three of the children had undergone one of the qualifying events.

The trial court held three hearings on the matter, and throughout the proceedings the Husband objected to the consideration of any testimony concerning the parties' intent when agreeing to the contested support provision, arguing that no such testimony was needed because the agreement unambiguously provided for a reduction in child support upon the occurrence of a qualifying event as to each child, and if the provision was ambiguous, the ambiguity was patent, in which case parol evidence was inappropriate. Conversely, the Wife argued the provision unambiguously provided for no reduction in support until a qualifying event occurred as to all three children, and if the provision was ambiguous, the ambiguity was latent and required parol evidence to clear up the ambiguity. The parties also disagreed on whether the support award was allocated or not.

The court ultimately issued an order denying the Husband's modification petition finding that in its prior order, it "determined that there was a latent ambiguity concerning the language in Paragraph 8 of the Stipulated Final Judgment," and that "it would be necessary to entertain parol evidence and testimony concerning the intent of the parties as it pertains to Paragraph 8 of the Stipulated Final Judgment of Dissolution of Marriage." The court noted the Husband's objection to such evidence on the ground the ambiguity was patent, and found that in the absence of any testimony or evidence concerning the intent of the parties, the Court had to construe the provisions of Paragraph 8 to represent an unallocated award of child support in the amount of $1,600.00. The District Court reversed:

1. "A cursory review of this provision reveals that it is far from a model of clarity. The court correctly found it ambiguous, but also found that the ambiguity was 'latent,' which required parol testimony to determine the parties' intent and, absent such testimony, it was constrained to find that the provision constituted an unallocated child support award."

2. "First, no extrinsic evidence was presented to create an ambiguity. Second, the language under scrutiny was anything but clear and intelligible, suggesting 'but a single meaning.' Rather, the ambiguous nature of the provision is clear on its face, even without extrinsic evidence, and the provision lends itself to two possible interpretations: 1) [the Husband's] obligation to pay the full $1,600 in monthly child support continues until a qualifying event has occurred with respect to the last of the children; or 2) the support obligation will decrease whenever a qualifying event occurs for the first two children (regardless of the order in which this takes place), and terminate altogether when such an event occurs with respect to the remaining child, i.e., 'when there are no minor children because of one of the qualifying events.'"

3. "Finally, the judgment does not fail to specify the rights or duties of the parties with respect to child support. To the contrary, the support provision expressly addresses [the Husband's] obligation to pay child support and [the Wife's] right to receive that support, as well as when [the Husband] is entitled to cease paying all or some of his obligation."

4. "By finding the provision was latently ambiguous, thus requiring extrinsic evidence to interpret it, and pointing to [the Husband's] objection to introducing any such evidence, the trial

court determined that it could not interpret the provision, thus forcing it to deny [his] petition. Because the provision was in fact patently ambiguous, however, this was error, and it is for this court to interpret the support provision as it would any contract."

5. "The trial court also determined that the support award was unallocated and, without explanation, apparently determined that this prevented it from modifying [the Husband's] support obligation. To the extent this was the trial court's interpretation of the law, we disagree."

6. "Whether a support award is allocated or unallocated is relevant only as to the effective date of any modification—upon the occurrence of a qualifying event or as of the date of filing a modification petition. When a support award is allocated (i.e., not a lump sum), the 'obligor is entitled to seek a modification retroactive to that event.' When the award is unallocated (i.e., a lump sum), there is no automatic reduction retroactive to the qualifying event…. [A]lthough a qualifying event has occurred, the obligor may not be entitled to a modification, retroactive or prospective, if a reduction would result in an inadequate award for the remaining child(ren)."

7. "Thus, the fact that an award is unallocated does not, by itself, constitute grounds for denying a petition for modification. Rather, an obligor of an unallocated award must, upon the occurrence of a qualifying event or any time afterward, petition the court for modification and establish entitlement to modification pursuant to the relevant statute and guidelines."

8. "Consequently, to the extent the trial court's denial of [the Husband's] petition was compelled by its finding that the support award was unallocated, this was error."

9. "Turning now to the interpretation of the provision at issue…. logically, if the award was meant to continue without reduction until a qualifying event occurred with respect to all three children, as [the Wife] argues, then any language allowing for the possibility of a decrease is superfluous. If that was the meaning of the clause, then the word 'terminate' was sufficient. Instead, however, the provision allows for both the event of termination and a decrease of the support obligation."

10. "Furthermore, with respect to each qualifying event, the provision describes it as happening to a single child, e.g., 'the death of *the child*,' attainment of *her* 18th birthday,' '*the child* becoming self-supporting . . . ,' etc. (Emphasis added.) This use of the singular is nonsensical if the support obligation was not subject to a decrease until an event happened to all the children."

11. "Thus, the more logical interpretation of the agreement is that the child support obligation is subject to termination if a qualifying event occurs regarding all three children at or near the same time, or if one or more such events already occurred as to all three children."

12. "Likewise, the support obligation is subject to a decrease with the occurrence of a qualifying event as to each child, but with the proviso that after such an event has occurred as to two of the children, the award is subject to termination when such an event occurs with respect to the remaining child, i.e., 'when there are no minor children because of one of the qualifying events.'"

13. "Thus, because one of the children reached the age of majority and graduated from high school—one of the qualifying events—[the Husband] was entitled to petition for a downward modification of the award."

14. "This leaves the trial court's determination that the award was unallocated. Under the facts of this case, however, this issue is moot because [the Husband] filed his modification petition on June 1, 2011, immediately after a qualifying event occurred as to the oldest child.

Thus, there is no issue of whether any modification of the award is retroactive to the qualifying event or the date the petition was filed."
Thompson v. Watts, 111 So.3d 986 (Fla. 1st DCA 2013)

LANGUAGE IN MSA AWARDING WIFE HALF OF HUSBAND'S 401(k) RETIREMENT AS OF SPECIFIC DATE IN 1993 GRANTED WIFE A HALF <u>OWNERSHIP</u> IN THE ACCOUNT AS OF THAT DATE, NOT HALF THE VALUE OF THE ACCOUNT AS OF THAT DATE, AND THIS OWNERSHIP ENTITLED HER TO GAINS AND/OR LOSSES ON HER SHARE.

The Wife appealed a post-judgment order, contending that it failed to effectuate the MSA entered into in September of 1994, which gave her "half of the Husband's 401K retirement as of July 24, 1993", and asserts that the trial court erred in calculating her share of the Husband's 401(k) account. She introduced expert testimony that her portion of the 401(k) account was worth approximately $103,000. The Husband maintained that she was entitled only to the value of her half share as of July 24, 1993, namely $18,111.49, and introduced evidence that, if she was entitled to the present value of the account, her portion should be valued only at around $37,000. The trial court agreed with the Husband and awarded the Wife $18,111.49, refusing to award interest or otherwise adjust for the present value of the account. The District Court held:

1. "Interpretation of marital settlement agreements is subject to *de novo* review, just as any other contract interpretation, at least in the absence of parol evidence. As with any contract, the starting point is the language of the agreement. That the agreement is incorporated into a court decree does not alter the rule."

2. "Here, rather than granting Ms. Graham half the value of the 401(k) account as of July 24, 1993, the marital settlement agreement granted her half ownership in the 401(k) account (and its contents) as of that date. This ownership entitles her to gains (and puts her at risk of losses) on her share."

3. "The phrase "1/2 of the Husband's 401(k)" describes a one-half ownership interest in the 401(k) account itself. Half ownership of any asset, real or tangible personal property, say – for example, a house – plainly means something other than entitlement to a fixed sum of money. The same is true of intangible personal property, the value of which may also fluctuate."

4. "If the parties wanted to agree to a specific dollar amount, they could have done so easily enough by specifying a sum certain. In the present case, the marital settlement agreement lacks not only a sum certain, but also any reference to the dollar value of the 401(k) account. If the parties had wanted Ms. Graham to receive a fixed number of dollars, they should not have written the marital settlement agreement to give her one-half of the portfolio of the investments then in the account. The agreement does not contain a dollar amount or speak in terms of the account's value, as opposed to the account itself."

5. "[L]imiting Ms. Graham's portion of the 401(k) account to half of its 1993 value would effectively award Mr. Graham money his wife's assets generated. Had the 401(k) account lost all of its value, Mr. Graham would now owe Ms. Graham nothing. By the same token, the 401(k) account's growth did not entitle Mr. Graham to the increase in value of assets that were not his."

6. "Ms. Graham held a property interest in her half of the 401(k) account, necessarily including gains (or losses) attributable to those assets…. We therefore reverse and remand with

instructions that the trial court determine the present value of Ms. Graham's half of what the 401(k) account held as of July 24, 1993."
Graham v. Graham, 123 So.3d 625 (Fla. 1st DCA 2013)

TRIAL COURT ERRED IN DETERMINING AMOUNT WIFE WAS TO RECEIVE FROM FUTURE MONTHLY INSTALLMENTS OF HUSBAND'S RETIREMENT WITHOUT FIRST CALCULATING "DISPOSABLE RETIRED PAY" AND IN SO CALCULATING ERRED IN DEDUCTING AMOUNT HUSBAND WAS PAYING TOWARDS A SURVIVOR BENEFIT PLAN FOR HIS CURRENT SPOUSE AS SAID PAYMENTS WERE NOT BEING MADE PURSUANT TO COURT ORDER.

The Wife appealed from the trial court's determination of the recurring amount awarded to her from future monthly installment of Husband's Army retirement based upon the MSA entered into in September of 1994, which gave her "10/23 of the Husband's Army retirement as of the date of this Agreement". The MSA required the entry of QDROs, one of which was for her share of her Husband's military retirement benefits, but no QDROs were entered at that time. The Wife did not formally petition for the entry of the QDROs until 2010. After taking evidence, the trial court awarded her $401.39 monthly based on the Husband's Army pension, and arrived at that amount by deducting from the Husband's disposable retirement pay the amount he was voluntarily paying towards a survivor benefit plan for his current spouse. The Wife argued that the statute allows SBP premium payments to be deducted only if they are being made pursuant to a court order. The Husband argued that there would rarely be a need for a court order to require a spouse to pay for an SBP for a current spouse and that the requirement of a court order pertains only to former spouses. The District Court held:

1. "[W]e start with the language of the parties' marital settlement agreement, which gave Ms. Graham '10/23 of the Husband's Army retirement.' Although the rule was once otherwise, state courts may divide a former service member's 'disposable retired pay' between spouses in accordance with 10 U.S.C. §1408(c)(1)(2011). In order to arrive at the amount of Mr. Graham's retirement benefits to which Ms. Graham is entitled, the trial court had first to calculate his disposable retired pay."

2. "In defining disposable retired pay, section 1408(a)(4) enumerates certain deductions from gross retired pay, including amounts which 'are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.' 10 U.S.C. §1408(a)(4)(D)(2011)."

3. "The trial court ruled section 1408(a)(4)(D) required it to deduct from disposable retired pay the amount Mr. Graham was voluntarily paying towards a survivor benefit plan (SBP) for his current spouse."

4. "[S]ection 1408(a)(2) defined 'court order' as 'a final decree of divorce, dissolution, annulment, or *legal separation* issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree which… in the case of a division of property, specifically provides for the payment of an amount… from the disposable retired pay of a member *to the spouse* or former spouse of that member.' The inclusion of 'legal separation' in this language, along with the specific reference to a current spouse… shows that Congress contemplated court orders requiring payments for current spouses and former spouses alike, and

that court orders are required if SBP payments are to be deducted from a retiree's disposable retired pay."

5. "In short, when calculating disposable retired pay, SBP premiums should be deducted from gross retirement pay only if they are being made pursuant to court order. The trial court erred by deducting Mr. Graham's voluntary SBP premium payments when calculating his disposable retired pay."

Graham v. Graham, 123 So.3d 625 (Fla. 1st DCA 2013)

Second District

TRIAL COURT ERRED IN DENYING HUSBAND'S PETITION FOR REDUCTION OF ALIMONY OBLIGATION BASED ON FINDING THAT HE WAIVED RIGHT TO MODIFICATION IN MARITAL SETTLEMENT AGREEMENT WHERE LANGUAGE OF AGREEMENT DID NOT CLEARLY AND UNAMBIGUOUSLY WAIVE THIS RIGHT.

In May 2008, the trial court entered its final judgment of dissolution, incorporating the parties' mediated settlement agreement (MSA). The final judgment awarded the Former Wife rehabilitative alimony of $5,000 per month for five years. However, by the terms of the MSA, the parties agreed to certain self-executing modifications of the term and amount of the award:

> (1) "Except as set forth below, the term of the rehabilitative alimony shall be non-modifiable, however, since the alimony is insufficient to meet the needs of the wife as established during the parties' marriage, the amount of the alimony shall be modifiable;"
>
> 2) Should the Former Wife remarry within the first three years after dissolution, the Former Husband's alimony obligation would automatically be reduced to $2,000 per month and the term would be shortened to twenty-four months following the remarriage;
>
> 3) If the Former Wife remarried at any time between the beginning of the third year and the conclusion of the fifth year after dissolution, the Former Husband's alimony obligation would be reduced to $2,000 per month for the remainder of the five-year term. This paragraph specifically states that "[t]he payments established by this paragraph shall be non-modifiable [sic] as to amount and duration;" and
>
> 4) Alimony shall be extended at the rate of $2,000 a month for an additional twenty-four months should the original five-year term expire and the Former Wife remain unmarried. Again, this provision specifically states that the payments "shall otherwise be non-modifiable [sic] as to amount and duration."

Post-dissolution, the Former Husband failed to make the alimony and child support payments required by the Agreement. The Former Wife filed a motion for contempt to enforce the support obligations. The Former Husband filed a petition for a downward modification of his alimony and child support obligations. The trial court found that by the language of the Agreement, the Former Husband had waived his right to seek modification of the amount of the rehabilitative alimony. Because the Former Wife had not remarried and the sixty-month term

had not expired, the only language that was subject to review by the trial court was the initial statement setting forth the length of the term and the amount of the rehabilitative alimony. The trial court agreed with the Former Wife that the phrase "since the alimony is insufficient to meet the needs of the wife" limited the parties' rights to modify to only her right to seek an increase. Accordingly, the trial court granted the Former Wife's motion for summary judgment on the waiver issue. The Former Husband appealed the denial of his petition for modification. The District Court reversed:

1. "Here, the language of the MSA provisions contemplating the Former Wife's remarriage demonstrates a clear intent to make those provisions non-modifiable. The terms are clear and leave no room for interpretation."

2. "However, the expression in the initial statement is not so clear. The phrase 'since the amount of the alimony is insufficient to meet the needs of the wife . . . the amount of alimony shall be modifiable' suggests that the Former Wife may indeed seek an increase in the amount of the alimony should the Former Husband's income increase. But the language does not clearly and plainly state that such would be the only circumstance under which modification may occur."

3. "We conclude that the language of the instant MSA also describes one set of facts under which the amount of rehabilitative alimony may be modified but does not in clear and express terms limit modification to only that one set of facts."

4. "The terms are not a clear and unambiguous waiver by the Former Husband of his statutory right to seek modification, and we decline the invitation to read the language as a condition precedent to his seeking relief."

Centeno v. Centeno, 109 So.3d 1259 (Fla. 2d DCA 2013)

Third District

TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT UPHOLDING VALIDITY OF MARITAL SETTLEMENT AGREEMENT WHERE WIFE ASSERTED CLAIMS UNDER *CASTO* BUT AGREEMENT WAS ENTERED DURING PENDING LITIGATION WHICH MAKES *CASTO* INAPPLICABLE; TRIAL COURT REQUIRED TO DETERMINE VALIDITY OF AGREEMENT BEFORE PERMITTING FINANCIAL DISCOVERY.

The parties were married in 1982. During their twenty-eight year marriage, the Husband became a successful businessman, amassing substantial wealth. During that same time, the Wife owned and operated a series of beauty supply businesses. Eventually, the parties experienced marital difficulties, and in December 2007, the Husband filed a petition for dissolution of marriage ("the First Dissolution Action"). During the pendency of the First Dissolution Action, the parties, who were attempting to resolve their differences, began to negotiate a marital settlement agreement that would control the terms of any future dissolution.

In January 2008, the Husband's attorney sent the Wife's attorney and accountant a draft of a proposed agreement, along with a box of various personal and corporate financial records. In response, the Wife requested that the Husband submit a financial affidavit and other financial records, which the Husband immediately provided. After the Wife reviewed the additional documents with her counsel and forensic accountant, the Wife's accountant compiled a list of additional financial documents to be produced by the Husband. After the Husband's counsel

received the list, which the Wife's accountant admitted was quite expansive, the parties set a meeting to "try to narrow down what [the accountant] really needed" and possibly to reach a settlement.

That meeting took place on March 10, 2008, with the parties, their attorneys, and their accountants in attendance. At the meeting, the Husband proposed settlement terms. The Wife's accountant, however, indicated that neither he nor the Wife's counsel could make any recommendations until the Husband furnished additional financial information. The Husband agreed to provide the additional records, but also withdrew the settlement offer. The Wife then spoke with her lawyer and accountant, who advised her not to accept the offer without additional financial disclosure. However, she informed them that she wanted to take the offer even though the Husband had not yet furnished the additional financial statements, and instructed her accountant not to seek additional financial disclosure.

Over the next few months, the parties engaged in negotiations, which the Wife admitted resulted in the incorporation of several terms that were to her benefit. In June 2008, the Husband provided a second financial affidavit to the Wife. Between June 20, 2008, and July 12, 2008, the Wife met with her counsel six times to discuss the proposed agreement. The Wife's accountant explained to the Wife the terms of the agreement in great detail. Additionally, the Wife's accountant composed and presented to the Wife an equitable distribution schedule from the financial information he had obtained from the Husband, which demonstrated that the Wife should receive an additional $7,033,435 to equalize the proposed share of assets. The Wife, however, wanted to accept the offer in spite of the disparity in the offer. The Wife's counsel explained that she did not need to sign the agreement, and that she could continue to pursue further financial disclosure and engage in additional negotiations. The Wife, however, insisted on entering into the agreement.

The agreement was signed by the Husband on July 21, 2008, and by the Wife on July 23, 2008. Pursuant to the agreement, the Wife would receive over $6.8 million of the parties' assets, including $175,000 cash upon the execution of the agreement. The Husband would retain the remaining assets. The agreement also provided that each party waived any claim to alimony. Regarding the voluntariness of the execution of the agreement, the agreement stated that each "had the opportunity to have independent counsel and legal advice of his or her own selection"; that each "executed this Agreement freely and voluntarily"; and that each was given "full and complete access to each other's financial records," "waives any additional financial disclosure from the other," and "believes he and she has an adequate knowledge of the other's exact financial circumstances." Additionally, the Wife's counsel testified that she did not believe that the Wife was under any type of duress when she executed the agreement, and her accountant testified that she did not appear coerced into signing.

After the execution of the agreement, the Husband filed a motion for the trial court to adopt and ratify the agreement, as contemplated by paragraph 20 of the marital settlement agreement. At a hearing on the motion, the Wife testified that she understood the agreement, entered into it freely and voluntarily, reviewed it with her counsel, and accepted its terms. The trial court adopted and ratified the agreement, and the First Dissolution Action was thereafter dismissed on February 12, 2010, for lack of prosecution.

Later, in February 2011, the Husband filed a second petition for dissolution, asking the trial court to distribute the assets pursuant to the marital settlement agreement. The Wife responded by raising three affirmative defenses, pled generically: Marital Settlement Agreement (MSA) was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching by

the Husband; the MSA makes unfair or unreasonable provision for the Wife, given the circumstances of the parties at the time, and therefore should be vacated; the MSA, on its face, does not adequately provide for the Wife. Consequently, it is unreasonable and should be vacated. Based on these affirmative defenses, the Wife demanded additional, extensive discovery of financial documents from twenty-nine corporations. The Husband filed objections, characterizing the requests as a "fishing expedition," and requesting that the Wife be deposed before the production of any documents. The Wife was subsequently deposed regarding her ability to obtain more documents prior to signing the agreement and her choice not to do so, her accountant's advice not to sign the agreement until he obtained the additional financial disclosures from the Husband, and the Wife's instruction to her accountant not to pursue the additional financial disclosures.

The Husband's counsel also questioned the Wife regarding her allegations of fraud. She claimed the Husband defrauded her by characterizing his businesses as "bankrupt" and deceiving her into believing he had "no money in the bank," and that he concealed certain ownership interests in several properties/businesses. However, through questioning, the Husband's counsel ultimately established that the Wife's allegations were completely unsubstantiated, and that the financial disclosures the Husband had provided to the Wife rebutted each of the Wife's claims.

The Husband's counsel also questioned the Wife regarding her allegations of duress, coercion, and overreaching. The Wife testified that the marital settlement agreement was the product of duress and coercion because the Husband had "psychologically abused and harassed her," which she was unaware she was experiencing at the time she executed the agreement because she "was not going to the psychologist yet." Thus, her claim was essentially that through psychological counseling she received subsequent to the signing of the agreement, she learned she was experiencing psychological or emotional abuse. Regarding her allegation of overreaching, the Wife testified without further elaboration that she believed the Husband had taken advantage of her affection toward him.

The Husband filed a motion for summary judgment regarding the Wife's affirmative defenses, arguing that as a matter of law the agreement was valid and should control the dissolution action. Attached to the motion was the transcript of the hearing where the agreement was ratified by the trial court. The evidence presented at the hearing included the depositions of the Wife, her accountant, and her counsel. The trial court granted the Husband's motion and entered a final judgment for dissolution of marriage, which adopted and ratified the marital settlement agreement. The District Court affirmed:

1. "We dispense with the Wife's discovery argument at the outset . . . In this case… the Wife attempted to set aside a marital settlement agreement entered into during the course of litigation, but her pleadings were entirely conclusory and lacked specificity. Under these circumstances, the trial court was duty-bound to determine the validity of the marital settlement agreement prior to granting the Wife's discovery requests. We therefore reject the Wife's discovery argument."

2. "Additionally, the Wife's reliance on *Casto* is misplaced. *Casto* concerned a postnuptial agreement entered into between a husband and wife who, unlike the Husband and the Wife in this case, were not in the midst of litigation against each other. The rationale . . . is that a husband and wife in such a situation hold a position of mutual trust and confidence, and, therefore, a trial judge may more carefully scrutinize a marital settlement agreement between an unestranged husband and wife for fairness."

3. "Florida case law is clear that *Casto* does not govern marital settlement agreements entered into during the course of litigation, when the Husband and the Wife are necessarily dealing at arm's length, and when each party has had ample opportunity to avail himself or herself of Florida's liberal discovery procedures to unearth the opposing party's finances."

4. "The distinction recognized in [*Petracca v. Petracca*] holds true even when the agreement entered into during litigation contemplates reconciliation and the underlying dissolution action is subsequently dismissed."

5. "It is uncontested that the agreement at issue here was entered into during the course of litigation. Thus, the Wife's reliance on *Casto* is misplaced, and the Wife's second and third affirmative defenses, which were premised entirely on the fairness inquiry in *Casto*, were deficient as a matter of law."

Parra De Rey v. Rey, 114 So.3d 371 (Fla. 3d DCA 2013)

TRIAL COURT DID NOT ERR IN GRANTING HUSBAND'S MOTION FOR SUMMARY JUDGMENT AS TO WIFE'S ATTEMPT TO SET ASIDE MARITAL SETTLEMENT AGREEMENT WHERE WIFE'S PLEADING WAS ENTIRELY CONCLUSORY AND LACKED SPECIFICITY.

The Husband filed a motion for summary judgment regarding the Wife's affirmative defenses, arguing that as a matter of law the agreement was valid and should control the dissolution action. Attached to the motion was the transcript of the hearing where the agreement was ratified by the trial court. The evidence presented at the hearing included the depositions of the Wife, her accountant, and her counsel. The trial court granted the Husband's motion and entered a final judgment for dissolution of marriage, which adopted and ratified the marital settlement agreement. The District Court affirmed:

1. "We turn now to the standard that does govern the present case. To set aside a marital settlement agreement during the course of litigation, 'the challenging spouse is . . . limited to showing fraud, misrepresentation in the discovery, or coercion.' As we will demonstrate below, the Wife, as a matter of law, has failed to establish any of these three grounds."

2. "First, the Wife failed to plead the affirmative defense of fraud with even a semblance of particularity, and therefore waived fraud as a defense."

3. "In this situation, the vagueness of the Wife's pleading was understandable, given that the Husband's counsel demonstrated that every instance of fraud the Wife alleged in her deposition was entirely baseless."

4. "It goes without saying that conclusory allegations of fraud are insufficient to survive a motion for summary judgment."

5. "With respect to the second ground, the Wife herself admitted in her deposition that she had no basis for alleging any 'misrepresentation in the discovery' . . . Thus, the Wife's own unrebutted testimony establishes that the Husband was entitled to summary judgment on the Wife's defense of 'misrepresentation in the discovery.'"

6. "Lastly, with respect to the third ground, the Wife claims the marital settlement agreement was the product of duress because the Husband slashed her tires three times at unspecified points over the course of their twenty-eight year marriage, slept with a gun underneath the mattress, and at some point called her and stated, '[I]f you don't sign the agreement I will take care of you.' The Wife, however, failed to establish any nexus between the first two allegations and her signing of the agreement."

7. "For instance, the Wife did not testify that the Husband slashed her tires because she did not or would not sign the agreement. Likewise, the Wife did not testify that the Husband threatened her with the gun, or otherwise used it to intimidate her into signing the agreement. Surely, the fact that the Husband exercised his second amendment right to bear arms, standing alone, does not rise to the level of duress."

8. "Finally, even if we were to read the Wife's third duress allegation in the light most favorable to her, *i.e.*, that the Husband meant that he 'would take care of her' in a threatening, rather than in a loving way, it would still be insufficient to survive a motion for summary judgment."

9. "'Duress involves a dual concept of external pressure and internal surrender or loss of volition in response to outside compulsion.' As such, the party claiming duress must establish that the effects of the alleged coercive behavior affected their subjective intent to act. The Wife has established the opposite in this case."

10. "Importantly, during her deposition testimony, the Wife explained that the reason she stated, in open court, that she was entering the agreement freely and voluntarily was that she was not aware of any psychological stress resulting from the above mentioned allegations at the time she executed the agreement, or during her colloquy with the trial court, and that she actually believed she was entering into the agreement freely and voluntarily when she executed the agreement."

11. "It follows that if the Wife was unaware of the impact of the Husband's alleged coercive actions, then their resulting pressures could not have 'destroy[ed] the free agency of [the Wife] and cause[d] [her] to . . . make a contract not of [her] own volition,' or 'free choice or will.' As a result, the Wife has failed to establish the defense of duress."

Parra De Rey v. Rey, 114 So.3d 371 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT DID NOT ERR IN ENTERING FINAL JUDGMENT APPROVING SETTLEMENT AGREEMENT AND IN FINDING FORMER HUSBAND HAD FAILED TO COMPLY WITH ITS TERMS BY NOT PAYING AGREED UPON ALIMONY AND CHILD SUPPORT AMOUNTS; HUSBAND IS NOT PRECLUDED FROM PROCEEDING ON PENDING PETITION FOR MODIFICATION, WHICH HAD NOT YET BEEN CONSIDERED AT THE TIME HE APPEALED FINAL JUDGMENT.

The Former Wife filed a Petition for Dissolution of Marriage seeking child support and alimony. The parties attended mediation, but could not reach an agreement. They subsequently entered into an Marital Settlement Agreement. The trial court later entered a Final Judgment of Dissolution of Marriage, approving the MSA and incorporating it by reference. Pursuant to the MSA, the Former Husband was to pay durational alimony for a period of five years with a direct income deduction order of $865.38 every pay period. He was also to pay $600 per month in child support, also via income deduction order. The trial court found the Former Husband to be $8,821.10 in arrears from October 30, 2011 to February 10, 2012. He was ordered to pay that amount in sixty days. The trial court further ordered him pay $1,142.30 in combined alimony and child support every other week. At the end of the Final Judgment, a handwritten note instructed the Former Husband to make any arguments concerning substantial change in circumstances through an "appropriate petition to modify." The Former Husband filed a Petition

to Modify Court Ordered Alimony and Attorney's Fees and for a Rehearing, explaining that he had lost his job and was currently unemployed. He argued that he had only $500 in assets, and was unable to pay the amounts set forth in the Final Judgment. The trial court denied the motion, treating it as a Motion for Rehearing. The Former Husband then filed another Petition for Modification, and argued that a substantial change in his income rendered him unable to pay the alimony agreed upon in the MSA. At the time of the appeal, there was no final order on this petition yet. The Former Husband appealed the Final Judgment, raising various issues. the District Court affirmed:

1. "Th[e] sum [set forth in the Final Judgment] accurately reflects the child support and alimony sums ordered to be deducted on each pay period under the MSA."

2. "We therefore affirm the Final Judgment, but note that our opinion does not preclude the former husband from proceeding on his pending Petition for Modification, which had not been considered by the trial court at the time he appealed the Final Judgment."

Pomerance v. Pomerance, 112 So.3d 737 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN ACCEPTING MAGISTRATE'S RECOMMENDATION THAT FORMER HUSBAND PAY ONE-HALF OF FORMER WIFE'S RENT FOR LOCATION OTHER THAN ONE IDENTIFIED IN MSA WHERE MSA UNAMBIGUOUSLY REQUIRED THAT HE PAY ONE-HALF OF RENT AT ONLY ONE LOCATION.

The parties' entered into a Marital Settlement Agreement ("MSA"), wherein the Former Husband was required to share equally in the "rent on the [Former Wife's] residence located at" a specific address. At a subsequent hearing on the Former Wife's motion for civil contempt and enforcement, she produced evidence showing that she resided at two different locations during the relevant period, including the one identified in the MSA. She provided three different leases, one of which was for the location identified in the MSA, and testified to the rent expense at both locations. The magistrate recommended that the Former Husband pay one half of the rent at both of the locations. The Former Husband then filed an exception to this recommendation, arguing that the MSA limited his obligation to pay one half of the rent for the first location only. The trial court overruled his exception, however, and ordered him to pay rent in the amount of $31,325, covering one half of the rent at both of the locations. From this order, the Former Husband appealed. The District Court reversed in this regard:

1. "As with any contract, 'where the terms of a marital settlement agreement are clear and unambiguous, the parties' intent must be gleaned from the four corners of the document. It is only when a term in a marital settlement agreement is ambiguous or unclear that the trial court may consider extrinsic evidence as well as the parties' interpretation of the contract to explain or clarify the language.'"

2. "Because the MSA is unambiguous in requiring the Former Husband to pay one half of the rent at only one location, the trial court erred when it accepted the magistrate's recommendation that the Former Husband pay one half of the rent for the other location."

3. "We therefore reverse and remand the case for the trial court to reduce the amount owed by the Former Husband to the amount of his unpaid share of rent for the specific location listed in the MSA."

Wrieden v. Wrieden, 117 So.3d 842 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN FINDING HUSBAND IN DEFAULT OF A SETTLEMENT STIPULATION AND SUBSEQUENTLY FORCING SALE OF HOME WHERE AGREEMENT PROVIDED FOR DEFAULT IN THE EVENT HUSBAND FAILED TO MAKE MORTGAGE PAYMENTS AND FAILED TO TRANSFER MORTGAGE LIABILITY FROM BOTH PARTIES TO HIMSELF, WHERE HUSBAND DID MAKE THE MORTGAGE PAYMENTS; ERROR TO FIND HUSBAND IN DEFAULT ON CONTEMPT THEORY WHERE THERE WAS NO FINDING OF WILLFUL DISREGARD OF DIVORCE ORDER.

While married, the parties owned a Florida home burdened by a mortgage naming both parties as borrowers. Ultimately, the parties ended their marriage by divorce in New York. The New York divorce order incorporated the parties' settlement stipulation, which provided that New York law would govern its terms. Regarding the Florida home, the settlement stipulation provided that the Former Husband would retain exclusive possession of the home and be solely responsible for all mortgage, taxes, and insurance expenses. The Former Husband was also obligated to transfer the mortgage liability solely to his name. The stipulation further provided that if the Husband failed to make mortgage payments and fail to transfer the mortgage liability from both parties to himself, then in such event the Wife could bring an action for the sale of the home.

The Former Wife registered the New York divorce order in Florida and filed her motion to enforce the settlement stipulation, alleging that the Former Husband failed to remove her from the mortgage within the settlement's allotted time, and so he was in default. She sought an order requiring the immediate liquidation of the property. The Former Husband contended that he was not in default because of the use of the conjunctive in the Agreement when describing his obligations— (1) failure to remove the former wife from liability under the mortgage; *and* (2) failure to make the necessary mortgage payments. Accordingly, because he paid the mortgage, he could not be in default.

A hearing was held at which the court noted that "both sides agree the [Florida home] has not been refinanced, and it's not been sold," and "[s]o it's really going to be what my interpretation of the [settlement] is without any additional facts." The court later entered its written order granting the Former Wife's motion, finding the settlement's language was not ambiguous, and finding that the undisputed evidence showed that the Former Husband had been paying all carrying charges on the property, but had failed to relieve the Wife from financial liability within the six (6) months called for in the agreement. The Former Husband appealed, arguing that the trial court erred in finding that he defaulted on the settlement stipulation under both a contractual and a contempt theory. The District Court agreed and reversed:

1. "On the contractual theory, the circuit court erroneously interpreted the plain and ordinary meaning of the settlement stipulation as granting the Former Wife a contractual right to force a sale of the Florida home if the Former Husband was not able to remove her from the home's mortgage in the settlement's allotted time."

2. "The plain and ordinary meaning of this provision is that the Former Wife's ability to force a sale of the Florida home has two conditions precedent: (1) the Former Husband fails to make mortgage payments; and (2) the Former Husband fails to remove the Former Wife from the mortgage. This is because the phrase 'and further fail[s]' shows that the two conditions are linked, and both must occur."

3. "Additionally, as the Former Husband notes, the provision's use of the phrase 'default' plainly refers to the Former Husband failing to make a necessary mortgage payment, and not to removing the [Former Wife] from the mortgage. This can be seen by considering the provision's indemnification requirement for the Former Husband in the event of a default. Such would be superfluous if [he] had removed the Former Wife from the mortgage, because she would have no obligations under the mortgage. "

4. "This reasoning appears to be confirmed by the fact that the notice and cure provisions are plainly read to allow the Former Husband to cure a default by bringing any delinquent mortgage payments up to date."

5. "The above reasoning is further confirmed by considering what would occur if either condition were independently sufficient to trigger the Former Wife's contractual right to force a sale of the Florida home. Under such an interpretation, whenever the Former Husband fails to make a necessary payment under the mortgage and is unable to cure his default after sufficient notice, the Former Wife would have the ability to force the sale of the Florida home. This would hold even if the Former Husband had, pre-default, succeeded in removing the Former Wife from the mortgage and she had transferred her interests in the home to him. Such a result is clearly unreasonable, yet logically follows if each condition is independently sufficient to trigger the Former Wife's contractual right to force a sale. Accordingly, such an interpretation should not be applied."

6. "On a contempt theory, the circuit court made no finding that the Former Husband willfully disregarded the New York divorce order. On the contrary, the record shows [he] affirmatively attempted to comply with the New York divorce order by his numerous, yet unsuccessful, attempts at refinancing the Florida home. Thus, the circuit court's order also must be reversed under a contempt theory."

McDonald v. Browne-McDonald, 125 So.3d 833 (Fla. 4th DCA 2013)

Fifth District

C. Miscellaneous

First District

Second District

Third District

Fourth District

Fifth District

II. ALIMONY (SPOUSAL SUPPORT)

A. Permanent Alimony

First District

Second District

TRIAL COURT ABUSED ITS DISCRETION IN AWARDING WIFE $100/MONTH IN ALIMONY WHERE IT IMPUTED ANNUAL INCOME OF $52,000 TO HUSBAND WHOSE PREVIOUSLY HIGH INVESTMENT INCOME HAD BEEN SEVERELY DAMAGED BY THE REAL ESTATE MARKET COLLAPSE AND WHERE AWARD FAILED TO MEET WIFE'S NEEDS; TRIAL COURT WAS ALSO OBLIGATED TO DETERMINE, GIVEN THE RELEVANT CIRCUMSTANCES, WHETHER WIFE MERITED PERMANENT PERIODIC, RATHER THAN DURATIONAL, ALIMONY.

In 1992 when the parties married, the Wife was thirty years old and the Husband was thirty-three. They had two sons, one born in 1993 and the other in 1996. At the time of the marriage, the Husband was working for his brother in his software firm and also owned an interest in the firm. The brother sold the firm in 1998 and the Husband and Wife netted over three million dollars from the Husband's share of the proceeds. The Husband invested a portion of this money in another company, PODS (Portable On Demand Storage); built a large home, estimated to be worth approximately $1.5 million at the time of trial in 2011; and commenced a marital lifestyle the trial court described as lavish. When the Husband sold his shares in PODS in 2007, he netted over five million dollars.

The Wife was primarily a homemaker and the Husband supported the family by investing in companies and real estate. He supported their luxurious marital lifestyle with the proceeds from each successive real estate deal or by tapping the equity in their home when the business deals did not provide sufficient income. However, at the time of the real estate market collapse in 2008, the Husband was overexposed financially in real estate investments and was carrying a large debt-load which required servicing, a financial burden he had difficulty in meeting.

The Wife filed for dissolution in March 2009. Although the Husband filed various financial affidavits in the course of the proceedings showing differing amounts of monthly income, he took the position at trial that he was unemployed and, therefore, was earning no income. During the dissolution proceedings, for a short time, the Husband had a job at which he earned about $52,000 a year, but he lost it before trial. Based on this evidence, the trial court imputed income to him of $52,000 a year. Based on the Wife's age, health, and abilities, the Wife's counsel stipulated to imputing income to her of $24,000 a year, and the trial court accepted this figure in its calculations. At the time of trial, there were no marital liabilities and only one marital asset of significance, the marital home owned free and clear; the only other marital assets were the couple's personal belongings, two autos, and some cash accounts.

The Wife maintained that the Husband's investments could be the source of alimony and child support. The Husband claimed that he had no more capital to invest because he had

divested himself of all his interests to pay off the marital debts. In the equitable distribution scheme, the court noted that the Husband's divestment of the marital assets to pay marital liabilities was a reasonable decision although it left the parties upon dissolution without marital liabilities. The Wife was thus put in a position of not being able to realize any income from these former positions or have any positive or potential credit or credit-worthiness that the Husband retained for the future. To compensate for this imbalance, the trial court ordered that the marital home be sold and that the Wife receive two-thirds of the net proceeds and the Husband one-third.

Although the trial court found that the Wife had a need for spousal support, that the marital standard of living was quite high during the marriage, and that $100 a month was not consistent with the marital standard of living during most of the marriage, the trial court also noted that the parties' lifestyle must be reduced due to the intervening economic downturn and the Husband's reduced ability to pay. In its final judgment, the trial court made no specific factual findings for its alimony award based upon an imputation of an annual income to the Husband of $52,000.

Both parties appealed. With regard to the alimony award, the Wife claimed on appeal that the trial court abused its discretion in awarding her only a nominal $100 a month in durational alimony, lasting sixteen years. The District Court agreed and reversed:

1. "We are hampered in our review by the trial court's lack of specific findings on the issue of alimony."

2. "[A]lthough the trial court's determination is reviewed under an abuse of discretion standard, its discretion is not without borders."

3. "Here, assuming an annual income of $52,000 per year to the husband, an award of $100 per month in alimony to the wife, where that amount admittedly fails to meet the her needs, is woefully insufficient and beyond the pale."

4. "We conclude that an award of $100 a month—where this payor is recognized to have imputed income and future prospects—is an award that no reasonable court would impose and is thus an abuse of discretion."

5. "Here, the trial court found that the Wife has limited income potential, that the marriage's duration was 16 years and 10 months, that the Wife was 49 years of age at the time of the final judgment and the Husband was 52 years of age, and that virtually all of the parties' income came from the Husband's investments. In light of these circumstances and the final judgment's lack of factual findings that an award of permanent alimony is inappropriate, we reverse for further proceedings."

6. "On remand, the trial court is directed to determine pursuant to section 61.08(7) whether the Wife merits permanent periodic alimony; further, any type of alimony awarded must be of a legally sufficient amount. In doing so, to ensure meaningful appellate review—should one be necessary—the trial court must set forth its rationale for any award."

Doganiero v. Doganiero*,* 106 So.3d 75 (Fla. 2d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING WIFE NOMINAL ALIMONY WITHOUT FACTUAL FINDINGS AS TO §61.08 FACTORS WHERE MARRIAGE FELL IN "GRAY AREA" BETWEEN A SHORT-TERM AND LONG-TERM MARRIAGE

The parties were married for thirteen years. They once owned a successful tile business' but shortly after the relationship began to deteriorate, so did the business. The Former Wife now

works as a sales manager and the Former Husband obtained his general contractor's license. During the dissolution proceedings below, the trial court found that although the Former Husband was then earning less than the Former Wife, his work history and general contractor's license evidenced that he had a significant earning potential. Thus, the Former Wife was awarded nominal alimony of $10 per month. As for consideration of the statutory factors, the final judgment merely stated that "such an [alimony] award is appropriate upon consideration of the factors set forth in subsection (2) of [section] 61.08." Otherwise, it entirely omitted findings related to the Former Wife's need for support' the standard of living established during the marriage' the age and physical and emotional condition of each party' the Former Wife's financial resources' the contribution of each party to the marriage' and the sources of income available to either party. The Former Husband's appeal followed. Finding that the trial court abused its discretion in failing to make sufficient factual findings as required under Section 61.08 Florida Statutes, the District Court reversed:

1. "In this case, the parties' thirteen-year marriage falls within the 'gray area' between short-term and long-term marriages and is not entitled to the presumption for permanent, periodic alimony."

2. "When a marriage falls within the 'gray area,' factual findings are essential to facilitate appellate review."

3. "Although several of the factors can be established through the record, the record does not adequately establish the factors relating to the Former Wife's need for alimony."

4. "Specifically, the record does not adequately establish the parties' standard of living during the marriage, the contribution of each party to the marriage, or the sources of income available to the Former Wife."

5. "In fact, the record indicates that the Former Wife is performing well at her new job and that her company has recently seen an increase in business."

6. "Furthermore, the record does not provide adequate information regarding the Former Wife's current living expenses and whether her current income is capable of meeting those expenses."

7. "Because it is difficult to discern the facts supporting the Former Wife's need for alimony, the trial court's omission of factual findings in its final judgment confounds meaningful appellate review. Accordingly, we reverse the final judgment as it relates to the award of nominal alimony and remand for reconsideration and factual findings as required under section 61.08."

Turcotte v. Turcotte, 122 So.3d 954 (Fla. 2d DCA 2013)

Third District

Fourth District

Fifth District

B. Durational Alimony

First District

TRIAL COURT ERRED IN AWARDING WIFE DURATIONAL RATHER THAN PERMANENT ALIMONY UPON DISSOLUTION OF TWENTY-SEVEN-YEAR MARRIAGE WITHOUT MAKING THE REQUIRED FINDINGS.

At the time of the January 2012 amended dissolution judgment, the Former Wife was fifty-two years old and the Former Husband was fifty-four. The trial court found that the parties had a very modest lifestyle during the marriage, in the course of which the Former Husband was employed outside the home and served as the breadwinner, while the Former Wife was the homemaker and primary caregiver to the children, who are now adults. Although the Former Husband repeatedly urged the Former Wife to seek outside employment to supplement his income, she did not do so on any regular basis. Her last job outside the home ended in 1993, after which she earned no income from employment. To explain her failure to seek outside employment over the years, the Former Wife contended that her debilitating, progressive, and observable medical conditions rendered her unable to work full-time. Ultimately, after hearing medical and vocational testimony, the court imputed $15,000 - $20,000 annually in income to the Former Wife.

The Former Husband was employed by BAE Systems. In his April 2011 amended financial affidavit, he listed his monthly gross salary or wages as $5,249.92 and his 2009 gross income as $68,000.00. After deducting taxes, health insurance, and temporary support, the Former Husband listed his net monthly income as $2,839.01. In the amended final judgment, the court listed his gross monthly income as $4,139.00, without explaining the discrepancy between this figure and the substantially higher amount listed in the financial affidavit.

The Former Wife stated her monthly need as $4,100.00, an amount the trial court deemed unrealistic. Given her voluntary unemployment status, the court imputed income to her in the approximate amount of $15,000.00 annually. The court found that the Former Wife's current actual need was $2,000.00 monthly, which the court awarded as bridge-the-gap alimony for twenty-four months. For the period beyond those twenty-four months, the court determined that the Former Wife would need, and the Former Husband had the ability to pay, $700.00 a month for durational alimony for a period not to exceed the twenty-seven-year marriage. Accounting for the equitable distribution, the court ordered each party to pay his or her own attorney's fees and costs (excepting the $9,600.00 the court had previously ordered the former husband to pay toward the former wife's temporary fees and costs). The District Court reversed the failure to award permanent alimony to the Wife:

1. "The former wife argues that the factual record and the law do not support the refusal to award permanent alimony. We agree that a remand is necessary because the lack of required findings of fact renders us unable to review the alimony issue in a meaningful way."

2. "In the dissolution judgment, the court failed to address the initial rebuttable presumption or explain why it does not apply to this case."

3. "The court did not explain why it reduced the monthly amount from $2,000.00 to $700.00 or why durational alimony, rather than permanent alimony, is appropriate."

4. "The Former Wife is entitled on remand to a correct determination of the Former Husband's monthly income for purposes of assessing his ability to pay alimony, and to findings addressing the rebuttable presumption and explaining why it was overcome."
Broemer v. Broemer, 109 So.3d 284 (Fla. 1st DCA 2013)

DURATIONAL ALIMONY AWARD REMANDED FOR FINDINGS OF FACT MANDATED BY 61.08 FLORIDA STATUTES RELATING TO THE AWARD OF ALIMONY.

After a 9-year marriage, trial court awarded wife, who was 68 years old, bridge-the-gap durational alimony for a period of 36 months in the amount of $700.00 per month. The Husband was 79 years old at the time. The Final Judgment contained no findings regarding the parties' income. The District Court held:

1. "Section 61.08 requires the trial court to consider the parties' need for alimony and their ability to pay, taking into account the financial resources of each party and all sources of income available to either party."

2. "In the final judgment, the trial court made no findings regarding the parties' income. But, the record established that the husband's monthly income is $4,690 while the wife's is $545. There are no findings explaining the court's arrival at the figure of $700 per month for alimony, given the disparity between the parties' incomes, or explaining the three-year limit in a case where both parties' working lives may well be nearing an end."

3. "Durational alimony is intended 'to provide a party with economic assistance for a set period of time.' §61.08(7), Fl. Stat. (2010). Because the record does not make clear that the trial court considered the disparity in the parties' incomes and the financial resources of both parties, we remand for findings of fact relating to the award of alimony."
Bruno v. Bruno, 119 So.3d 1273 (Fla. 1st DCA 2013)

Second District

PERIOD OF DURATIONAL ALIMONY AWARD IN FINAL JUDGMENT REQUIRED CORRECTION SUCH THAT A PERIOD COMMENSURATE WITH THE LENGTH OF THE PARTIES' MARRIAGE WAS REFLECTED, AS INTENDED BY TRIAL COURT

The Former Husband appealed the final judgment of dissolution of his marriage to the Former Wife, wherein the trial court awarded durational alimony of $3,000 per month for a period of 192 months. However, the length of the parties' marriage, which the court appeared to have intended as the period for alimony payments, was approximately 150 months. Regarding the period of the durational alimony award, the District Court reversed:

1. "[T]he court appears to have intended to award alimony for a period representing the length of the marriage. The marriage in this case lasted approximately 150 months—not 192 months."

2. "The Former Husband and the Former Wife agree that this was error. Accordingly, we reverse and remand for the circuit court to correct the period of the durational alimony award to reflect the length of the marriage."
Cooley v. Cooley, 106 So.3d 17 (Fla. 2d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN AWARDING WIFE $100/MONTH IN ALIMONY WHERE IT IMPUTED ANNUAL INCOME OF $52,000 TO HUSBAND WHOSE PREVIOUSLY HIGH INVESTMENT INCOME HAD BEEN SEVERELY DAMAGED BY THE REAL ESTATE MARKET COLLAPSE AND WHERE AWARD FAILED TO MEET WIFE'S NEEDS; TRIAL COURT WAS ALSO OBLIGATED TO DETERMINE, GIVEN THE RELEVANT CIRCUMSTANCES, WHETHER WIFE MERITED PERMANENT PERIODIC, RATHER THAN DURATIONAL, ALIMONY.

In 1992 when the parties married, the Wife was thirty years old and the Husband was thirty-three. They had two sons, one born in 1993 and the other in 1996. At the time of the marriage, the Husband was working for his brother in his software firm and also owned an interest in the firm. The brother sold the firm in 1998 and the Husband and Wife netted over three million dollars from the Husband's share of the proceeds. The Husband invested a portion of this money in another company, PODS (Portable On Demand Storage); built a large home, estimated to be worth approximately $1.5 million at the time of trial in 2011; and commenced a marital lifestyle the trial court described as lavish. When the Husband sold his shares in PODS in 2007, he netted over five million dollars.

The Wife was primarily a homemaker and the Husband supported the family by investing in companies and real estate. He supported their luxurious marital lifestyle with the proceeds from each successive real estate deal or by tapping the equity in their home when the business deals did not provide sufficient income. However, at the time of the real estate market collapse in 2008, the Husband was overexposed financially in real estate investments and was carrying a large debt-load which required servicing, a financial burden he had difficulty in meeting.

The Wife filed for dissolution in March 2009. Although the Husband filed various financial affidavits in the course of the proceedings showing differing amounts of monthly income, he took the position at trial that he was unemployed and, therefore, was earning no income. During the dissolution proceedings, for a short time, the Husband had a job at which he earned about $52,000 a year, but he lost it before trial. Based on this evidence, the trial court imputed income to him of $52,000 a year. Based on the Wife's age, health, and abilities, the Wife's counsel stipulated to imputing income to her of $24,000 a year, and the trial court accepted this figure in its calculations. At the time of trial, there were no marital liabilities and only one marital asset of significance, the marital home owned free and clear; the only other marital assets were the couple's personal belongings, two autos, and some cash accounts.

The Wife maintained that the Husband's investments could be the source of alimony and child support. The Husband claimed that he had no more capital to invest because he had divested himself of all his interests to pay off the marital debts. In the equitable distribution scheme, the court noted that the Husband's divestment of the marital assets to pay marital liabilities was a reasonable decision although it left the parties upon dissolution without marital liabilities. The Wife was thus put in a position of not being able to realize any income from these former positions or have any positive or potential credit or credit-worthiness that the Husband retained for the future. To compensate for this imbalance, the trial court ordered that the marital home be sold and that the Wife receive two-thirds of the net proceeds and the Husband one-third.

Although the trial court found that the Wife had a need for spousal support, that the marital standard of living was quite high during the marriage, and that $100 a month was not consistent with the marital standard of living during most of the marriage, the trial court also noted that the parties' lifestyle must be reduced due to the intervening economic downturn and

the Husband's reduced ability to pay. In its final judgment, the trial court made no specific factual findings for its alimony award based upon an imputation of an annual income to the Husband of $52,000.

Both parties appealed. With regard to the alimony award, the Wife claimed on appeal that the trial court abused its discretion in awarding her only a nominal $100 a month in durational alimony, lasting sixteen years. The District Court agreed and reversed:

1. "We are hampered in our review by the trial court's lack of specific findings on the issue of alimony."

2. "[A]lthough the trial court's determination is reviewed under an abuse of discretion standard, its discretion is not without borders."

3. "Here, assuming an annual income of $52,000 per year to the husband, an award of $100 per month in alimony to the wife, where that amount admittedly fails to meet the her needs, is woefully insufficient and beyond the pale."

4. "We conclude that an award of $100 a month—where this payor is recognized to have imputed income and future prospects—is an award that no reasonable court would impose and is thus an abuse of discretion."

5. "Here, the trial court found that the Wife has limited income potential, that the marriage's duration was 16 years and 10 months, that the Wife was 49 years of age at the time of the final judgment and the Husband was 52 years of age, and that virtually all of the parties' income came from the Husband's investments. In light of these circumstances and the final judgment's lack of factual findings that an award of permanent alimony is inappropriate, we reverse for further proceedings."

6. "On remand, the trial court is directed to determine pursuant to section 61.08(7) whether the Wife merits permanent periodic alimony; further, any type of alimony awarded must be of a legally sufficient amount. In doing so, to ensure meaningful appellate review—should one be necessary—the trial court must set forth its rationale for any award."

Doganiero v. Doganiero, 106 So.3d 75 (Fla. 2d DCA 2013)

Third District

Fourth District

Fifth District

C. Bridge-the-Gap Alimony

First District

Second District

Third District

Fourth District

Fifth District

TRIAL COURT ERRED IN SETTING OFF EQUALIZATION PAYMENT FORMER HUSBAND WAS REQUIRED TO MAKE TO FORMER WIFE PURSUANT TO PARTIAL SETTLEMENT AGREEMENT AGAINST FORMER WIFE'S BRIDGE-THE-GAP ALIMONY OBLIGATION.

In the dissolution of marriage proceeding, the Former Husband was awarded $10,900 as bridge-the-gap alimony, which amount was then set off by a $7,772.28 equitable distribution credit, thereby reducing the bridge-the-gap alimony payable to the Former Husband to $3,127.72. The Former Husband appealed various aspects of the final judgment entered. In this regard, the District Court reversed:

1. "Alimony is not considered an ordinary debt; and in the absence of compelling equitable considerations, a trial court errs in allowing a set off of debt against alimony."

2. "It would seem to be a matter of common sense that this rule would apply with special force when the alimony at issue is expressly designed to provide immediate funds to the financially disadvantaged spouse with legitimate identifiable short term needs in order to cushion the transition away from being married to being single."

3. "[The] set-off [herein] is inconsistent with the purpose of a bridge-the-gap alimony award."

Moore v. Moore, 120 So.3d 194 (Fla. 5th DCA 2013)

D. Rehabilitative Alimony

First District

Second District

Third District

Fourth District

Fifth District

JUDGMENT CONVERTING REHABILITATIVE ALIMONY AWARD TO PERMANENT ALIMONY AWARD REVERSED WHERE WIFE FAILED TO MEET BURDEN OF PRESENTING EVIDENCE OF REASONABLE EFFORTS TO COMPLY WITH REHABILITATIVE PLAN.

In the first appeal arising from this dissolution of marriage, the District Court affirmed an award of rehabilitative alimony to the Former Wife. The genesis of the award was medical testimony and evidence presented in the original dissolution hearing that established that the Former Wife was afflicted with a litany of physical and mental disorders, most notably a severe form of obsessive/compulsive disorder (OCD). There is no cure for OCD and the main focus of

her treatment was to reduce and manage her symptoms. Despite these maladies, the Former Husband's vocational rehabilitation psychologist, who had previously evaluated the Former Wife, concluded that she was immediately capable of obtaining entry-level employment on a part-time basis. He also concluded that she could successfully transition into full-time employment within twelve months of vocational rehabilitation training at an estimated cost of $3,000 to $5,000. The trial judge found the psychologist's testimony and conclusions compelling and determined that the Former Wife was capable of full-time employment, earning $12 to $17 per hour within twelve months, if she participated in vocational training within the cost range projected by the psychologist. So, in addition to permanent alimony in the amount of $1,500 per month, the trial court awarded the Former Wife rehabilitative alimony in the amount of $1,000 per month for eighteen months.

Shortly before the rehabilitative period was to expire in August 2010, the Former Wife filed a petition to convert the rehabilitative alimony to permanent alimony. At the conversion hearing, evidence was presented by both parties and, at the conclusion, the trial court rendered the judgment granting the Former Wife's petition. The Former Husband appealed, contending that the evidence did not establish that the Former Wife had made reasonable and diligent efforts to comply with the provisions of the rehabilitative plan. The District Court agreed and reversed:

1. "This rehabilitative plan, like others formulated in dissolution cases, is premised on assumptions and probabilities that if the dependent former spouse makes reasonable and diligent efforts to comply, rehabilitation will occur within the projected time range that will assist the former spouse in achieving the goal of becoming partially or fully self-supporting, thus eliminating or reducing the need for further support."

2. "But plans designed with assumptions and probabilities are not infallible and, despite reasonable and diligent efforts at compliance, the expected results sometimes do not occur. In these instances, courts have the discretion to convert rehabilitative alimony to permanent alimony provided the spouse seeking the conversion presents evidence to establish that reasonable and diligent efforts were made to comply."

3. "The events that occur after rehabilitative alimony is awarded will be of primary significance."

4. "Despite more than sufficient funds allotted in the plan for vocational rehabilitation, [the Former Wife], instead, sought free services from the Department of Vocational Rehabilitation, but when the counselor there told her that her OCD was not sufficiently under control to qualify her for the Department's services, she sought no other rehabilitative services."

5. "[The Former Wife] did apply for nine paying jobs in a one-year period. However, the reasonableness of applying for a job less than once a month is highly questionable if one is diligently attempting to obtain employment—such as was required by the terms of the rehabilitation plan."

6. "[The Former Wife] also sought treatment from Dr. Buhrmann, who had last treated [her] approximately eight years before, but [she] did not make that effort until a month or two before the rehabilitative period was to expire. What is quite telling about [her] return to treatment with this doctor after an eight-year hiatus is that [she] informed the doctor that she would need the doctor's testimony at a later date. Both the timing of, and the reasons for, the return to treatment with this doctor are dubious and unsupportive of a conclusion that she was diligent in seeking assistance."

7. "[The Former Wife] had the burden of presenting evidence that she made reasonable and diligent efforts to comply with the rehabilitative plan. The requirements of reasonableness

and diligence in this context require more than simply erecting a façade to give the appearance of compliance."

8. "Because [the Former Wife] failed to meet her burden, the judgment converting the rehabilitative alimony award to permanent alimony is reversed."

Lilly v. Lilly, 113 So.3d 155 (Fla. 5th DCA 2013)

E. Temporary Alimony

First District

Second District

TRIAL COURT ERRED IN FAILING TO PROPERLY CREDIT HUSBAND FOR ALIMONY PAID DURING PENDENCY OF PROCEEDINGS

A petition for dissolution of marriage herein was filed in 2004 and the original final judgment was entered in 2007. In the amended final judgment, the court awarded retroactive alimony to the Wife and stated that it would be added to her equalization payment, subject to credit for alimony actually paid and designated as such during the time period in question. The original final judgment stated that the Husband had actually paid $86,909 in support for 2004, $153,305 for 2005, and $67,384 for 2006. However, the amended equitable distribution schedule did not appear to take these payments into account. The Husband appealed. The District Court reversed:

1. "We reverse because the trial court failed to properly credit [the Husband] for alimony paid during the pendency of the proceedings."

2. "Because the amended equitable distribution schedule does not appear to take these payments into account, we reverse and remand for the trial court to credit [the Husband] for these payments."

Huffman v. Huffman, 109 So.3d 1268 (Fla. 2d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN ORDERING HUSBAND TO MAKE SUPPORT AND ATTORNEY'S FEE PAYMENTS THAT CONSUME MORE THAN 80% OF HIS NET MONTHLY INCOME AND IN REQUIRING HIM TO PAY ALL OF WIFE'S TEMPORARY ATTORNEY'S FEES.

During the underlying dissolution of marriage proceedings, in making its temporary support determination, the trial court found the Husband's net monthly income to be $6,030.11, and determined that he had the ability to provide the Wife with $3,500 per month in temporary spousal support. The trial court further found that the Husband owed the Wife $22,730 in retroactive spousal support and directed him to pay an additional $350 per month until that amount was paid in full. Based on the child support guidelines, the trial court found that the Husband's child support obligation was $502.90 per month. Finally, the trial court granted the Wife's request for $25,960.50 in temporary attorney's fees and costs, and directed the Husband to pay another $500 per month until those fees and costs were paid in full. The total of the monthly

court-ordered payments that the Husband was directed to make was $4,852.90, representing 80.48% of his net monthly income and leaving him with only $1,177.21 to meet his monthly needs.

There were no findings in the order under review about the Husband's monthly expenses, but his financial affidavit reflected $5,761 in monthly expenses. His reported monthly rent alone was $1,200; thus, he did not have enough remaining income to cover even that. The trial court found that the Wife's total monthly needs were $4,415.70 and awarded her $4,352.90 in the form of temporary spousal support, retroactive support, and child support. The Husband appealed, and the District Court reversed:

1. "Although the order under review is a temporary support order in which the circuit court has broad discretion, we conclude that the circuit court abused its discretion in requiring the Husband to virtually exhaust his monthly income to make the ordered payments, leaving him with insufficient funds to support himself."

2. "The order's requirement that the Husband spend in excess of 80% of his income in monthly support and temporary attorney's fee payments reflects an abuse of discretion on its face."

3. "The Husband does not challenge, and we do not find error in, the circuit court's decision to award the Wife $3500 per month in temporary spousal support or in directing the Husband to pay his share of the child support obligation in the amount of $502.90 per month. Although these two payments represent more than one-half of the Husband's net monthly income, we note that based upon the relatively short duration of the parties' marriage, it seems unlikely that the circuit court will ultimately award any long-term alimony. Thus it does not appear that the Husband will be paying spousal support for an extended period."

4. "The Husband also does not challenge the amount awarded for retroactive support…. We find no error in the circuit court's determination of the amount of retroactive support. But we observe that the court-ordered payments of $350 and $500 per month toward retroactive support and temporary attorney's fees tip the scale to the extent that the Husband is deprived of sufficient funds to support himself."

5. "In his current predicament, the Husband cannot even make his reported monthly rental payment. Even if the Husband were able to secure a residence at the same monthly rate as that disclosed on the Wife's financial affidavit in the amount of $900 per month, he would still have only $277.21 remaining to pay the rest of his monthly expenses."

6. "On the other hand, the total payments to be made to the Wife nearly meet her monthly needs as found by the circuit court. This apparent 'imbalance' is grossly unfair and reflects a failure to 'balance needs, as fixed by the parties' standard of living on the one hand, and ability to pay, on the other."

7. "Accordingly, because the circuit court ordered the Husband to make payments in excess of 80% of his income and failed to balance the parties' needs and ability to pay, we conclude that the circuit court abused its discretion in entering the order under review."

8. "We observe that instead of impairing the Husband's ability to support himself, the circuit court could temporarily lower the amounts that the Husband is required to pay towards retroactive support and the Wife's temporary attorney's fees and costs. The circuit court could provide for an increase in these payments if the Husband's spousal support obligation ends or is reduced upon the entry of a final judgment dissolving the parties' marriage."

9. "Finally, as argued by the Husband, it appears that the circuit court may not have considered the effect of the court-ordered spousal support on the Wife's ability to pay her temporary attorney's fees, particularly in light of the retroactive support award totaling $22,730."

10. "Because the circuit court abused its discretion in ordering the Husband to make monthly payments that exceed 80% of his net monthly income and deprive him of the ability to support himself, we reverse the order on review to the extent that it requires the Husband to pay $300 per month in retroactive spousal support and $500 per month towards the Wife's temporary attorney's fees."

11. "We remand for the circuit court to reduce, at least temporarily, the amounts that the Husband is required to pay in retroactive spousal support and for any temporary attorney's fees awarded so that he has sufficient monthly income to support himself."

12. "The circuit court shall also reconsider the award of temporary attorney's fees and costs to the Wife. In so doing, the circuit court must consider whether the Wife has the ability to pay some or all of her fees in light of the support awarded to her and whether the Husband has the ability to pay after making his support payments."

Hoffman v. Hoffman, 127 So.3d 863 (Fla. 2d DCA 2013)

Third District

Fourth District

Fifth District

REMAND NECESSARY WHERE RECORD WAS INADEQUATE TO ENABLE APPELLATE COURT TO DETERMINE WHETHER TRIAL COURT ERRED IN TOTAL AMOUNT OF TEMPORARY SUPPORT AWARDED, WHICH HUSBAND CONTENDED REQUIRED HIM TO PAY MORE THAN 100% OF HIS AVAILABLE NEW INCOME.

The trial court conducted a hearing on Wife's motion for temporary relief. The Wife explained that the Husband "was solely responsible for [their] finances" prior to him leaving the home, that they had "decided when [they] first got married that [she] was to be home with the children," and that "[h]e was the provider, the sole—as they say, the breadwinner of the home." The Wife stated that she went back to work part-time as a substitute teacher eleven years ago when their youngest son was in elementary school. The most she had made on an annual basis during the eleven years was "fifteen two," and "[t]he only reason why it might go to seventeen" was due to an "extra bonus for FCAT money." Regarding the Husband's income history, the Wife explained that it fluctuated between one hundred and ninety thousand. Wife stated that the Husband always made his base salary and overtime.

The Husband testified that he was employed with the United States Postal Service. He identified one of his pay-stubs and explained that he had twenty-six pay-periods, and the pay-stub showed his year-to-date gross at the fifteenth pay-period as $36,177.83. He confirmed that dividing fifteen pay-periods into $36,000.00 would give the amount that he received per pay-period. With respect to Wife's testimony that he had made $90,000, Husband said that was not the amount he had always been earning, but said that it fluctuated depending on overtime. He indicated that he did not anticipate any change in his earning potential (based on the above

calculations) and that there was "very little" overtime available. The Husband acknowledged that he was not current on the mortgage payments. He also confirmed that, out of his paycheck, he was repaying a $699 Thrift Savings loan, and covering Wife's health, dental, vision, and car insurance. He indicated that he had no money available after bills to give to Wife,.

In closing argument, the Wife's counsel argued that the Husband allegedly had a five hundred dollar a month rent payment to his friend and nothing else; and that he had cut the utilities off on Wife during the pendency of the case and refused to give her any funds. He further argued that his earnings last year were eighty-one thousand dollars per his W–2, while his pay stub showed he was on track for sixty-two, and he didn't know what Husband was doing with his money. The Husband's counsel responded that Husband hadn't had the lawn business since 2002. With regard to his expenses—the three mortgages, car insurance, credit cards, the IRS, Wife's health insurance—Husband was paying over twenty-six hundred dollars of net income a month just to meet marital expenses. "Other than that, he's cut to the bone to where he can't afford to do anything else. He's made as much of the payments as he can." Husband counsel further argued, "There's no money. He's not living a good life like he was when he got all the overtime. And his own testimony was that he got all this overtime because they had to close down Daytona and move everything down here. So his hours were jacked up last year, and that's why his income is where it is."

The trial court ordered the Husband to keep the mortgages current, to maintain the health insurance and pay the Wife the sum of $1,000 per month. The Husband filed a motion to vacate order and a motion for reconsideration, which the trial court denied. On appeal, the Wife argued that her testimony that Husband's income "was historically greater than his base salary and sufficient to pay their marital expenses was competent, substantial evidence that permitted the trial court to properly find [as it did,] especially in light of [his] own testimony that his income fluctuated." The District Court reversed and remanded:

1. "Importantly, '[a] financial award which requires one party to pay alimony or marital obligations in excess of that party's ability to pay constitutes an award which is not supported by substantial, competent evidence.'"

2. "As such, 'a trial court cannot enter a temporary [financial] award that exceeds or nearly exhausts a party's income because it would abuse its discretion by doing so."

3. "The pay-stub, the piece of record evidence relied upon by the trial court, contains information from which to calculate the following:

> Net Year–to–Date Income for Fifteen of Twenty–Six Pay–Periods = $36,157.83 (Gross Year–to–Date Income for Fifteen of Twenty–Six Pay–Periods)– $13,571.14 (Year–to–Date Withholdings for Fifteen of Twenty–Six Pay–Periods) = $22,586.69;
>
> Average Net Income Per Pay–Period = $22,586.69 (Net Year–to–Date Income for Fifteen of Twenty–Six Pay–Periods) / 15 Pay Periods = $1,505.78;
>
> Estimated Annual Net Income = $1,505.78 (Average Net Income Per Pay–Period) Pay–Periods = $39,150.28;
>
> Estimated Monthly Net Income = $39,150.28 (Estimated Annual Net Income)/12 months = $3,262.52."

4. "In order to determine Husband's monthly net income available to live on, the following amounts need to be deducted from his Estimated Monthly Net Income: mortgage payments, car insurance premium, and the $1000.00 alimony payment."

5. "Doing so,

Husband's Monthly Net Income Available to Live On = $3,262.52 (Estimated Monthly Net Income)-$1,400.00 (1st Mortgage Payment)-$440.00 (2nd & 3rd Mortgage Payments)-$330.00 (Car Insurance Premium)-$1000.00 (Alimony Payment) = $92.52."

6. "The temporary relief order appears to nearly exhaust Husband's net income…. Without an updated financial affidavit of Husband or discovery from Husband concerning his actual income and expenditures, it is unclear, however, whether the trial court erred."

7. "Accordingly, we vacate the current temporary relief order and remand for Husband to make full and current disclosure of his income and expenses, for the trial court to re-evaluate temporary support in light of better information and to enter a new order."

Clore v. Clore, 115 So.3d 1100 (Fla. 5th DCA 2013)

TRIAL COURT ERRED IN FAILING TO AWARD FORMER WIFE ARREARAGES DUE FROM FORMER HUSBAND UNDER TEMPORARY SUPPORT ORDER.

During the pendency of the dissolution action, the trial court entered a stipulated temporary order under which the Former Husband was required to pay mortgage payments and other specified obligations related to the marital home such as utilities, car payments and car insurance for the Former Wife, private school tuition for the minor children, and unallocated support of $7,500 per month. The uncontroverted testimony established that during the pendency of the proceedings, the Former Wife paid $21,370.631 for expenses that were to be the Former Husband's obligation per the temporary order. Despite demand from the Former Wife, he failed to pay these due and owing monies. The trial court also failed to award the Former Wife these arrearages due her under the temporary support order. The Former Wife appealed. In this regard, the District Court reversed:

1. "It appears from the record that the trial court was under the misapprehension that the monies claimed by the Former Wife had been reimbursed by the Former Husband."

2. "On remand, the trial court shall require the Former Husband to pay this arrearage amount."

Sasseen v. Sasseen, 116 So.3d 1281 (Fla. 5th DCA 2013)

F. Lump Sum Alimony

First District

Second District

Third District

TRIAL COURT DID NOT ABUSE DISCRETION BY TERMINATING HUSBAND'S TEMPORARY SUPPORT OBLIGATION WHERE AMOUNT ALREADY PAID EXCEEDED AMOUNT HE WAS REQUIRED TO PAY UNDER PRENUPTIAL AGREEMENT AND WIFE HAD SUBSTANTIAL MEANS OF HER OWN.

In July 2002, after an eighteen year romantic relationship, the parties executed a prenuptial agreement in which the Husband, then with a disclosed net worth approaching $160 million, and the Wife, then with a worth of almost $1 million, agreed that in the event their contemplated marriage ended in a divorce, the Wife would receive only $260,000 from the Husband.

In February 2010, the Husband filed for divorce and sought to enforce the prenuptial agreement, while the Wife sought to set it aside. During the course of the proceedings, the parties entered into two agreements to provide for temporary support and attorney's fees for the Wife. Both agreements, or stipulations, were spread on the record in the form of agreed orders.

The first agreement, entered on July 29, 2010, was embodied in an order titled "Agreed Order on Wife's Motion for Temporary Relief and Husband's Motion for Exclusive Use of Marital Home," and required the Husband to pay support to the Wife and provided her with use of the former marital residence. No specific termination date was provided. The second agreement (or stipulation) between the parties was executed on June 23, 2011, and modified only paragraph 5 of the earlier stipulation and order regarding attorney's fees, requiring that the Husband pay a percentage amount of the Wife's fees as on a temporary basis so long as the proceeding was pending.

On April 10, 2012, following a three-week trial, the court below orally announced that it had determined that the parties' prenuptial agreement was valid and enforceable. The court advised, however, that it would take "several months" before a written judgment would be entered. A little less than three weeks later, the Husband filed a "Motion to Terminate Temporary Support, Temporary Attorney's Fees and Costs, for the Immediate Return of Automobile, and for Other Relief" claiming that continued compliance with the parties' prior agreements (and agreed orders thereon) would "give the Former Wife an undeserved windfall" because the amount of alimony that she was to receive pursuant to the prenuptial agreement was substantially less than sums already paid in temporary support and fees. In response, the trial court terminated both the Husband's temporary support and attorney's fees obligations. The Wife's appeal followed. The District Court affirmed the trial court's decision to terminate the Wife's temporary alimony:

1. "On the facts presented, we cannot conclude the trial court abused its discretion in terminating [the Husband's] temporary support obligation."

2. "Having paid over ten times the amount previously agreed to and with no claim by [the Wife] of insufficient funds for her own support, good cause arguably was demonstrated for termination of [the Husband's] temporary support obligation. Thus, we cannot characterize the trial court's decision as arbitrary, fanciful, or unreasonable."

Schecter v. Schecter, 109 So.3d 833 (Fla. 3d DCA 2013)

Fourth District

ALTHOUGH SPECIAL CIRCUMSTANCES OF HUSBAND'S NON-COOPERATION EXISTED TO JUSTIFY IMPOSITION OF LUMP-SUM ALIMONY, TRIAL COURT'S AWARD OF MARITAL HOME AS LUMP-SUM ALIMONY IN ENTERING FINAL JUDGMENT *NUNC PRO TUNC* FOR ALL ASPECTS OF THE DISSOLUTION WAS INAPPROPRIATE BECAUSE BETWEEN ORIGINAL FINAL JUDGMENT, REVERSED BECAUSE HUSBAND DID NOT HAVE NOTICE OF FINAL HEARING, AND LATER FINAL JUDGMENT, WIFE HAD REMARRIED.

After 22 years of marriage, the Wife filed a dissolution action on May 8, 2008. There was a final hearing, which only the wife attended, and the court entered a final judgment of dissolution on October 16, 2008. On February 28, 2009, the Wife remarried. In 2011, the appellate court reversed the final judgment because the Husband did not have notice of the final hearing. On remand, the Husband appeared at the final hearing and represented himself. The parties' only significant asset was a marital home valued at $380,000. In the final judgment, the circuit court awarded the Wife the Husband's "one-half interest in the marital residence as lump sum alimony" based on the rationale that the Husband had demonstrated hostility against providing any spousal support. Reasoning that the Wife was entitled to permanent alimony, the court observed that "to award the Wife any kind of monthly support will only encourage the Husband to continue to defeat the Wife's right to support by in some way concealing or hiding his true earnings." The Husband appealed. The District Court reversed the award of lump sum alimony:

1. "The problem with the lump sum alimony award was that the original justification for the award had evaporated by the time of the 2011 hearing. In evaluating the need for spousal support, the court could not ignore the Wife's 2009 remarriage."

2. "Although the court correctly made the dissolution aspect of the judgment *nunc pro tunc* to October 16, 2008, the financial aspects of the 2011 judgment involved facts developed at the 2011 trial which the Husband attended. Therefore, the 2011 judgment necessarily involved something more than memorializing a 'previously taken judicial act,' making a *nunc pro tunc* order on all aspects of the dissolution inappropriate."

3. "In the case at hand, the trial court was justified in finding, based upon the Husband's threats and history of non-payment, that 'unusual circumstances' existed which justified the imposition of lump sum alimony over permanent periodic payments."

4. "However, there was no 'special necessity' for lump sum alimony because the Wife's remarriage terminated her entitlement to permanent alimony on February 28, 2009."

5. "Therefore, the award of the Husband's entire share in the marital home constituted an abuse of discretion."

6. "We therefore reverse the award of lump sum alimony and remand to the trial court to divide the marital home according to section 61.075, Florida Statutes (2008). We affirm the other aspects of the final judgment."

Taylor v. Taylor, 114 So.3d 283 (Fla. 4th DCA 2013)

ERROR FOR TRIAL COURT TO DECLINE TO CHARACTERIZE PAYMENTS DUE TO WIFE UNDER PROVISION OF MSA TITLED "LUMP SUM ALIMONY AND EQUITABLE DISTRIBUTION" AS TO WHETHER SAID PAYMENTS ARE TAXABLE TO WIFE AND DEDUCTIBLE BY HUSBAND.

The parties' MSA contained a provision titled "Lump Sum Alimony and Equitable Distribution" requiring the former husband to pay the former wife one-half of his salary after payment of child support for ten years, followed by yearly payments of $10,000. The parties agreed that the payments would be non-modifiable. The MSA was silent as to whether the payments would be taxable/deductible. The parties' accountants differed in their opinions and the trial court expressly declined to characterize the payments for tax purposes, subject to any future IRS or tax court ruling. The District Court held:

1. "'The usual treatment of alimony is to make the alimony taxable to the recipient and deductible by the payer.' However, payments are not deductible by the payer as alimony if they are 'part of a property settlement agreement.'"

2. "Lump sum alimony 'is a fixed and certain amount, the right to which is vested in the recipient and which is not therefore subject to increase, reduction, or termination in the event of any contingency, specifically including those of death or remarriage.'"

3. "If the payments qualify as lump sum alimony, they remain payable to the former wife's estate in the event of her death, and consequently, generally will not be deductible by the former husband under the relevant Internal Revenue Code provisions."

4. "In the present case, the opinions of the parties' accountants conflicted as to whether the former husband could deduct the payments. The trial court stated that 'the better part of discretion [was] to do nothing' and expressly 'decline[d] to characterize the payments for federal tax purposes, subject to any future ruling by the Internal Revenue Service or the Tax Courts.' We find this was error, and direct the trial court to amend its final judgment to indicate whether or not the payments shall be deductible by the former husband and taxable to the former wife, after analyzing the pertinent provisions of the MSA."

Kuchera v. Kuchera, 123 So.3d 631 (Fla. 4th DCA 2013)

Fifth District

G. Enforcement

First District

Second District

Third District

Fourth District

Fifth District

H. Security/Insurance

First District

TRIAL COURT ERRED IN REQUIRING HUSBAND TO OBTAIN AND MAINTAIN $50,000 LIFE INSURANCE POLICY TO SECURE ALIMONY OBLIGATION IN ABSENCE OF EVIDENCE REGARDING AVAILABILITY AND COST OF INSURANCE AND HUSBAND'S ABILITY TO PAY

In the final judgment of dissolution of marriage, the trial court ordered the Husband to obtain and maintain a life insurance policy in the amount of $50,000 to secure his alimony obligation. However, no evidence was adduced regarding the reasonable availability of life insurance, the cost thereof, or the Husband's ability to pay. The Husband appealed. The District Court reversed:

1. "[The Husband] correctly asserts that no evidence was adduced regarding the reasonable availability of life insurance, the cost thereof, or his ability to pay."

2. "Absent any competent, substantial evidence and factual findings to support the $50,000 life insurance obligation, we reverse this award and remand for the court to make the requisite findings."

Payton v. Payton, 109 So.3d 280 (Fla. 1st DCA 2013)

Second District

ORDER REQUIRING FORMER WIFE TO MAINTAIN LIFE INSURANCE POLICY WITH FORMER HUSBAND AND CHILDREN AS EQUAL BENEFICIARIES REQUIRED CLARIFICATION AS TO WHETHER POLICY WAS INTENDED TO SECURE ALIMONY OR CHILD SUPPORT; ABSENT SPECIAL CIRCUMSTANCES, ERROR FOR TRIAL COURT TO REQUIRE SPOUSE TO MAINTAIN LIFE INSURANCE FOR PURPOSE OF SECURING ALIMONY AWARD

During the parties' marriage, the Former Wife maintained a life insurance policy insuring her life in the face amount of $1 million. The final judgment entered herein mandated that she maintain this policy and that the Former Husband and their children continue as equal beneficiaries of the policy. The order was otherwise silent as to what purpose was to be served by maintaining this insurance. Both parties appealed various aspects of the amended final judgment. In this regard, the District Court reversed:

1. "The order is silent as to what purpose is served by maintaining this insurance: is it to secure the payment of alimony or child support or both?"

2. "In [an earlier case], this court stated that '[i]n the absence of special circumstances, a spouse cannot be required to maintain life insurance for the purpose of securing an alimony obligation.'"

3. "This court in [another case], concluded that 'sufficient findings [must be] contained in the final judgment to justify a requirement for life insurance as alimony security.'"

4. "The final judgment in [the earlier casse] was deficient in that it stated merely that 'the husband shall provide life insurance on his life in the amount of $93,000 as security for his alimony obligations….' [T]his court could not ascertain whether [the wife] would be paid the

entire policy proceeds in the event of [the husband's] death or only so much as to compensate her for an alimony arrearage and noted that '[e]ither arrangement may be appropriate, but those terms must be certain.' The final judgment [herein] is even less specific…."

5. "[I]f the life insurance policy the trial court ordered [the Former Wife] to maintain is for alimony, the specific circumstances justifying it must be provided in the final judgment."

6. "We also encourage the trial court on remand to further specify whether upon [the Former Wife's] death [the Former Husband] shall receive only that portion of the proceeds required to compensate him for alimony payments due but not yet paid or otherwise."

Busciglio v. Busciglio, 116 So.3d 620 (Fla. 2d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN REQUIRING FORMER HUSBAND TO MAINTAIN LIFE INSURANCE POLICY AS SECURITY FOR ALIMONY WITHOUT FINDING THAT HE COULD AFFORD TO MAINTAIN THE POLICY AND THAT SUCH WAS NECESSARY TO SECURE ALIMONY OBLIGATION.

Upon dissolution of their twenty-eight year marriage, the parties herein entered into a marital settlement agreement that contained a provision requiring the Former Husband to maintain a $500,000 life insurance policy to secure his alimony obligation. The Former Husband later filed a supplemental petition for modification of alimony and support wherein he sought, in part, a termination of the life insurance requirement. Prior to the hearing thereon, the parties agreed to reduce the policy amount to $132,000, which agreement was subsequently ratified by the court and an agreed order entered thereon.

Later, during the bifurcated hearing on the Former Husband's petition, he offered evidence that the $500,000 life insurance policy was terminated when he resigned from his previous law firm, and that he obtained a $132,000 life insurance policy through his current one. There was no other evidence offered to support his request to terminate the life insurance requirement. During closing arguments, the Former Wife's attorney conceded that the $132,000 policy would be sufficient to cover the alimony obligation. Inexplicably, however, the trial court changed the life insurance requirement to $250,000. Reversing that portion of the order, the District Court held:

1. "We reverse this portion of the order because there was no evidence adduced at the hearing regarding whether the Former Husband could afford the required life insurance policy."

2. "Moreover, the trial court did not make a finding that a $250,000 life insurance policy is necessary to secure the alimony obligation."

3. "On remand, the trial court shall amend the life insurance requirement in the order to reflect the $132,000 life insurance policy agreed to by the parties."

Froeschle v. Froeschle, 122 So.3d 967 (Fla. 2d DCA 2013)

REMAND REQUIRED FOR DETERMINATION REGARDING WHETHER TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO ORDER HUSBAND TO CHANGE BENEFICIARY ON MILITARY GROUP LIFE INSURANCE POLICY; IF BENEFICIARY DESIGNATION IS PROTECTED BY FEDERAL SERVICEMEMBERS' GROUP LIFE INSURANCE ACT, COURT IS WITHOUT JURISDICTION TO ORDER CHANGE OF BENEFICIARY.

During the trial in the dissolution of marriage proceedings, the Former Husband testified that he maintained a group life insurance policy acquired through his military service in the Army Reserve. He testified that at the time of trial, he had named his children, his parents, and his fiancée as the policy's beneficiaries. Although the existence, amount, and monthly cost of a life insurance policy were established through testimony, neither the name nor the specific type of policy was provided. Furthermore, the policy was not entered into evidence. Other than this testimony, the only evidence in the record addressing the policy were pay stubs referring to an unspecified military group life insurance policy.

At the conclusion of the trial, the court found that the Former Husband "does have a life insurance policy available to him at an extremely reasonable rate" and ordered him to maintain the policy and name the Former Wife as the beneficiary. The final judgment reflected that this was done and ordered pursuant to section 61.08(3), Florida Statutes (2011). The Former Husband neither objected to this order at trial nor moved for rehearing after the final judgment issued. The Former Husband subsequently appealed, arguing for the first time that the trial court lacked subject matter jurisdiction to interfere with his choice of beneficiary. Finding that it was not clear from the record whether the trial court had subject matter jurisdiction to order as it did, the District Court reversed:

1. "Regarding beneficiaries, the [Servicemembers' Group Life Insurance Act (SGLIA)] provides that following the death of an insured, payment is to be made '[f]irst, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death (1) in the uniformed services if insured under Servicemembers' Group Life Insurance . . . .' 38 U.S.C. § 1970(a)."

2. "The SGLIA has been interpreted by the United States Supreme Court to 'bestow upon the service member an absolute right to designate the policy beneficiary.' Accordingly, due to the operation of the Supremacy Clause of the United States Constitution, state laws interfering with the right to designate the beneficiary under a qualifying policy are federally preempted."

3. "The issue of federal preemption is a question of subject matter jurisdiction that may be raised for the first time on appeal."

4. "Here, it is undisputed that the trial court directed the Former Husband to change the beneficiary designation of his existing life insurance policy. However, it is unclear from the record whether the policy is one whose beneficiary designation is protected under the SGLIA. The policy was not entered into evidence, nor does the record contain other evidence resolving the issue. We are therefore unable to determine whether this application of section 61.30(3) has been federally preempted by the SGLIA."

5. "Consequently, we remand for an evidentiary hearing for the trial court to determine whether it had subject matter jurisdiction to order the beneficiary designation changed."

6. "If the court, after the evidentiary hearing, concludes that the existing beneficiary designation is protected by the SGLIA, then it cannot order the change. However, the trial court

may nonetheless order the Former Husband to obtain an additional policy pursuant to section 61.08(3) if the trial court deems it appropriate under the circumstances."
Hirsch v. Hirsch, 38 FLW D2241 (Fla. 2d DCA 2013)

Third District

Fourth District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT PROVISION OF FINAL JUDGMENT REQUIRING FORMER HUSBAND TO MAINTAIN CERTAIN AMOUNT OF LIFE INSURANCE WAS A SUPPORT OBLIGATION ENFORCEABLE BY CONTEMPT.

The trial court found the Former Husband in contempt for failing to maintain the amount of life insurance required per the parties' property settlement agreement and final judgment of dissolution of marriage. The trial court then ordered the Former Husband to either secure the insurance or deposit cash of an equivalent amount in an account for the Former Wife's benefit, should he predecease her. The Former Husband appealed, contending that the final judgment did not provide for alimony or other support for the Former Wife; thus, he argued, the life insurance was part of the equitable distribution of property and a breach of that obligation was not enforceable by contempt. At trial, however, the Former Wife argued to the contrary, stating that the provision of life insurance was in the nature of support. The District Court affirmed:

1. "Based upon the evidence presented, the trial court did not abuse its discretion in determining that the life insurance provision was a support obligation enforceable by contempt."

2. In a footnote, the Court added: "Of course, as the former husband pointed out at the final hearing, if it is an obligation of support, then it is modifiable. Earlier in the proceeding, the former husband petitioned for modification to end the life insurance premiums because of his total disability. The wife defended, claiming the life insurance was part of an equitable distribution scheme and thus not modifiable. The husband then voluntarily dismissed his petition, and the former wife began these contempt proceedings, taking the contrary position that the insurance was a support provision and thus enforceable by contempt. Principles of judicial estoppel would preclude the former wife from maintaining in any subsequent proceedings that the insurance provision was part of equitable distribution of property and thus not modifiable."
Morrell v. Morrell, 103 So.3d 985 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN ORDERING HUSBAND TO MAINTAIN LIFE INSURANCE AS SECURITY FOR ALIMONY AND CHILD SUPPORT WITHOUT FINDINGS REGARDING SPECIAL CIRCUMSTANCES THAT WARRANT THE REQUIREMENT, AVAILABILITY AND COST OF INSURANCE, AND HUSBAND'S ABILITY TO PAY FOR INSURANCE; WHERE INSURANCE IS SECURING CHILD SUPPORT, CHILDREN SHOULD HAVE BEEN NAMED BENEFICIARIES.

The parties were married in 1994, and a petition for dissolution of marriage was filed in 2009. Two children were born of the marriage in 1997 and 1999. The Wife was not employed and had not worked during the sixteen-year marriage. The Husband worked as a painting contractor for his own company. The parties' tax returns reflected adjusted gross income of

$394,510 in 2006, $269,014 in 2007, $116,055 in 2008, and $71,467 in 2009. The final judgment of dissolution of marriage awarded the Wife durational alimony of $1,500 a month for fourteen years. The court ordered the Husband to maintain a life insurance policy in the amount of $50,000, naming the Wife as the beneficiary, in order to secure the payment of alimony. The trial court also ordered the Husband to pay $656 per month for child support, as well as $100 per month to pay for $1,300 in arrearages. He was further required to purchase at least $150,000 in life insurance to secure the payment of child support. The Husband appealed, raising several issues, including that the trial court erred in ordering him to maintain life insurance to secure alimony and child support. The District Court reversed:

1. "In the present case, the trial court did not make a specific finding of special circumstances."

2. "Additionally, the trial court did not make the required findings as to the availability and cost of insurance and the [H]usband's ability to pay."

3. "Further, the trial court erred by naming the [W]ife as the beneficiary of the life insurance policy securing the payment of child support."

4. "Accordingly, we reverse and remand for the trial court to make the requisite findings, including whether special circumstances are present, and if such special circumstances are present, for an evidentiary hearing on the availability, cost, and the [H]usband's ability to pay any insurance required by the trial court."

5. "If all the above are met, and the trial court orders life insurance to secure child support, then the trial court should require that the children be designated as the beneficiaries of the life insurance policy purchased to secure the child support payment."

Zvida v. Zvida, 103 So.3d 1052 (Fla. 4th DCA 2013)

TRIAL COURT FAILED TO MAKE REQUIRED FINDINGS IN ORDERING HUSBAND TO PURCHASE LIFE INSURANCE TO SECURE ALIMONY.

In the final judgment of these dissolution of marriage proceedings, the trial court ordered Husband to purchase life insurance to secure the payment of alimony, pursuant to section 61.08(3), Florida Statutes (2011). Husband appealed various portions of the final judgment, including this decision of the trial court. The District Court reversed and remanded for the trial court to make the requisite findings in this regard: "[W]hen ordering a party to purchase life insurance, 'the trial court must make specific evidentiary findings regarding the availability and cost of insurance, the obligor's ability to pay, and the special circumstances that warrant the requirement for security of the obligation.' The trial court did not make these required findings."

Burton v. Burton, 127 So.3d 656 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT ERRED IN REQUIRING THAT FORMER HUSBAND SECURE ALIMONY AWARD WITH LIFE INSURANCE WHERE FORMER WIFE WAS UNABLE TO DEMONSTRATE THAT FORMER HUSBAND'S PREMATURE DEATH WOULD LEAVE HER IN DIRE ECONOMIC CIRCUMSTANCES.

The Former Husband appealed from two orders—a final judgment of dissolution of marriage and a post-judgment award of fees and costs to the Former Wife. With respect to the

requirement that the Former Husband secure the alimony award with life insurance, the District Court reversed:

1. "This court and other districts have held that such security is justified only if there is a demonstrated need to protect the alimony recipient, such as when he or she would be left in dire economic straits upon the death of the payor former spouse."

2. "In [an earlier case] this court noted that cases upholding such security included those in which the recipient was disabled, elderly, or had such limited employment skills that the death of his or her former spouse would cause that person to rely on welfare or the generosity of others."

3. "In addition, the trial court must set forth specific findings of special circumstances, the payor spouse's ability to afford the security, and whether the security exists only for arrearages, or alternatively, if the whole or a portion of the security is payable to the surviving family to minimize economic harm."

4. "In this case, the trial court's findings do not support the order requiring the Former Husband to secure his alimony payment obligation, and the evidence would not support the necessary findings in any event."

5. "With the large equitable distribution made to the Former Wife, and her ability to work to support herself, she was unable to demonstrate that the Former Husband's premature death would leave her in dire economic circumstances."

6. "Accordingly, we strike the security requirement from the final judgment, and affirm as to all other issues relating to the final judgment."

Sweeny v. Sweeny, 113 So.3d 987 (Fla. 5th DCA 2013)

ERROR TO ORDER PROCUREMENT OF LIFE INSURANCE AS SECURITY FOR SUPPORT WITHOUT INCLUDING REQUISITE STATUTORY FINDINGS.

The trial court rendered a final judgment requiring the husband to maintain life insurance, specifically "The Husband shall be required to maintain a $500,000.00 life insurance policy, naming the Wife as the sole and irrevocable beneficiary, as security for his alimony and child support obligations. This shall be in effect within thirty (30) days of the date of this Final Judgment with written proof given to the Wife also within thirty (30) days of the date of this Final Judgment." The District Court held:

1. "A trial court has the power to order any party responsible for payment of alimony to 'purchase or maintain a life insurance policy or a bond' to the extent necessary to protect the award."

2. "This obligation, however, must be supported by 'specific evidentiary findings regarding the availability and cost of insurance, the obligor's ability to pay, and the special circumstances that warrant the requirement for security of obligation. . . . A trial court's failure to make the required findings constituted reversible error."

3. "Additionally, the amount of insurance ordered must be related to the support obligation; thus, it is error for a court to order a party to purchase a life insurance policy that is greater in value than the support obligation."

4. "The language [in the Final Judgment] does not include the detailed findings needed to support its purpose. Accordingly, we reverse and remand for the trial court to reconsider the

life insurance obligation, and, if applicable, make the necessary findings to support such an obligation."
Packo v. Packo, 120 So.3d 232 (Fla. 5th DCA 2013)

I. Modification

First District

Second District

TRIAL COURT ABUSED ITS DISCRETION IN FINDING NO CHANGE IN CIRCUMSTANCES WARRANTING REDUCTION IN ALIMONY WHERE HUSBAND PRESENTED UNREBUTTED EVIDENCE ESTABLISHING A FORTY PERCENT DROP IN INCOME FROM BUSINESS HE OWNED AND OPERATED, THE UNAVAILABILITY OF ADDITIONAL MONEY FROM THE BUSINESS, THE LACK OF SUBSTANTIAL ASSETS TO LIQUIDATE, GRIM JOB EXPECTATIONS, AND MONTHLY EXPENSES EXCEEDING HIS INCOME.

The trial court dissolved the parties' marriage in 2003 and ordered the Former Husband to pay $1,250 per month in permanent periodic alimony, an obligation that he timely met until sometime in 2011. In late 2011, the Former Wife moved for contempt, alleging that the Former Husband had not paid alimony since May 2011. In response, he petitioned to abate, terminate, or reduce his obligation due to his changed circumstances.

The Former Husband, with his two sons, owned and operated an air conditioning business. Business activity dropped forty percent since 2008–09. Efforts to reinvigorate the business yielded little, and his monthly income now totaled $1,154, with monthly expenses of $1168.25. The Former Husband had no ability to take more money from the business, and his age precluded him from obtaining new employment. The Former Wife presented no contravening evidence. She focused, instead, on the fact that the Former Husband, apparently through his business, maintained a lease on Georgia hunting property where he spent up to sixty days a year, which fact the Former Husband countered by showing that the modest lease payment paid for itself by generating business from referral sources.

On the other hand, since the 2003 dissolution, the Former Wife's income had increased to over $3,400 per month. Despite some health ailments, she has enjoyed substantial employment. She spends money on discretionary items for family, friends, pets, and entertainment, owns real property, and has retirement savings. In contrast, the Former Husband has few assets. He owns an old Ford F–250 truck that he uses for work, a four-wheeler of little value, and a tractor of little value. The trial court valued these assets at slightly over $6,500.

The trial court ultimately denied the Former Husband's petition for modification, concluding that there were no material changes in his circumstances because his expenses were paid by his business and he voluntarily elected to spend several weeks a year at the Georgia hunting camp. The trial court also granted the Former wife's motion for contempt. The Former Husband appealed, and the District Court reversed:

1. "Here, [the Former Husband] demonstrated an uncontemplated substantial change in circumstances that was not voluntary or temporary. He established a forty-percent drop in his business income, which was not likely to improve soon, the unavailability of additional money to him from the business, lack of substantial assets to liquidate, and grim job expectations…. His monthly expenses exceed his income. We emphasize that [the Former Wife] failed to rebut [his] evidence."

2. "Under these circumstances, we must also conclude that the contempt order is unsupported by competent substantial evidence and constitutes an abuse of discretion."

3. "Unquestionably, the final judgment of dissolution created a presumption that [the Former Husband] has the ability to pay alimony. He bears the burden to show that he can no longer pay due to changed circumstances…. [The Former Husband] met that burden with a substantial amount of unrebutted evidence."

4. "The trial court abused its discretion when it denied [the Former Husband's] motion to abate, terminate, or reduce alimony based on his substantial change in circumstances and granted [the Former Wife's] motion for contempt."

Driggers v. Driggers, 127 So.3d 762 (Fla. 2d DCA 2013)

Third District

Fourth District

TRIAL COURT PROPERLY DENIED FORMER HUSBAND'S PETITION TO TERMINATE HIS ALIMONY OBLIGATION ON GROUND THAT FORMER WIFE WAS RESIDING WITH ANOTHER IN A SUPPORTIVE RELATIONSHIP WHERE PARTIES HAD ENTERED INTO MARITAL SETTLEMENT AGREEMENT THAT PROVIDED THAT ALIMONY OBLIGATION WOULD BE NON-MODIFIABLE REGARDLESS OF ANY CHANGE IN CIRCUMSTANCES OF EITHER PARTY

The Former Husband filed a petition to terminate his alimony obligation on the grounds that the Former Wife was in a supportive relationship as defined under Florida's supportive relationship statute, § 61.14(1)(b). The Former Wife responded to the petition by filing a motion for judgment on the pleadings, arguing that the parties' marital settlement agreement expressly provided that the alimony obligation was "non-modifiable by the parties, in either amount or duration, regardless of any change in circumstances of either party." The trial court granted the Former Wife's motion and the Former Husband appealed. The District Court affirmed:

1. "We hold that a party to a marital settlement agreement may not invoke Florida's supportive relationship statute in order to modify or terminate an alimony obligation where such action is prohibited under the terms of the agreement."

2. "Florida's supportive relationship statute section 61.14(1)(b), 'is actually a codification of prior case law which held that, in post dissolution matters, cohabitation can be a basis for reduction or termination of alimony awards.'"

3. "Courts in this State have long recognized that the statutory right to petition for modification of an alimony award may be intentionally or impliedly waived and that the waiver may be stated in express terms or through interpretation of the agreement as a whole . . . '[I]f the language of the agreement indicates a clear intention by the parties that the agreed-upon provisions for alimony would be controlling, and that its terms would be modifiable only as

authorized therein, then the language is sufficient to operate as an implied waiver of any other ground for modification.'"

4. "Finally, '[a]n agreement which fails to make provision for unmarried cohabitation may be interpreted as precluding reduction or termination of alimony on that ground.'"

5. "Viewed as a whole, the parties' agreement unambiguously provided that all alimony was non-modifiable and would cease only upon the occurrence of the death of either of the parties, or [the Former Wife's] remarriage."

6. "To be sure, the concept of a supportive relationship as a possible termination event was something the parties could have contemplated at the time they entered into their agreement. They chose not to do so."

Smith v. Smith, 110 So.3d 108 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING AMOUNT OF ALIMONY AWARDED, DESPITE CLAIMS BY FORMER HUSBAND THAT AWARD EXCEEDED HIS ABILITY TO PAY; ERROR TO BASE MODIFICATION AMOUNT FOR ENTIRE RETROACTIVE PERIOD ON HIS SALARY AT THE TIME OF TRIAL AND NOT CONSIDER PERIOD OF INVOLUNTARY UNEMPLOYMENT.

The parties were married for twenty-two years. The Judgment of Dissolution was entered in March, 2009 and incorporated the parties' marital settlement agreement ("MSA"). When the parties entered into the MSA, the Former Husband was employed as an engineer, earning a gross yearly salary of just over $180,000, while the Former Wife was working part-time in retail, grossing approximately $5,100 per year. The terms of the MSA required Former Husband to pay permanent periodic alimony in the amount of $3,750 per month. Shortly thereafter, the Former Husband was laid off from his job. He received a severance package that included sixteen weeks of pay in the amount of $49,987.68. In June, 2009, he filed a supplemental petition seeking to reduce his alimony payments. He remained unemployed from May 21, 2009 until January 20, 2011. During this period, he received unemployment compensation and shareholder distributions from a company that he owned. His 2010 and 2011 tax returns indicated that his annual gross income was $61,020 and $101,022, respectively. Also during this period, the Former Husband failed to pay Former Wife the required alimony, thereby accruing a substantial arrearage.

In January 20, 2011, the Former Husband was hired by a new company at an annual starting salary of $92,500. Ninety days later, he received a raise to $102,500 annually. The Former Husband's July 2012 financial affidavit reflected gross monthly income of $8,539 (net of $3,385), and monthly expenses of $4,566. According to the Former Wife's July 2012 financial affidavit, she was earning approximately $1,000 per month working part-time in retail. Including the alimony she received, her monthly net income was approximately $2,994, which did not cover her monthly expenses.

A trial was held on the petition for modification in August, 2012. The trial court found that the Former Husband was laid off from his job, but he received sixteen weeks' severance pay in the amount of $49,987.68 and ninety days of job placement assistance, which he utilized. He spent a significant portion of the severance package in a reckless fashion and willfully chose to ignore his court-ordered obligations although he had the ability to pay. In 2010, Former

Husband received a shareholder distribution of $74,235 and unemployment compensation in the amount of $30,307.42. He remained unemployed for approximately seventeen months until his current employer hired him on January 20, 2011. In 2011, Former Husband again received a shareholder distribution, this time in the amount of $9,616.00. Thus, for both 2010 and 2011, the trial court found his income to be approximately $105,000.

The court determined that there had been a substantial change in circumstances since the entry of the Judgment of Dissolution: Former Husband's employment involuntarily changed and his income was substantially reduced from $180,000 per year to $102,500 per year. The court found that Former Husband had the ability to pay $2,750 per month in ongoing permanent alimony, although Former Wife had a need for $2,960 per month.

The Former Husband appealed the alimony amount and argued that it was error to base the modification for the entire retroactive period on his salary at the time of trial and not take into consideration the period of time when he was unemployed. He contended that he earned substantially less in 2010 than he was earning at the time of trial thus, his alimony obligations should have been reduced to a greater extent in 2010 than 2011 and 2012. The District Court held:

1. "On appeal, Former Husband first argues that the trial court erred in awarding an alimony amount that exceeds his ability to pay…. We find no abuse of discretion in the trial court's award."

2. "Generally, a party seeking modification of alimony obligations must prove a substantial change in circumstances that is permanent in nature…. However, a temporary modification is appropriate where the court determines that the payor has suffered a reduction in income through no fault of his own and is acting in good faith to return his income to its previous level."

3. "We have held that if the party cannot prove a permanent change in circumstances—for example, where he is unemployed but seeking new employment—that party is entitled to a suspension of his payment obligations during the period of unemployment…. Alternatively, rather than suspending the payment obligations entirely, the court can reduce them."

4. "When calculating arrearage during this temporary period of reduced income, a payor's complete inability to pay requires cessation of arrearage accrual, not mere abatement of payment…. As we explained in [an earlier case], '[to] cause [the payor] to go deeper and deeper and deeper in debt, as the months of his inability to pay [the alimony] continue, potentially puts him in a hole from which he could never be extricated, save a win at the lottery or other bonanza.' Accordingly, '[w]hen an inability to pay support alimony arises the only proper thing to do is suspend payments until the ability is restored.'"

5. "In this case, the record reflects that Former Husband was laid off due to no fault of his own. His income was reduced in or around September 2009. Although he was actively seeking new employment, he was not successful in obtaining employment until January 2011. Between September 2009 and January 2011, he earned substantially less than he had previously earned. Allowing arrearage of $3,750 per month, or even $2,750 per month, to accrue between September 2009 and December 2010 would be to ignore [the earlier precedent]."

6. "Additionally, the trial court found that Former Husband's income, for both 2010 and 2011, averaged at least $105,000 annually. This finding is not supported by competent, substantial evidence."

7. "In reaching this conclusion, the trial court relied on the fact that Former Husband received $30,307.42 in unemployment compensation during his unemployment. Instead, the

evidence reflects that Former Husband did not receive any unemployment compensation in 2010. Former Husband's uncontroverted testimony, corroborated by his tax returns, reflected that he received $1,119 in unemployment per month until November 2009…. Thus, we remand for recalculation of the arrearage."
Hedstrom v. Hedstrom, 123 So.3d 150 (Fla. 5th DCA 2013)

REMAND REQUIRED FOR CLARIFICATION WHERE TRIAL COURT HELD FORMER HUSBAND WAS ENTITLED TO ALIMONY REDUCTION RETROACTIVE TO JANUARY 1, 2011, CONTRARY TO THE COURT'S FINDING THAT HE WAS SO ENTITLED BEGINNING JANUARY 1, 2010; TRIAL COURTS ABUSE THEIR DISCRETION BY FAILING TO GRANT MODIFICATION RETROACTIVELY TO THE DATE THE PETITION WAS FILED IF THE REASONS JUSTIFYING MODIFICATION EXISTED AT THAT TIME.

The parties were married for twenty-two years. The Judgment of Dissolution was entered in March, 2009 and incorporated the parties' marital settlement agreement ("MSA"). When the parties entered into the MSA, the Former Husband was employed as an engineer, earning a gross yearly salary of just over $180,000, while the Former Wife was working part-time in retail, grossing approximately $5,100 per year. The terms of the MSA required Former Husband to pay permanent periodic alimony in the amount of $3,750 per month. Shortly thereafter, the Former Husband was laid off from his job. He received a severance package that included sixteen weeks of pay in the amount of $49,987.68. In June, 2009, he filed a supplemental petition seeking to reduce his alimony payments. He remained unemployed from May 21, 2009 until January 20, 2011. During this period, he received unemployment compensation and shareholder distributions from a company that he owned. His 2010 and 2011 tax returns indicated that his annual gross income was $61,020 and $101,022, respectively. Also during this period, the Former Husband failed to pay Former Wife the required alimony, thereby accruing a substantial arrearage.

In January 20, 2011, the Former Husband was hired by a new company at an annual starting salary of $92,500. Ninety days later, he received a raise to $102,500 annually. The Former Husband's July 2012 financial affidavit reflected gross monthly income of $8,539 (net of $3,385), and monthly expenses of $4,566. According to the Former Wife's July 2012 financial affidavit, she was earning approximately $1,000 per month working part-time in retail. Including the alimony she received, her monthly net income was approximately $2,994, which did not cover her monthly expenses.

A trial was held on the petition for modification in August, 2012. The trial court found that the Former Husband was laid off from his job, but he received sixteen weeks' severance pay in the amount of $49,987.68 and ninety days of job placement assistance, which he utilized. He spent a significant portion of the severance package in a reckless fashion and willfully chose to ignore his court-ordered obligations although he had the ability to pay. In 2010, Former Husband received a shareholder distribution of $74,235 and unemployment compensation in the amount of $30,307.42. He remained unemployed for approximately seventeen months until his current employer hired him on January 20, 2011. In 2011, Former Husband again received a shareholder distribution, this time in the amount of $9,616.00. Thus, for both 2010 and 2011, the trial court found his income to be approximately $105,000.

The court determined that there had been a substantial change in circumstances since the entry of the Judgment of Dissolution: Former Husband's employment involuntarily changed and his income was substantially reduced from $180,000 per year to $102,500 per year. The court found that Former Husband had the ability to pay $2,750 per month in ongoing permanent alimony, although Former Wife had a need for $2,960 per month. The Former Husband appealed, arguing, among other things, that because his income was reduced beginning September 1, 2009, the trial court should have applied the modification retroactively to that date. In this regard, the District Court remanded for clarification:

1. "Retroactivity is the rule rather than the exception…. There is a presumption of retroactivity 'unless there is a basis for determining that the award should not be retroactive.'"

2. "Trial courts have discretion to modify alimony retroactively to the date the petition for modification was filed or any date subsequent thereto…. However, trial courts abuse their discretion by failing to grant modification retroactively to the date the petition was filed if the reasons justifying modification existed at that time."

3. "Former Husband's tax returns demonstrate that his total yearly income did not drop substantially until 2010, when it was reduced from $180,079 to $61,020. Thus, the trial court found that in 2009, Former Husband 'had ability to pay alimony as [originally] ordered.'"

4. "Similarly, it found that Former Husband 'had an obligation to pay the full amount between August 14, 2009 and January 1, 2010,' and that he 'has had and continues to have, since Jan. 1, 2010, the ability to pay [a reduced amount].' Given Former Husband's tax returns, these findings were within the court's discretion."

5. "However, the court then concluded that Former Husband was entitled to a reduction retroactive to January 1, 2011. This ruling contradicts the court's finding that Former Husband was able to pay the full amount through 2009 and a reduced amount beginning January 1, 2010. We therefore remand this portion of the judgment for clarification or recalculation."

Hedstrom v. Hedstrom, 123 So.3d 150 (Fla. 5th DCA 2013)

J. Supportive Relationships

First District

Second District

Third District

TRIAL COURT DID NOT ERR IN REDUCING FORMER HUSBAND'S ALIMONY OBLIGATION ON THE BASIS THAT FORMER WIFE HAD ENTERED INTO A SUPPORTIVE RELATIONSHIP WITH ANOTHER MAN WHERE FORMER WIFE WAS PROVIDING ECONOMIC SUPPORT TO THIRD PARTY COHABITANT.

On September 14, 2005, the parties herein entered into a marital settlement agreement ("MSA"), and their marriage was dissolved on November 9, 2005. Pursuant to the agreement, the Former Husband was required to pay the Former Wife $3,200 in alimony until August 1, 2006, when the child support obligation would terminate and alimony would increase to $4,200

per month. In addition, among the assets distributed to her, the Former Wife received the marital residence, valued at $450,000, but encumbered by a small $15,000 mortgage at the time of the modification hearing.

The Former Husband made all payments timely and complied with the terms of the final judgment, despite the reduction of his salary and various increases in his expenses, which at the time of the evidentiary hearing included several substantial expenditures. For example, the Former Husband could not sell his Broward County home because it was "upside down;" however, because he is a Miami–Dade judge and must reside in Miami–Dade County, he also maintained a Miami residence. He was also financially assisting the Former Wife's adult son, and supporting the parties' adult daughter and her child (the parties' grandchild), who were both living in his Broward County home at the time of the evidentiary hearing. Based on the salary reduction, the Former Husband was now paying the Former Wife 46% of his net income, compared to the 42% he was paying when the parties divorced in 2005, despite her decreased expenses and his increased expenses. In addition, the Former Husband was driving a 2004 GMC Envoy with about 118,000 miles because he could not afford to replace it.

In contrast, the Former Wife, fifty-eight years old at the time of the evidentiary hearing, was no longer working and was now living with her boyfriend, Llerena, (since 2009) in the former marital home, the monthly mortgage payment of which was only $400. Although Llerena had full-time employment, he paid no rent and contributed nothing towards the household expenses, although he periodically purchased some of the groceries. According to Llerena, he only contributed about $150 a month towards the relationship, which was spent on food and meals consumed outside of the home. Further, the Former Wife "loaned" him $1,200 to purchase an automobile, which "debt" remained unpaid at the time of the evidentiary hearing. In addition to the foregoing, the Former Wife converted her son's bedroom into a room for Llerena's two minor children for overnight visitation, paying for all the necessary changes herself. And, she may have also been paying for the expenses incurred during their stays since there was no evidence that Llerena paid for anything other than the $150 per month he'd claimed.

The trial court found that the Former Wife and Llerena were involved in a "supportive relationship" within the meaning of section 61.14(1)(b) and thus, the court had the authority to reduce or terminate the Former Husband's alimony obligation. After considering all the relevant factors in section 61.08(2) and balancing the equities, the trial court concluded that a $700 per month reduction was warranted. Accordingly, the monthly alimony obligation was reduced from $4,200 to $3,500 per month. The Former Husband was also awarded a credit of $2,100 for the overpayment of $700 for the three months preceding the issuance of the trial court's order. The Former Wife appealed. Finding that the order was supported by substantial competent evidence and comported with applicable Florida law, the District Court affirmed:

1. "In 2005, the Florida Legislature enacted subsection (b) of section 61.14(1), which codifies the law regarding reduction or termination of alimony on the basis of cohabitation… Section 61.14(1)(a) authorizes a modification of alimony when 'the circumstances or the financial ability of either party changes,' whereas section 61.14(1)(b) authorizes modification based on the existence of a 'supportive relationship' between the obligee and another person."

2. "Section 61.14(1)(b)… requires the court to consider '[t]he extent to which the obligee and the other person have pooled their assets or income or otherwise exhibited financial interdependence.'… '[t]he extent to which the obligee or the other person has supported the other, in whole or in part.'… '[t]he extent to which the obligee or the other person has performed valuable services for the other… [w]hether the obligee and the other person have provided

support to the children of one another, regardless of any legal duty to do so.' There was clear and unrefuted evidence in the record as to each of these and other relevant factors."

3. "Because the Former Wife, who was able-bodied and only fifty-eight years old at the time of the hearing, was not working, the Former Husband was providing the means whereby [she] could offer these substantial benefits to Llerena, who worked full-time but did not contribute towards his and his children's room and board."

4. "Although the Former Wife and Llerena did not pool their assets or share a bank account, it is clear that Llerena was substantially dependent on the Former Wife."

5. "It is also undisputed that, although Llerena either lacked the financial ability or the inclination to provide financial assistance to the Former Wife, he did perform valuable services for [her]. He cleaned the pool, cut the grass, periodically washed [her] car, and helped with some of the chores. The relationship is not dissimilar to many marriages where one spouse financially supports the other, while the other spouse contributes by performing valuable services that reduce the couple's overall expenses."

6. "The cases relied on by the Former Wife do not support a conclusion that a supportive relationship cannot be found absent some form of direct economic support by the third party cohabitant to the recipient spouse."

7. "In [an earlier case, reversing the trial court's order reducing former wife's alimony award on the ground she was in a supportive relationship)]… [a]lthough the former wife's boyfriend lived with her when her children were not visiting her, and the former wife and her boyfriend drove to work together, there was no other indicia of a 'supportive relationship.' They did not pool their assets, did not hold themselves out as married, and unlike the facts in the instant appeal, had separate residences, and there was no evidence that either was supporting the other, providing valuable services to the other, or providing support to the children of the other."

8. "In [another earlier case] case relied on by the Former Wife… although the trial court found that a supportive relationship existed, the appellate court concluded that because the supportive relationship, and thus the change in circumstances, predated the divorce and the award of alimony, the circuit court was not authorized to reduce or terminate the alimony payments under section 61.14(1)(b)…. The [court therein] did not state that the determination of whether a supportive relationship exists requires a finding that the third party cohabitant is providing economic support to the recipient spouse, nor could it under the statutory scheme."

9. "The statute specifically provides that a supportive relationship may exist if, in whole or in part, either the obligee or the other person is supporting the other, is providing valuable services for the other, or providing support to the other's children…. The impact that a third party cohabitant's contributions, financial or otherwise, may have on the former spouse's need is merely a relevant consideration as to whether to reduce or terminate alimony after a determination is made that a supportive relationship exists."

10. "Contrary to the Former Wife's argument that section 61.14(1)(b) requires at least some form of economic support being provided to the recipient spouse by a third party cohabitant, the statute provides that a supportive relationship may be established through the economic support provided by the recipient spouse to the third party cohabitant, and other valuable non-economic services provided by either to the other is a relevant consideration in determining whether a supportive relationship exists."

11. "Based on the undisputed evidence that the relationship between the Former Wife and Llerena, which began in 2008 after the divorce, was a monogamous, romantic relationship; Llerena had been living with [her] in the former marital home since March of 2009, and he had

no other residence; Llerena did not contribute any money towards his share of the utilities or the maintenance of the home; the Former Wife primarily paid for the food they consumed; [she] provided room and board and a venue to facilitate visitation for Llerena with his minor children at [her] home; and Llerena provided certain valuable services, including maintenance of the pool and yard, and washing the Former Wife's car, the trial court's finding that the Former Wife and Llerena were involved in a 'supportive relationship' is supported by competent substantial evidence."

12. "Because the trial court considered and weighed the Former Wife's need and the Former Husband's decreased ability to pay, the trial court's order finding that a reduction in the Former Wife's alimony award was warranted is also supported by the evidence."

13. "Lastly, the $700 per month reduction to the Former Husband's $4,200 monthly alimony obligation was entirely reasonable. Thus, the trial court's order reducing [his] monthly alimony obligation by $700 (from $4,200 to $3,500) is affirmed, and [his] future alimony payments should be adjusted for payments he may have made to the Former Wife in excess of $700 from the time the trial court's order granting the modification was entered."

Murphy v. Murphy, 38 FLW D2283 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT PROPERLY DENIED FORMER HUSBAND'S PETITION TO TERMINATE HIS ALIMONY OBLIGATION ON GROUND THAT FORMER WIFE WAS RESIDING WITH ANOTHER IN A SUPPORTIVE RELATIONSHIP WHERE PARTIES HAD ENTERED INTO MARITAL SETTLEMENT AGREEMENT THAT PROVIDED THAT ALIMONY OBLIGATION WOULD BE NON-MODIFIABLE REGARDLESS OF ANY CHANGE IN CIRCUMSTANCES OF EITHER PARTY

The Former Husband filed a petition to terminate his alimony obligation on the grounds that the Former Wife was in a supportive relationship as defined under Florida's supportive relationship statute, § 61.14(1)(b). The Former Wife responded to the petition by filing a motion for judgment on the pleadings, arguing that the parties' marital settlement agreement expressly provided that the alimony obligation was "non-modifiable by the parties, in either amount or duration, regardless of any change in circumstances of either party." The trial court granted the Former Wife's motion and the Former Husband appealed. The District Court affirmed:

1. "We hold that a party to a marital settlement agreement may not invoke Florida's supportive relationship statute in order to modify or terminate an alimony obligation where such action is prohibited under the terms of the agreement."

2. "Florida's supportive relationship statute section 61.14(1)(b), 'is actually a codification of prior case law which held that, in post dissolution matters, cohabitation can be a basis for reduction or termination of alimony awards.'"

3. "Courts in this State have long recognized that the statutory right to petition for modification of an alimony award may be intentionally or impliedly waived and that the waiver may be stated in express terms or through interpretation of the agreement as a whole . . . '[I]f the language of the agreement indicates a clear intention by the parties that the agreed-upon provisions for alimony would be controlling, and that its terms would be modifiable only as authorized therein, then the language is sufficient to operate as an implied waiver of any other ground for modification.'"

4. "Finally, '[a]n agreement which fails to make provision for unmarried cohabitation may be interpreted as precluding reduction or termination of alimony on that ground.'"

5. "Viewed as a whole, the parties' agreement unambiguously provided that all alimony was non-modifiable and would cease only upon the occurrence of the death of either of the parties, or [the Former Wife's] remarriage."

6. "To be sure, the concept of a supportive relationship as a possible termination event was something the parties could have contemplated at the time they entered into their agreement. They chose not to do so."

Smith v. Smith, 110 So.3d 108 (Fla. 4th DCA 2013)

Fifth District

K. Amount

First District

TRIAL COURT DID NOT ERR IN FINDING THAT WIFE WAS ENTITLED TO SOME AMOUNT OF PERMANENT ALIMONY UNDER THE CIRCUMSTANCES; HOWEVER, IT WAS ERROR TO AWARD PERMANENT ALIMONY IN AMOUNT THAT CREATED A SIGNIFICANT DISPARITY IN PARTIES' MONTHLY FINANCIAL CIRCUMSTANCES WITHOUT MAKING FINDINGS JUSTIFYING THE DIFFERENT TREATMENT.

In these dissolution of marriage proceedings, the Wife requested permanent alimony based on the parties' twenty-year marriage, rebuttably presumed to be a long-term marriage under section 61.08(4), Florida Statutes (2010). She alleged her inability to support herself and the Husband's ability to pay $886/month in permanent alimony. In the final judgment, the trial court determined that the Wife needed more than the amount previously ordered for temporary maintenance and support, in addition to her income, to enjoy the standard of living established during the parties' marriage. However, given the other substantial financial obligations placed upon the Husband, the court acknowledged its intent not to create a significant disparity between the parties' incomes. Nonetheless, the trial court ultimately found that no other form of alimony, except permanent alimony, was fair and reasonable under the parties' circumstances and concluded that the Wife's request for $886/month was reasonable and appropriate under the circumstances. The Husband appealed, asserting that the cumulative effect of his court-ordered obligations placed the Wife in a relatively secure financial posture approximating the marital standard of living, while leaving him with a substantial monthly deficit. While affirming the Wife's entitlement to permanent alimony, the District Court reversed as to amount:

1. "We affirm the determination that [the Wife] is entitled to some amount of permanent alimony."

2. "The general rule is that a former spouse should not be left 'shortchanged' by marital obligations to the other former spouse."

3. "The figures from the parties' most current financial affidavits in the record support [the Husband's] argument that the final judgment created a significant discrepancy in their monthly financial circumstances without judicial findings to justify the different treatment."

4. "Given the unresolved issues relating to the total cost of [the Wife's] health insurance, and the availability, cost, and [the Husband's] ability to pay life insurance, we recognize that the parties' net incomes may also be different after the trial court makes findings on remand."

5. "Accordingly, we reverse the amount of permanent alimony and instruct the trial court either to award an amount that does not result in a significant disparity between the parties' net incomes, or to make specific findings explaining why a different amount is appropriate."

Payton v. Payton, 109 So.3d 280 (Fla. 1st DCA 2013)

TRIAL COURT ERRED IN BASING PERMANENT PERIODIC ALIMONY AWARD ON HUSBAND'S GROSS INCOME, RATHER THAN ON HIS NET INCOME.

The parties were married in 1989. The Wife filed a petition for dissolution of marriage in May 2011. The parties were self-employed by Kevin Roberts Entertainment Agency, Inc. (KREA), a booking agency that represented artists and provided entertainment to nightclubs, casinos, festivals, and bars. The Wife was the majority shareholder (51%) and the Husband was the minority shareholder (49%). She maintained the books and he was responsible for booking the acts. KREA was the sole source of income for both parties. After the Wife filed for divorce, the Husband assumed control of the bookkeeping and continued to operate KREA. The Wife, however, was only able to secure a job making minimum wage. The final judgment was entered in March 2012. Therein, the trial court awarded, among other things, permanent periodic alimony to the Wife based on a finding that the Husband's annual gross income was approximately $140,000, and that he had the capacity to earn at least $150,000. The trial court also found that the Wife had the ability to earn "just a little more than minimum wage." As such, she was awarded alimony of $4,000 per month. The husband appealed, arguing that the trial court erred in failing to base the alimony award on his net income. The District Court agreed and reversed:

1. "Here, the only mention in the final judgment of [the Husband's] income, and thus his ability to pay alimony, was his gross income. This is error."

2. "Although it appears that [the Husband] may have had the ability to pay $4,000 per month in alimony, it is impossible to know for certain without some indication of his net income."

3. "In arriving at [the Husband's] net income, the trial court must 'make specific findings as to the former wife's need for alimony and the former husband's ability to pay.'"

4. "On remand, because the record includes conflicting testimony as to what expenses are attributable to KREA and what expenses are attributable to [the Husband's] personal responsibilities, the trial court must make specific findings as to how it arrives at [the Husband's] net income."

5. "On remand, the trial court is instructed to make specific findings as to [the Husband's] ability to pay alimony based on his net income."

6. "If the trial court determines that, based on [his] net income, he is unable to pay $4,000 per month in alimony, the trial court must also recalculate child support consistent with section 61.30(1)(a)."

Kingsbury v. Kingsbury*,* 116 So.3d 473 (Fla. 1st DCA 2013)

Second District

TRIAL COURT ABUSED ITS DISCRETION IN ORDERING FORMER HUSBAND TO PAY FORMER WIFE $1,000 PER MONTH IN ALIMONY WHERE AWARD LEFT FORMER HUSBAND WITH ONLY $200 PER MONTH OF IMPUTED INCOME ON WHICH TO LIVE.

The Former Husband filed a motion to reduce the amount of alimony he was paying, alleging that he had suffered a reduction in his income and that the Former Wife's need had lessened as a result of her being in a supportive relationship with her boyfriend. Following an evidentiary hearing, the trial court found that the Former Wife was indeed in a supportive relationship and that such reduced her monthly need to $1,000. The trial court also found that the Former Husband had a permanent reduction in income that was beyond his control. The trial court imputed minimum wage of $1,200 a month to the Former Husband and ordered that he pay the Former Wife $1,000 per month in alimony. No findings that the Former Husband had the ability to pay this amount were made. The Former Husband appealed. The District Court reversed the final judgment insofar as it awarded an amount of alimony beyond the Former Husband's ability to pay.

1. "Because this award leaves the Former Husband with $200 per month of imputed income on which to live, it amounts to an abuse of the trial court's discretion."

2. "We note that the Former Wife argues that the Former Husband has a significant income source above minimum wage and that he is supported by a paramour. However, she has not appealed the amount of income imputed to the Former Husband or the determination that the Former Husband's income was significantly reduced through no fault of his own."

3. "And because he is the former spouse ordered to pay alimony, the potential financial support of the Former Husband by his girlfriend is not a factor for the trial court's consideration in setting the amount of the alimony award."

4. "Accordingly, we reverse the order and remand for the trial court to set an alimony amount in keeping with the Former Wife's need and the Former Husband's ability to pay and to include the necessary factual findings."

Pisciotta v. Pisciotta, 114 So.3d 1088 (Fla. 2d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING ALIMONY WITHOUT DETERMINING FORMER HUSBAND'S ABILITY TO PAY; FAILURE TO INCLUDE LANGUAGE THAT ALIMONY MUST TERMINATE UPON FORMER WIFE'S DEATH OR REMARRIAGE DID NOT MERIT REVERSAL

In the dissolution proceedings below, the Former Wife requested various types of alimony including a lump-sum award of the marital property because of her greater need. The trial court declined to award property as lump-sum alimony, but did award her permanent, periodic alimony in the amount of $500 a month for five years and nominal $1 monthly thereafter, particularly in light of her increased insurance needs. The trial court found that the Former Wife had a need for the alimony in order to pay for health insurance because she had suffered from cancer, and also because her insurance premiums would be significantly higher than they were during the marriage as she would no longer be on the Former Husband's policy. Both parties appealed, the Former Husband challenging alimony award. Finding that the trial

court erred by failing to determine the Former Husband's ability to pay alimony, the District Court reversed:

1. "Neither the findings of need nor the amount of alimony constitutes an abuse of discretion because they are supported by competent, substantial evidence."

2. "We conclude that neither the final order nor the record reflects whether the trial court determined Former Husband's ability to pay."

3. "A failure to state such findings [as to a spouse's ability to pay] can be harmless error when we can determine from the order itself or from the transcripts that such findings were in fact made."

4. "Even if the trial court did consider the Former Husband's ability to pay, we cannot determine such consideration took place. Therefore, we reverse for the trial court to determine Former Husband's ability to pay while making the necessary specific findings."

5. "Finally, the Former Husband asks us to require the trial court to correct the alimony award for its failure to include language that the alimony must terminate upon the Former Wife's death or remarriage. Section 61.08(8), Florida Statutes requiring the termination of alimony in either one of those two circumstances, did not exist when Former Wife commenced this dissolution action. Even now, it does not mandate specific language in an alimony award. Accordingly, the failure of the order to include the relevant language does not merit reversal. However, because we reverse on the ability-to-pay issue, we encourage the trial court to specifically state on remand that any new award of alimony terminates upon death or remarriage."

Voda v. Voda, 122 So.3d 936 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN DENYING ALIMONY BASED ON APPARENT REASONING THAT WIFE'S INABILITY TO EXPLAIN HOW SHE SPENT MONEY OBTAINED FROM SALE OF NON-MARITAL PROPERTY SUGGESTED SHE OWNED SIGNIFICANT OTHER UNIDENTIFIED ASSETS AND WAS REQUIRED TO LIQUIDATE AND DEPLETE THEM TO PROVIDE FOR HER LIVING EXPENSES IN LIEU OF HUSBAND'S ANTICIPATED CONTRIBUTION.

During trial in the dissolution of marriage proceedings, the testimony showed that the Former Wife co-owned with her family certain unspecified non-marital properties. During the marriage, she received a minimal monthly income from these properties. Also during the marriage, the parties retained an attorney to file a partition action in order to obtain the Former Wife's individual ownership of some of the property. During the dissolution litigation, the Former Wife sold one of these non-marital properties for the sum of $180,000. She spent all of the funds she received during a twelve-month period, but could not explain to the court how the money was spent. Additionally, she was unable to explain to the trial court the nature or value of her remaining property interests. The Former Husband argued below that because the Former Wife had sufficient non-marital property, she was not in need of alimony, claiming that she "blew" $180,000 without being able to explain where the money went, suggesting that her other assets were of significant value and that her ambiguity as to the value of the assets was an intentional attempt to preclude identification of her post-marriage holdings.

The final judgment entered included a finding that the marriage was "barely a long term marriage, just over seventeen (17) years in duration," indicating a presumption that some amount of alimony should be awarded if the Former Wife had a demonstrated need. However, while the

trial court found that the Former Husband had the ability to pay some alimony, it found that the Former Wife failed to demonstrate a need for it and denied her request for same. The Former Wife appealed. The District Court reversed:

1. "The trial court seemingly accepted the Former Husband's arguments in its denial of the requested alimony. The trial court's conclusion suggests that the Former Wife had sufficient non-marital assets such that, if she were to liquidate them, she would be able to meet her living expenses without the need of alimony. Such reasoning is error."

2. "In the circumstances of this long-term marriage and under section 61.08, the Former Wife is not required to liquidate and deplete her assets to provide for her living expenses in lieu of the Former Husband's anticipated contribution."

3. "Accordingly, we reverse and remand for either the entry of a final judgment with sufficient findings or for further proceedings, if necessary."

4. "On remand, the trial court will necessarily have to address the respective incomes and living expenses of the parties. Until such time as the findings regarding need and ability to pay are made, this court is unable to further review the Former Wife's need for an alimony award."

Grill v. Grill, 123 So.3d 683 (Fla. 2d DCA 2013)

ERROR TO FAIL TO CONSIDER INCOME TAX CONSEQUENCES OF ALIMONY AWARD IN CALCULATING WIFE'S NEED.

The Former Husband sought modification of permanent alimony alleging a significant reduction in his income and that the Former Wife was in a supportive relationship. The case was referred to the general magistrate, who granted the Former Husband's modification petition, reducing the monthly amount of alimony to $1,294.06.

The GM had before her a "Chart on Lifestyles Expenditures" submitted by the Former Wife, listing her annual living expenses averaged over the four calendar years preceding the hearing. The GM used this chart to calculate the amount of the Former Wife's current living expenses. Included in that chart was $13,497 for income taxes, thus the Former Wife's monthly need calculation included the payment of said taxes. The GM found the Former Wife's current monthly need to be $5330.19, excluding the payment of income taxes, and calculated the Former Wife's current monthly income from investments and retirement accounts to be $4036.16, arriving at a negative balance of $1294.06, which is the amount to which the GM recommended the monthly alimony payment to be reduced.

In her exceptions, the Former Wife raised the issue that the GM's calculations failed to consider the effect of federal and state income taxes on her needs. The Former Wife also raised the income tax issue in her motion for rehearing. The circuit court did not address the issue of the Former Wife's expenses for income taxes in its order approving and ratifying the Recommended Order, or in its order denying the motion for rehearing. The District Court held:

1. "Section 61.08(2)(h) requires that 'in determining the . . . amount of alimony . . ., the court shall consider all relevant factors, including, but not limited to: [t]he tax treatment and consequences to both parties of any alimony award.' 'It is error for the trial court to fail to consider tax implications of any alimony award when such evidence is presented.'"

2. "Here, the Former Wife presented appropriate evidence to the GM and to the circuit court concerning the income tax implications of the alimony award and her need for continued support in an amount sufficient to enable her to pay her obligations for federal and state income taxes. In calculating the Former Wife's current needs, both the GM an the circuit court failed to

account for the income tax consequences of the award to the Former Wife and the Former Wife's expenses for the payment of income taxes."

3. "By failing to consider the Former Wife's expenses for federal and state income taxes and her current investment income, the GM recommended an alimony award to the Former Wife in an amount that was less than necessary to meet her needs. The circuit court overruled the Former Wife's exceptions and approved the recommended amount without addressing these issues. This constituted error."

4. "Accordingly, on the Former Wife's appeal, we reverse the amount of the reduction in the alimony award to the Former Wife. On remand, the circuit court shall reconsider the reduction in the amount of the alimony award to the Former Wife in light of the Former Wife's income tax obligations and her current investment income. Upon such reconsideration, the circuit court shall adjust the amount of the reduction in alimony so that the Former Husband's alimony obligation is sufficient to meet the Former Wife's needs."

Tarkow v. Tarkow, 128 So.3d 82 (Fla. 2d DCA 2013)

ERROR TO USE OUTDATED INFORMATION IN MODIFICATION PROCEEDING TO CALCULATE WIFE'S INVESTMENT INCOME FOR ALIMONY DETERMINATION PURPOSES.

The parties' alimony modification proceeding was referred to general magistrate. The final hearing was originally scheduled for April 12, 2011, but the parties didn't conclude the matter, so they reconvened two months later, on June 16, 2011 to complete the final hearing. At the continuation, the Former Wife proffered evidence that her investment accounts had been reduced in value in the amount of $61,146 during the two-month break. The Former Husband did not dispute the accuracy of the claim, but objected its admission. The GM sustained the objection and refused to consider the updated information, thereby using incorrect information to calculate the Former Wife's income from her investments. The GM's calculations therefore substantially overstated the Former Wife's investment income going forward. The Former Wife raised the issue of the GM's failure to consider her current investment income in her exceptions to the Recommended Order and in her Motion for Rehearing. The circuit court did not consider this issue either in its order approving and ratifying the Recommended Order, or in its order denying rehearing. The District Court held:

1. "The circuit court also erred in using outdated information to calculate the Former Wife's investment income."

2. "The GM's calculations of the Former Wife's income from her investments should have reflected current reality.

3. "Accordingly, on the Former Wife's appeal, we reverse the amount of the reduction in the alimony award to the Former Wife. On remand, the circuit court shall reconsider the reduction in the amount of the alimony award to the Former Wife in light of the Former Wife's income tax obligations and her current investment income. Upon such reconsideration, the circuit court shall adjust the amount of the reduction in alimony so that the Former Husband's alimony obligation is sufficient to meet the Former Wife's needs."

Tarkow v. Tarkow, 128 So.3d 82 (Fla. 2d DCA 2013)

Third District

Fourth District

ALIMONY AWARD OF $25,000 PER MONTH REQUIRED REVERSAL WHERE AWARD INCLUDED CERTAIN EXPENSES THE PARTIES HAD NOT CARRIED FOR YEARS AND A SAVINGS COMPONENT, WHICH SHOULD HAVE BEEN EXCLUDED; THUS, UPON THEIR EXCLUSION, AWARD WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The final judgment of dissolution, ending the nearly thirty-year marriage of the parties, awarded the Wife $25,000 per month in alimony. At trial, the Wife's expert testified that the Wife's monthly needs were $18,934, requiring an award of $29,129 after accounting for taxes. The $18,934 assumed continuation of expenses associated with the Wife's continued residence in the former marital home, included $3,115 per month for homeowners' insurance although the parties had not carried such insurance for years, and included $786 as the Wife's half of the estimated annual cash surplus. According to the Husband's expert, however, the Wife's "needs" amounted to approximately $9,000 per month, an amount which excluded the costs associated with the marital residence. The trial court rejected portions of both the Husband's and the Wife's experts' analysis, and found as follows: this was a 29–year marriage; the Wife had raised the couple's children and, by agreement of the parties, had not worked outside the home; and, the parties had lived a lavish lifestyle, with the Husband earning $100,000 per month. There were no specific factual findings supporting the $25,000 figure. Both parties appealed various aspects of the final judgment. Regarding the alimony award, the District Court reversed:

1. "The $25,000 award is clearly more in line with the Wife's expert's analysis but, given the findings in the judgment, the award is not supported by the record."

2. "The Wife's expert's analysis included in excess of $3,000 per month for homeowners' insurance the parties had not carried for years."

3. "It also included the significant expenses associated with the upkeep of the marital home. The final judgment, though, required that the Husband pay these expenses pending the sale of the home."

4. "Additionally, the Wife's expert's 'needs' analysis included $786 in annual cash surplus. Such amount may not be deemed a 'need' of the Wife as alimony may not include a savings component."

5. "When these amounts are excluded, as they should have been, the $25,000 alimony award is not supported by the evidence."

Schmidt v. Schmidt, 120 So.3d 31 (Fla. 4th DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN DENYING HUSBAND'S REQUEST FOR ALIMONY WHERE WIFE'S EXPERT ACKNOWLEDGED HUSBAND'S REASONABLE EXPENSES WERE AN AMOUNT THAT EXCEEDED HIS INCOME AND WIFE HAD THE ABILITY TO PAY.

This appeal stems from a dissolution proceeding following a moderate term marriage. The trial court below relied upon the Wife's Fifth Financial Affidavit to determine a net income of $24,407 per month. The Wife admitted at trial, however, that this affidavit understated her true income. Her expert testified that her net income was actually about $67,000 per month, although, according to the Wife, she was facing an imminent decline in income. Conversely, the

Husband's net monthly income, a hotly disputed issue at trial, was $5,115. The Husband's claimed expenses totaled over $20,000 per month. According to the Wife's expert's figures, however, his reasonable expenses totaled only $12,626 per month. Based on the Husband's monthly deficit, he requested an award of alimony from the Wife. The trial court denied his request. The Husband appealed various aspects of the final judgment. As to denial of alimony, the District Court reversed:

1. "Here, it cannot be disputed that the Wife had the ability to pay alimony from her current income."

2. "Furthermore, while the Husband's income was a hotly disputed issue at trial, the trial court specifically found [his] net monthly income to be $5,115 for child support purposes."

3. "Moreover, assuming that the Husband's claimed expenses (over $20,000 per month) were somewhat excessive, it is notable that even the Wife's expert acknowledged that [his] reasonable expenses totaled $12,626 per month. Thus, even based solely upon the Wife's expert's figures regarding the Husband's reasonable expenses, the Husband would be running a significant monthly deficit and consequently would be shortchanged by a failure to award him alimony."

4. "Although the trial court need not award the amount of alimony that the Husband requested, we reverse the complete denial of alimony and remand for reconsideration."

Addie v. Coale, 120 So.3d 44 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN ALIMONY AWARD BY NOT MAKING FINDINGS REGARDING HUSBAND'S NET INCOME.

The Husband appealed the final judgment of dissolution of marriage to the Wife, arguing that in awarding alimony, the trial court erred by not making findings regarding his net income. The District Court agreed and reversed, holding:

1. "Net income rather than gross income is relevant when calculating support awards, including alimony."

2. "Because it is not apparent that the trial court based its alimony calculations on net income, we reverse and remand to make the required findings and to modify the award if necessary."

3. "The court may hold an evidentiary hearing if it needs additional evidence to make the required findings."

Rentel v. Rentel, 124 So.3d 993 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT ERRED IN EXCLUDING FROM WIFE'S INCOME VOLUNTARY CONTRIBUTIONS TO HEALTH SAVINGS ACCOUNT AND 401(k) PLAN.

Prior to trial, the parties stipulated that the Former Wife's 2011 net income was $70,925.15, after federal tax, Medicare, disability, dental, health insurance, pretax medical, and 401(k) withholdings. The Former Husband objected, however, asserting that Former Wife's contribution to her 401(k) account and to her health savings account were not statutorily authorized deductions from gross income for purposes of calculating her net income. The Former Wife's testimony established that her contributions were voluntary but a certain amount was

"mandatory" in order to have the employer match the amount contributed. In the final judgment, the trial court utilized the $70,925.15 figure to determine Former Wife's net income. The Former Husband appealed, asserting this was error. In this regard, the District Court agreed with the Former Husband and reversed:

1. "Based on this testimony, it is apparent that neither the 401(k) contribution nor the health savings account qualifies as an authorized deduction for calculation of net income under section 61.30(3), Florida Statutes (2011)."

2. "These sums that were erroneously deducted amount to $8,621.752 worth of net income available to Former Wife annually, or $718.483 worth of income available to Former Wife monthly. It is unclear whether this additional available income would have affected the final judgment; however, we are bound to remand for reconsideration of the judgment in light of the correct net income of Former Wife."

Moore v. Moore, 120 So.3d 194 (Fla. 5th DCA 2013)

L. Imputed Income

First District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPUTING INCOME TO WIFE WHERE THERE WAS COMPETENT, SUBSTANTIAL EVIDENCE OF AVAILABLE JOBS THAT WOULD ACCOMMODATE WIFE'S MEDICAL LIMITATIONS.

At the time of the January 2012 amended dissolution judgment, the Former Wife was fifty-two years old and the Former Husband was fifty-four. The trial court found that the parties had a very modest lifestyle during the marriage, in the course of which the Former Husband was employed outside the home and served as the breadwinner, while the Former Wife was the homemaker and primary caregiver to the children, who are now adults. Although the Former Husband repeatedly urged the Former Wife to seek outside employment to supplement his income, she did not do so on any regular basis. Her last job outside the home ended in 1993, after which she earned no income from employment. To explain her failure to seek outside employment over the years, the Former Wife contended that her debilitating, progressive, and observable medical conditions rendered her unable to work full-time.

The court heard the testimony of a physician who was not the Former Wife's primary care doctor. After performing a physical examination of the Former Wife, the doctor found signs and symptoms of carpal tunnel syndrome in both wrists, depression, and a shaking condition known as "essential tremor," which is a physical and nerve disorder. He opined that the Former Wife was unable to perform any work involving repeated lifting of twenty pounds or more.

The Former Wife underwent a personal interview and vocational evaluation with a vocational expert. She concluded that the Former Wife did not have permanent work restrictions. She conducted a labor market survey and prepared a vocational evaluation report. In formulating her conclusions, she accounted for the Former Wife's eleventh-grade level of education and her relative lack of work experience outside the home and opined that without a high-school degree, the Former Wife could obtain employment in Jacksonville earning

$15,196.00 annually. If she obtained a G.E.D. and received skills training in using computers and sophisticated telephone systems, the Former Wife would be able to secure full-time employment, earning between $15,000.00 and $20,000.00 a year.

The trial court found that the Former Wife was voluntarily unemployed and had been so throughout the marriage. The court determined that although the Former Wife qualified for several jobs that would pay $15,000.00 to $17,000.00 a year, she had made no effort to secure work. The Former Wife appealed and the District Court affirmed:

1. "The Former Husband presented evidence that would allow income to be imputed to the Former Wife.

2. "In weighing this evidence, the trial court deemed it relevant that the Former Wife claimed to have disabling conditions, yet she never applied for social security or disability."

3. "In this record, no physician has found the Former Wife to be medically disabled."

4. "To the substantial extent that these medical problems are external and observable, the trial judge had a superior vantage point to assess the Former Wife's demeanor and physical circumstances."

5. "Competent substantial evidence supports the findings that without any additional credentials, the Former Wife can earn $15,196.00 annually in available jobs that will accommodate her medical limitations."

6. "After receiving vocational skills training and rehabilitation and earning a G.E.D., the Former Wife will be able to earn between $15,000.00 and $20,000.00 a year in suitable jobs that are available."

7. "Because the record supports the imputation of income, we affirm this part of the amended final judgment."

Broemer v. Broemer, 109 So.3d 284 (Fla. 1st DCA 2013)

Second District

Third District

Fourth District

Fifth District

M. Miscellaneous

First District

WHERE TRIAL COURT NEGLECTED TO INCLUDE ALL STATUTORY FINDINGS RELATED TO ALIMONY, REMAND FOR TRIAL COURT TO MAKE SUCH FINDINGS AND TAILOR ALIMONY AWARD ACCORDINGLY.

In the dissolution of marriage proceedings, the Former Wife asserted in her Amended Answer that she should be awarded alimony based on her need and the Former Husband's ability to pay. During the final hearing, both parties testified and presented evidence concerning their

respective incomes, personal property located at rental storage facilities, personal and child support expenses, educational levels, earning capacities, and contributions to the marriage. Following the hearing, the trial court issued its Final Judgment.

Concerning alimony, the trial court found that the Former Wife had a need for alimony and the Former Husband had the ability to pay, and that the marriage was of long duration and permanent periodic alimony was the only fair and reasonable form of spousal support under the circumstances. The trial court made findings as to the standard of living established during the marriage' as to the age and physical condition of each party' as to the financial resources of each party' as to the earning capacities, educational levels, and employability of each party' as to the contribution of each party to the marriage' and as to all the sources of income available to each party. The Former Husband was ordered to pay prospective and retroactive permanent periodic alimony. Following the denial of his motion for rehearing, the Former Husband appealed. Because of the lack of statutory findings related to alimony, the District Court reversed:

1. "Because we remand the equitable distribution, we are constrained to remand both the alimony and retroactive child support awards."

2. "We also note that, as the Former Wife candidly acknowledged in her Answer Brief and at oral argument, the trial court neglected to include in the Final Judgment all of the statutory findings relative to alimony, as required by section 61.08(2)(g), (h), and (j), Florida Statutes (2012)."

3. "Therefore, on remand, the trial court should make these findings and, if necessary, tailor the alimony award accordingly."

Watson v. Watson, 124 So.3d 340 (Fla. 1st DCA 2013)

Second District

FAILURE TO INCLUDE LANGUAGE THAT ALIMONY MUST TERMINATE UPON FORMER WIFE'S DEATH OR REMARRIAGE DID NOT MERIT REVERSAL.

In the dissolution proceedings below, the Former Wife requested various types of alimony including a lump-sum award of the marital property because of her greater need. The trial court declined to award property as lump-sum alimony, but did award her permanent, periodic alimony in the amount of $500 a month for five years and nominal $1 monthly thereafter, particularly in light of her increased insurance needs. The trial court found that the Former Wife had a need for the alimony in order to pay for health insurance because she had suffered from cancer, and also because her insurance premiums would be significantly higher than they were during the marriage as she would no longer be on the Former Husband's policy. Both parties appealed, the Former Husband challenging alimony award. Finding that the trial court erred by failing to determine the Former Husband's ability to pay alimony, the District Court reversed:

1. "Neither the findings of need nor the amount of alimony constitutes an abuse of discretion because they are supported by competent, substantial evidence."

2. "We conclude that neither the final order nor the record reflects whether the trial court determined Former Husband's ability to pay."

3. "A failure to state such findings [as to a spouse's ability to pay] can be harmless error when we can determine from the order itself or from the transcripts that such findings were in fact made."

4. "Even if the trial court did consider the Former Husband's ability to pay, we cannot determine such consideration took place. Therefore, we reverse for the trial court to determine Former Husband's ability to pay while making the necessary specific findings."

5. "Finally, the Former Husband asks us to require the trial court to correct the alimony award for its failure to include language that the alimony must terminate upon the Former Wife's death or remarriage. Section 61.08(8), Florida Statutes requiring the termination of alimony in either one of those two circumstances, did not exist when Former Wife commenced this dissolution action. Even now, it does not mandate specific language in an alimony award. Accordingly, the failure of the order to include the relevant language does not merit reversal. However, because we reverse on the ability-to-pay issue, we encourage the trial court to specifically state on remand that any new award of alimony terminates upon death or remarriage."

Voda v. Voda, 122 So.3d 936 (Fla. 2d DCA 2013)

TRIAL COURT DID NOT ERR IN GRANTING CONTINUING WRIT OF GARNISHMENT OVER DISBURSEMENTS FROM DISCRETIONARY TRUSTS TO FORMER HUSBAND FOR PAYMENT OF ALIMONY UPON FINDING THAT TRADITIONAL REMEDIES FOR ENFORCEMENT OF ALIMONY WERE NOT EFFECTIVE; ALTHOUGH TRUST CONTAINED SPENDTHRIFT PROVISIONS, SAME ARE UNENFORCEABLE AGAINST A BENEFICIARY'S SPOUSE WITH JUDGMENT OR COURT ORDER AGAINST BENEFICIARY FOR SUPPORT OR MAINTENANCE

After thirty years of marriage, the parties divorced in 2007. Pursuant to a marital settlement agreement, the Former Husband agreed to pay the Former Wife $16,000 a month in permanent alimony. Thereafter, the Former Husband and his current wife enjoyed a substantial lifestyle sustained by payments made to him directly or on his behalf by the Berlinger Discretionary Trusts. The trusts paid for all of his living expenses including, but not limited to, mortgage payments, property taxes, insurance, utilities, food, groceries, and miscellaneous living expenses. Although he continued to live on the substantial proceeds of the Berlinger Discretionary Trusts, the Former Husband stopped paying alimony in May 2011.

When the Former Husband stopped paying alimony, the Former Wife filed a motion to enforce and for contempt and set it for hearing in August 2011. Just prior to the hearing, the parties reached a settlement wherein the Former Husband agreed to satisfy his alimony arrears by liquidating an IRA account. An agreed order was entered August 25, 2011. After that liquidation, $32,625.54 plus interest remained owing, so the court issued writs of garnishment to SunTrust as trustee to the Berlinger Discretionary Trusts.

Unbeknownst to the Former Wife, the Former Husband executed deeds on July 21, 2011, conveying his two-third interest in his real property, including his residence (the Banyon Property), into a never-before-disclosed trust, the Schweiker–Berlinger Irrevocable Life Insurance Trust. Michael Presley, the Former Husband's attorney, enlisted the assistance of his longtime friend, attorney Richard Inglis, to prepare the deeds and set up the new trust. The Former Husband reported his two-third interest in the Banyon Property to be worth $1,386,000; the deed reflected that he was the sole holder of the beneficial interest in the new trust. He never amended or supplemented his financial disclosures to reveal the real property transfer or the existence of the Schweiker–Berlinger Irrevocable Life Insurance Trust. To the contrary, he gave

a deposition eight days after he executed the deeds and set up the new trust and swore that there were no life insurance trusts and that he was no longer the trustee for any of the family trusts. However, the Former Wife's discovery efforts revealed this new trust, that attorney Presley was named as trustee, and that the Former Husband was trustee until October 11, 2011.

Around September 2011, the Former Husband was provided a Visa card from SunTrust Bank (the then corporate co-trustee of the Berlinger Discretionary Trusts) to use for paying expenses not directly paid by the trusts. The trusts paid the Visa credit card bills, including expenses for travel, entertainment, clothing, medical expenses, grooming, gifts, and his current wife's credit card bills. The Former Husband also took cash advances on the card to pay their maid, provide cash to his current wife, and to pay her personal expenses.

In January 2012, the Former Wife filed a second motion for civil contempt and enforcement against the Former Husband. On January 17, 2012, the trial court issued writs of garnishment against SunTrust. Neither the Former Husband nor SunTrust objected to these writs. Then, on April 26, 2012, the Former Wife filed a motion for continuing writ of garnishment against SunTrust seeking to attach the present and future distributions made to or for the benefit of the Former Husband from any trust. She alleged that traditional methods of enforcing alimony were insufficient. Attorney Presley filed a response in opposition on behalf of SunTrust. A hearing was set on that motion for November 6, 2012.

While the garnishment and family law matters were proceeding, the probate court removed SunTrust and substituted attorney Inglis as the new corporate trustee. SunTrust transferred all of the Berlinger Discretionary Trusts' funds and assets to Inglis's designated custodian, Rochdale, a securities firm. Thereafter, attorney Presley filed a motion on behalf of SunTrust Bank and Inglis seeking to substitute Inglis for SunTrust as a party to the ongoing family law case. On November 5, 2012, one day before the hearing on the motion for continuing writs of garnishment, Inglis withdrew his motion for substitution and filed an action seeking a declaration that the family trusts at issue were discretionary trusts.

During the November 6, 2012, hearing, Inglis testified that for the past year, the trustees, including Inglis, had not made any payments directly to the Former Husband. Instead, the trustees made payments on his behalf directly to his creditors and utilities. He asserted that the trusts were discretionary and opined that the applicable trust statute, section 736.0504, prohibited any creditor, including the Former Wife, from attaching any distributions paid on behalf or for the benefit of Berlinger.

Additional evidence adduced at the hearing revealed that the Former Husband and his current wife continued to live on the Banyon Property and that the mortgage loan for the property remained in his name. Neither he nor his wife were employed and neither of them intended to look for work. All of their expenses were paid by the trusts. To avoid making distributions directly to the Former Husband, the Berlinger Discretionary Trusts, by and through Inglis, directly paid for his and his current wife's health insurance and household expenses, including: mortgage, property taxes, homeowner's insurance, electricity, water, garbage, sewer, telephone, internet, lawn care, pool care, and pest control.

On November 27, 2012, the trial court granted the Former Wife's motion for continuing writs of garnishment and the motion for substitution of Inglis as the garnishee. The order on the continuing writs provided that all distributions made directly or indirectly to, on behalf of, or for the benefit of the Former Husband by the trustees of all the Berlinger Discretionary Trusts to which he was a beneficiary would be made payable to the Former Wife unless, at the time of any future distributions, there was no alimony or alimony arrears owed. Further, the order provided

that if the trustee wished to make distributions beyond the amount of the then outstanding amount of alimony, the trustee must seek court approval before doing so to ensure that there remained sufficient assets in the trust to secure the continued payment of alimony. The Former Husband appealed the order granting the Former Wife's motion for contempt and motion for a continuing writ of garnishment The District Court affirmed:

1. "[The Former Husband] argues that section 736.0504 specifically prohibits [the Former Wife] from attaching distributions made to or for [him] because the trusts are discretionary trusts and are afforded greater protection from creditors under the Florida Trust Code. We disagree. We conclude that the Florida Supreme Court's decision in *Bacardi v. White*, 463 So.2d 218 (Fla.1985), is controlling."

2. "Like *Bacardi*, the trusts in this case include spendthrift provisions. As such, the provisions are not a bar to the enforcement of the alimony orders or judgment in this case."

3. "The trial court's order granting [the Former Wife's] motion for continuing writs of garnishment specifically finds that traditional enforcement remedies are not effective and imposes the writs as a last resort. In accordance with *Bacardi*, the trial court's order granting [the Former Wife's] motion for continuing writs of garnishment against the Berlinger Discretionary Trusts was proper."

4. "According to subsections (2) and (3) [of Section 736.0503], a spendthrift provision is unenforceable against a beneficiary's former spouse who has a judgment or court order against the beneficiary for support or maintenance and permits the former spouse to obtain a court order attaching present or future distributions to or for the benefit of the beneficiary. Thus, the spendthrift provisions included in [the Former Husband's] trusts are unenforceable as to [the Former Wife] because she has an order against him for support."

5. "According to section 736.0504(2), a former spouse may not compel a distribution that is subject to the trustee's discretion or attach or otherwise reach the interest, if any, which the beneficiary may have. The section does not expressly prohibit a former spouse from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion. As a result, it makes no difference that the instant trusts are discretionary. [The Former Wife] is not seeking an order compelling a distribution that is subject to the trustee's discretion or attaching the beneficiary's interest. Instead, she obtained an order granting writs of garnishment against discretionary disbursements made by a trustee exercising its discretion."

6. "Sections 736.0503 and 736.0504 codify the Florida Supreme Court's holding in *Bacardi*. Neither section protects a discretionary trust from garnishment by a former spouse with a valid order of support. The order in this case complied with the *Bacardi* decision and sections 736.0503 and 763.0504 of the Florida Trust Code."

7. "Florida has a public policy favoring spendthrift provisions in trusts and protecting a beneficiary's trust income; however it gives way to Florida's strong public policy favoring enforcement of alimony and support orders."

Berlinger v. Casselberry, 38 FLW D2482 (Fla. 2d DCA 2013)

Third District

TRIAL COURT ERRED IN AWARDING ALIMONY TO WIFE WHERE SHE NEVER ASKED FOR SAME IN HER PLEADINGS; HER FILING OF A MOTION TO AMEND HER ANSWER TO HUSBAND'S PETITION FOR DISSOLUTION TO INCLUDE A COUNTER-CLAIM FOR ALIMONY, ON WHICH SHE NEVER OBTAINED AN ORDER, DID NOT CONSTITUTE AN ACTUAL AMENDMENT TO THE PLEADINGS.

The Husband filed a petition for dissolution of marriage seeking equitable distribution, exclusive possession of the marital home, shared parental responsibility, and child support. The Wife, who was represented by counsel in the court below, filed an answer to the petition, which did not seek alimony or spousal support. At one point in the proceedings, the Wife moved to amend her answer to include counterclaims for alimony and for damages resulting from an alleged tort, but she never obtained an order on that motion. As trial approached, the Wife filed a pretrial statement, which listed "child support, child time-sharing, and division of marital property"—but not alimony—as the issues to be tried. At the end of the trial, the judge indicated that he intended to award alimony. The Husband objected specifically on the basis that alimony "was never plead and there is no counterclaim asking for alimony." Nevertheless, the final judgment required that the Husband pay $1,000/month in alimony "until [the] Wife remarries, lives in a supportive relationship as that term is defined by statute or dies." The Husband appealed, and the District Court reversed the alimony award:

1. "Because the wife never asked for alimony in her pleadings, we vacate the portion of the final judgment of dissolution which awarded alimony."

2. "We agree with the husband that the trial court erred in awarding alimony in these circumstances."

3. "A court is not at liberty to award alimony where the benefitting spouse has failed to seek such relief in the pleadings."

4. "Unless and until is granted, the mere filing of a motion to amend the pleadings does not constitute an actual amendment to the pleadings."

McClain v. McClain, 105 So.3d 641 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT ERRED IN FAILING TO INCLUDE FINDINGS IN FINAL JUDGMENT RELATING TO ALL FACTORS LISTED IN §61.08(2), FLORIDA STATUTES.

Reversing the award of alimony herein, the District Court held:

1. "We again remind trial judges of the importance of making explicit findings as to all statutorily mandated factors for the determination of alimony in final judgments, as well as establishing a value (even if zero or *de minimus*) for all marital assets and liabilities when devising an equitable distribution scheme."

2. "Here, the trial court explained in the final judgment that it considered six of the ten factors, but no mention was made of the other four factors."

3. "Further, the order completely fails to make any factual findings regarding the missing four factors as a result, the order is insufficient to support an award of alimony."

4. "Therefore, we reverse so that the trial court may have an opportunity to make factual findings in accordance with section 61.08(2)."
Patino v. Patino, 122 So.3d 961 (Fla. 4th DCA 2013)

Fifth District

III. APPEAL

First District

APPEAL OF SUPPLEMENTAL FINAL JUDGMENT ADJUDICATING CHILD SUPPORT ARREARAGE AND MODIFYING CHILD SUPPORT WAS UNTIMELY WHERE MOTION TO VACATE THE ORDER FAILED TO DELAY ITS RENDITION BECAUSE MOTION WAS NOT FILED WITHIN TEN DAYS OF THE ORDER; ORDER DENYING MOTION TO VACATE NOT SUBJECT TO APPELLATE REVIEW BECAUSE THE MOTION WAS NOT TIMELY.

The Former Husband, sought review of three orders entered in a post-dissolution of marriage modification proceeding. Finding that the appeal was untimely with respect to the Supplemental Final Judgment Adjudicating Child Support Arrearage and Modifying Child Support and the Order Denying Motion to Vacate Supplemental Final Judgment, the District Court dismissed for lack of jurisdiction:

1. "Although the July 6, 2012, Supplemental Final Judgment Adjudicating Child Support Arrearage and Modifying Child Support is a final appealable order, appellant failed to timely invoke the Court's jurisdiction to review the order."

2. "Appellant's motion to vacate the order failed to delay its rendition because the motion was not filed within ten days of the order as required by Florida Family Law Rule of Procedure 12.491(f). Thus, rendition of the order occurred on July 6, 2012, and appellant's notice of appeal failed to timely invoke the Court's jurisdiction to review it."

3. "In addition, to the extent that appellant seeks review of the August 9, 2012, Order Denying Motion to Vacate Supplemental Final Judgment Adjudicating Child Support Arrearage and Modifying Child Support as Untimely, appellate review is unavailable."

4. "Although Florida Rule of Appellate Procedure 9.130(a)(5) provides for review of an order on a motion to vacate, the rule requires that the motion precipitating the order be both authorized and timely. Here, as determined by the lower tribunal and conceded by appellant, the motion to vacate was not timely. Thus, the order does not fall within the scope of rule 9.130(a)(5)."
Christ v. Christ, 103 So.3d 1056 (Fla. 1st DCA 2013)

APPELLATE REVIEW OF ORDER DENYING MOTION FOR REHEARING FAILED WHERE MOTION WAS TIMELY, BUT NOT AUTHORIZED.

The Former Husband, sought review of three orders entered in a post-dissolution of marriage modification proceeding. With respect to the Order Denying Motion for Rehearing, the

District Court found that the appeal, while timely, was not authorized and thus, dismissed for lack of jurisdiction:

1. "[A]ppellant's attempt to appeal the August 24, 2012, Order Denying Motion for Rehearing fails."

2. "Although a motion for rehearing is capable of delaying rendition of the underlying order where the motion is both timely *and authorized*, . . . here, the motion was timely, but *not authorized*."

3. "Moreover, the order denying rehearing is not independently reviewable."

Christ v. Christ, 103 So.3d 1056 (Fla. 1st DCA 2013)

REMAND FOR RECONSIDERATION OF ENTIRE EQUITABLE DISTRIBUTION SCHEME REQUIRED WHERE WIFE'S RETIREMENT ACCOUNTS WERE INCORRECTLY VALUED AND SUCH ERROR CANNOT BE CORRECTED IN ISOLATION.

In a case with very little stated facts, the equitable distribution portion of the final judgment included a value of $8,059.92 for the Wife's retirement account, although the evidence in the record established a value of exactly twice that amount ($16,119.84). In this regard, the District Court reversed: "Because this error cannot be corrected in isolation, on remand, the trial court shall reconsider the equitable distribution scheme."

Allen v. Allen, 114 So.3d 1102 (Fla. 1st DCA 2013)

NO ABUSE OF DISCRETION IN DENYING FORMER WIFE'S MOTION FOR STAY PENDING APPEAL OF SUPPLEMENTAL FINAL JUDGMENT REGARDING TIMESHARING.

The Former Wife filed a motion to stay final judgment regarding timesharing entered in response to Former Husband's Second Amended Supplemental Petition for Modification, which was denied by the trial court. She then filed an emergency motion for stay in the appellate court. The District Court held:

1. "This court applies an abuse of discretion standard in reviewing a lower tribunal's order on a motion for stay."

2. "The burden is on the movant to demonstrate such an abuse of discretion."

3. "A party seeking to stay the lower tribunal order pending appeal should demonstrate a likelihood of prevailing on appeal, irreparable harm to movant if the motion is not granted, or a showing that a stay would be in the public interest."

4. "Appellant has failed to meet this standard. In her motion, appellant argues that the trial court erred in finding a substantial change in circumstances and in concluding that the children's best interest would be served by having them primarily reside with appellee. With this argument, appellant appears to have simply adopted a view of the facts different than the facts found by the trial court in its lengthy and detailed order."

5. "Despite discounting the evidence favorable to appellee, appellant has not shown at this point in the appellate process that any of the material facts found by the trial court are unsupported by the evidence, or that the trial court abused its discretion in denying a stay

pending appeal. Accordingly, we find no abuse of discretion and affirm the order of the trial court denying the stay."
Lampert-Sacher v. Sacher, 120 So.3d 667 (Fla. 1st DCA 2013)

APPEAL FILED 34 DAYS AFTER RENDITION OF TRIAL COURT'S ORDER GRANTING MOTION TO RELOCATE WITH PARTIES' MINOR CHILDREN UNTIMELY WHERE MOTION FOR REHEARING OR RECONSIDERATION DID NOT TOLL TIME FOR FILING APPEAL FROM NON-FINAL ORDER REVIEWABLE PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.130.

In an appeal from an order on relocation, the District Court held:

1. "The Notice of Appeal having been filed thirty-four days after rendition of the trial court's order granting appellee's motion to relocate with the parties' minor children, we are compelled to dismiss this appeal as untimely."

2. "The law in Florida is well settled that a motion for rehearing or reconsideration does not toll the time for filing an appeal from a non-final order reviewable pursuant to the provisions of Florida Rule of Appellate Procedure 9.130."
Lovelace v. Lovelace, 124 So.3d 447 (Fla. 1st DCA 2013)

ARGUMENTS CONCERNING TRIAL COURT'S FAILURE TO RULE ON HUSBAND'S MOTION TO OBTAIN TIMESHARING WITH CHILDREN NOT REVIEWABLE ON APPEAL FROM NON-FINAL ORDER ESTABLISHING TEMPORARY CHILD SUPPORT OBLIGATION WHERE TRIAL COURT DID NOT GRANT OR DENY MOTION IN THE ORDER ON APPEAL

The Husband in the pending dissolution of marriage action appealed a non-final order establishing his obligation to pay temporary child support. The District Court affirmed the order and did not consider the Husband's arguments concerning the trial court's failure to rule on his motion:

1. "We affirm that order on the merits, and we are precluded from reviewing the Husband's arguments concerning the court's failure to rule on his motion to obtain timesharing with his children."

2. "Because the circuit court did not either grant or deny the Husband's motion in the order on appeal, the circuit court's handling of that motion is beyond the scope of our review."
Idumwonyi v. Belizaire, 129 So.3d 1110 (Fla. 1st DCA 2013)

SUMMARY AFFIRMANCE IS APPROPRIATE WHERE INITIAL BRIEF FAILS TO DEMONSTRATE PRELIMINARY LEGAL OR FACTUAL BASIS FOR REVERSAL OF APPEALED ORDERS.

After receiving and reviewing Appellant's initial brief, the court entered an order advising the parties that the appeal was being considered for summary affirmance under Florida Rule of Appellate Procedure 9.315(a). As such, the parties were directed to refrain from further briefing. Appellant thereafter filed a response to the preliminary summary affirmance order, arguing that the case was not appropriate for summary affirmance because she filed her brief in good faith and her arguments were meritorious. In this regard, the District Court held:

1. "Under rule 9.315(a), summary affirmance is appropriate where the initial brief fails to present a 'preliminary basis for reversal,' regardless of the good-faith intentions of the filing party."

2. "Because we conclude that Appellant's initial brief fails to demonstrate a preliminary legal or factual basis for the reversal of the appealed orders, we affirm the appealed orders under rule 9.315(a), and deny on the merits Appellant's motion requesting another means of disposition."

Spencer v. Florida Power Light/Broadspire, 38 FLW D2270 (Fla. 1st DCA 2013)

Second District

WHERE SETTLEMENT AGREEMENT PROVIDED THAT THE PARTIES WOULD USE THEIR BEST EFFORTS TO PROVIDE FOR THE EXPENSES OF SENDING THEIR CHILDREN TO PRIVATE SCHOOLS AND COLLEGES, TRIAL COURT PROPERLY FOUND THAT FORMER HUSBAND HAD NOT USED HIS BEST EFFORTS; FORMER HUSBAND'S DEFENSE THAT WIFE FAILED TO EXERCISE HER BEST EFFORTS TO CONTRIBUTE FUNDS COULD NOT BE CONSIDERED ON APPEAL WHERE FORMER HUSBAND NEITHER PLED NOR ARGUED SAME AT TRIAL.

The Former Wife and Former Husband herein entered into a Marital Settlement Agreement (MSA) on May 26, 1997. At that time, the parties had three minor children. By the terms of the agreement, the parties contracted to use their best efforts to provide for the expenses of sending their children to private school, college, and graduate school. The agreement also provided that "[t]he contribution of each parent shall be calculated on the basis of the ratio between their gross annual incomes as reported. In their most recent federal income tax return immediately preceding the academic year."

The parties' oldest child graduated from high school in December 2008 and enrolled in college the next month. The Former Husband began to contribute to the cost of the college expenses, however there came a time when he did not pay the full amount as expected by his now adult son and the Former Wife, and they sued the Former Husband for breach of contract. The trial court found that the Former Husband had not used his best efforts in supplying the costs of his son's college education and entered an order requiring him to pay a total of $41,603 to the son and the Former Wife as reimbursement for the costs of the college education.

The Former Husband appealed the trial court's award to the son and the Former Wife. He also argued that the trial court failed to take into account the Former Wife's failure to exercise her best efforts to contribute funds, as was also required by the agreement. Specifically, the Former Husband maintained that the Former Wife was willfully underemployed causing her annual income to range from $300 to $8,500. When compared to the Former Husband's income, the ratio described in the MSA required the Former Husband to pay the equivalent of 97.4% to 99.9% of the son's college expenses. The Former Husband argued that the trial court's failure to consider the Former Wife's willful underemployment in considering whether she was exercising her best efforts was error.

On appeal, the District Court affirmed the trial court's determination that the Former Husband be responsible for the college expenses:

1. "Although the agreement does suggest that each of the parties agreed to exercise his/her best efforts, the Former Husband did not plead the failure of the Former Wife to do so as an affirmative defense, nor did he argue this failure at trial."

2. "The only reference to 'best efforts' at trial was the Former Husband's argument that he indeed had exerted his best efforts by paying a portion of the costs even though he had not paid all of the costs. As such, the trial court determined the only issue that had been placed before it—whether the Former Husband exercised his best efforts in paying for the college expenses."

3. "Because the Former Husband did not plead the Former Wife's failure to employ her best efforts as an affirmative defense and did not argue the issue at trial, we cannot review this theory of defense for the first time on appeal."

4. "The Former Husband also argues on appeal that the trial court erred in calculating its award of total college costs by including room and board . . . Florida courts, however, have 'generally recognized that such expenses are factored into the cost of higher education.'"

Weaver v. Corey, 111 So.3d 947 (Fla. 2d DCA 2013)

CERTIORARI GRANTED TO QUASH TRIAL COURT'S DECISION TO EXCLUDE FORMER HUSBAND FROM DECISIONS INVOLVING CHILDREN'S MENTAL HEALTH CARE; ORDER IMPACTS HUSBAND'S FUNDAMENTAL LIBERTY INTEREST IN PARENTING HIS CHILDREN.

The Former Husband has a relationship with another woman who has apparently created significant parenting issues for this divorced couple. While a petition and counter-petition for modification of the final judgment were pending, the trial court entered several temporary orders restricting his participation in many parental decisions and limiting his contact with the children. The trial court entered an order granting the Former Wife "temporary sole parental responsibility over the parties' three minor children's health care, including mental health care." The order recited that it was to remain in place "until further order of the court." The Former Husband sought certiorari review. Granting the petition for certiorari in part, the District Court held:

1. "Although the order challenged in this proceeding is a procedurally uncommon order, we decline to hold that the trial court departed from the essential requirements of the law in entering it."

2. "Two aspects of the order, however, concern us…. In light of the psychologists' reports and the discussion in the earlier opinion, we understand the trial court's decision to exclude the former husband from decisions involving the children's mental health care. On the other hand, the former husband is a fully trained, licensed physician. If one of his children needed medical care other than mental health care, we see nothing in this record that would justify barring the former husband from participating in such medical decisions."

3. "Second, the order is intended to be temporary, but it provides no guidance as to when these significant restrictions on parental rights will end or what the former husband needs to do for these restrictions to be removed. The order simply recites that it will remain in place 'until further order of the court.'"

4. "It may be that the trial court anticipates that it will resolve these issues in an order addressing the pending petitions for modification at a hearing in the near future. If so, that is not explained in this order. On the face of this order, it could continue "temporarily" until the children reach majority."

5. "In this procedural context, these errors are not matters that can be adequately addressed in any subsequent direct appeal."

6. "Moreover, the first error impacts his fundamental liberty interest in parenting a child by restricting his participation in medical decisions. The second error raises additional serious due process concerns."

7. "We conclude that these errors are proper matters to address by certiorari."

Weissman v. Weissman, 112 So.3d 735 (Fla. 2d DCA 2013)

CERTIORARI GRANTED WHERE TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW WHERE WITHOUT GIVING HUSBAND'S NON-PARTY EMPLOYER NOTICE OR AN OPPORTUNITY TO BE HEARD, IT ENTERED AN ORDER DIRECTING EMPLOYER TO RETROACTIVELY REINSTATE HUSBAND'S HEALTH INSURANCE POLICY AFTER IT HAD LAPSED.

The petition for certiorari review by Presidio Networked Solutions, Inc. stemmed from an order entered in the underlying dissolution proceeding between its employee, the Husband, and his wife. Presidio argued that the trial court departed from the essential requirements of the law, thereby causing it irreparable harm, when, without notice or an opportunity to be heard, an order was entered directing Presidio to retroactively reinstate the Husband's health insurance policy after the policy had lapsed without any fault of Presidio. The District Court agreed and granted the petition, quashed the order on review, and remanded:

1. "Here, the circuit court ordered Presidio to reinstate [the Husband's] health insurance policy retroactively without giving Presidio notice or an opportunity to be heard. This complete denial of due process to Presidio in connection with the underlying proceedings constitutes the type of irreparable harm that is subject to certiorari review."

2. "Moreover, because Presidio is not a party to the underlying dissolution proceeding, it cannot challenge the order on direct appeal. Other than certiorari review, the only way that Presidio could challenge the circuit court's order would be to risk contempt for failure to comply with the order and then appeal an order of contempt…. 'However, this is too great a price to require [Presidio] to pay.'"

3. "Accordingly, the jurisdictional prong for certiorari review is met in this case."

4. "For similar reasons, we conclude that the circuit court departed from the essential requirements of the law in entering the subject order."

5. "The circuit court made a factual finding that '[the Husband's] policy of insurance was mistakenly cancelled,' without giving Presidio the opportunity to explain the circumstances under which the policy had lapsed, and it directed Presidio to take action that it may be unable to take without first giving Presidio notice and an opportunity to be heard. 'Denial of due process [to Presidio] constitutes a departure from the essential requirements of law.'"

Presidio Networked Solutions, Inc. v. Taylor, 115 So.3d 434 (Fla. 2d DCA 2013)

NO MERIT TO HUSBAND'S ARGUMENT, RAISED FOR FIRST TIME ON APPEAL, THAT GUARDIAN AD LITEM'S PARTICIPATION IN TRIAL REQUIRED REVERSAL WHERE ALTHOUGH TRIAL COURT ERRED WHEN IT ALLOWED GUARDIAN TO QUESTION WITNESSES, ERROR WAS NOT FUNDAMENTAL AND HUSBAND'S FAILURE TO OBJECT CONSTITUTED WAIVER OF ISSUE.

During the trial in the dissolution of marriage proceedings below, the guardian ad litem, a psychologist appointed to represent the parties' minor child, requested the trial court's permission to ask witnesses questions at trial. The trial court asked the parties whether they had any objection to the guardian's questioning of witnesses, and neither party objected. Throughout the four-day trial, the guardian ad litem questioned the parties and six witnesses. The questions covered substantially similar subject matter to the wife's questions, and also elicited comparable testimony to that which the wife's questions elicited. The trial court subsequently entered its final judgment, after which the Husband appealed, contending for the first time that the guardian's participation in the trial required reversal. The District Court affirmed:

1. "We first note, '[I]t is a mistake to hold a pro se litigant to a lesser standard than a reasonably competent attorney.'"

2. "Secondly, the guardian ad litem serves an important fact-finding role in cases that involve minor children. Section 61.401, Florida Statutes (2010), makes it abundantly clear that the guardian ad litem is to 'act as next friend of the child, investigator or evaluator, not as attorney or advocate.' To that end, '[t]he duties and rights of non-attorney guardians do not include the right to practice law.' § 61.403(7), Fla. Stat. (2010)."

3. "Additionally, any participation by the guardian ad litem in trial proceedings must be 'through counsel.' § 61.403(6), Fla. Stat. (2010). Examination of witnesses constitutes the practice of law and is a function reserved for licensed attorneys."

4. "The trial court thus erred when it allowed the guardian ad litem to question the witnesses."

5. "However, in the absence of an objection below, this Court will not consider issues for the first time on appeal except in cases of fundamental error … error that goes to the foundation of the case or goes to the merits of the cause of action."

6. "While the trial court's allowance of the guardian ad litem to question witnesses at trial was contrary to sections 61.401 and 61.403, reversal is not warranted because the error was not fundamental to the case. We cannot say with any certainty that the guardian's examination of witnesses affected the outcome of the trial or even had a substantial effect."

7. "Her questions targeted the same subject matter as those asked by the wife and elicited markedly similar responses. Additionally, the trial court offered the parties the opportunity to object to the guardian's participation in the trial, and neither party accepted the trial court's invitation to object. The guardian's participation in this trial plainly did not go to the foundation of the case and, thus, cannot constitute fundamental error."

8. "Accordingly, the Husband's failure to object to the guardian ad litem's questioning of witnesses at trial constitutes a waiver of this issue. For these reasons, we affirm the final judgment of dissolution of marriage."

Millen v. Millen, 122 So.3d 496 (Fla. 3d DCA 2013)

REMAND REQUIRED FOR CORRECTION OF MATHEMATICAL ERROR IN CHILD SUPPORT RESULTING IN EXCESS AWARD; NO MERIT TO MOTHER'S CLAIM THAT FATHER FAILED TO PRESERVE THIS ERROR BY NOT FILING A MOTION FOR REHEARING.

Shortly after the child's birth, the Father filed a petition to establish paternity. Following mediation, both parties sought an award of child support in the trial court. In the final judgment of paternity, the trial court found that the Mother was entitled to child support and awarded her an arrearage based on its determination and the Father's previous support payments. However, the trial court made a mathematical error when it calculated the amount of the child support arrearage at $4,050, instead of $3,050. The Father appealed. In this regard, the District Court reversed:

1. "[The Mother] argues that [the Father] failed to preserve this error for appellate review by electing not to file a motion for rehearing. While other district courts have required parties complaining on appeal about inadequate findings in dissolution cases to bring the alleged defect to the trial court's attention in a motion for rehearing in order to preserve the issue for appeal, this court has not yet decided the preservation issue in the broader context…. However, we previously declined to extend this line of reasoning to claims of mathematical error appearing on the face of a final judgment."

2. "Here, it is clear from the final judgment that the circuit court intended to calculate the arrearage based on a finite monthly award of $410 for child support, and that according to the court's determination of [the Fahter's] historical support payments the arrearage should have totaled $3050, not $4050."

3. "Because the imposition of the extra $1000 is not supported by competent, substantial evidence, we reverse and remand for the court to correct its mathematical error."

B.K. v. S.D.C., 122 So.3d 980 (Fla. 2d DCA 2013)

Third District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO AWARD ATTORNEY'S FEES TO EITHER PARTY PURSUANT TO PREVAILING PARTY PROVISION OF MSA WHERE BOTH PARTIES PREVAILED ON HUSBAND'S PETITION FOR DOWNWARD MODIFICATION OF ALIMONY AND CHILD SUPPORT AND ON CALCULATION AND COLLECTION OF EQUITABLE DISTRIBUTION MINUS SETOFFS.

The parties entered into a Mediated Marital Settlement Agreement, incorporated into the final judgment of dissolution of marriage, which provided that the Former Husband would pay durational alimony of $4,000 per month and child support of $1,200 per month. He was also required to pay the Former Wife a total of $60,000 as part of equitable distribution. The agreement further provided that, in the event of any legal dispute or enforcement action by either party, the prevailing or non-defaulting party would be entitled to payment of attorney's fees by the losing or defaulting party.

In August 2009, the Former Husband filed a petition for downward modification of his alimony and child support obligations due to a substantial reduction in income due to a downturn in the market. The Former Husband had always made all support payments required under the

parties' agreement' however, during the pendency of the underlying modification proceedings, he unilaterally reduced his support payments to $3,000 per month, and later further reduced them to $2500 per month. He also failed to pay any of the amounts he owed per the equitable distribution award. Although the parties initially attempted to resolve their dispute through mediation, they were unsuccessful. The Former Wife opposing the downward modification and moved to compel the delinquent equitable distribution payments. The Former Husband acknowledged that he owed the equitable distribution payments, but requested set-offs based on various payments he had already made on behalf of the Former Wife and children, as well as for any overpayment of his support obligations should petition for a downward modification be granted.

The trial court ultimately granted the Former Husband's downward modification and retroactively reduced his payments from $5,200 to $2,829 per month ($2,187 per month starting in 2011) and continuing prospectively. However, the trial court denied a modification for the balance of 2009. These amounts were calculated using an expert accountant, who submitted two potential alternative monthly support obligations, based on the parties' respective needs and ability to pay. The trial court adopted the proposal that favored the Former Wife and awarded the Former Husband a set-off of $7,261.70 on the amount owed for equitable distribution.

In his motion for attorney's fees per the prevailing party provision of the parties' agreement, the Former Husband argued that because he received a downward modification and was awarded a setoff against his equitable distribution delinquency, he was the prevailing party, and was thus entitled to attorney's fees. On the other hand, the Former Wife argued that an award of attorney's fees would be improper because he was not the prevailing party below, and that neither party should recover attorney's fees. After conducting a hearing on the issue, the trial court concluded that because each party had prevailed on significant issues in the litigation, neither party was entitled to attorney's fees as the prevailing party. The Former Husband appealed. Affirming, the District Court held:

1. "The party prevailing on the 'significant issues' in the litigation is the party that should be considered the prevailing party for attorney's fees."

2. "A party receiving a net positive judgment is not necessarily the prevailing party, although that is a factor in determining which party prevailed on the significant issues."

3. "Importantly, 'an attorney's fee award is not required each time there is litigation involving a contract providing for prevailing attorney's fees.'"

4. "Indeed, when the litigation 'end[s] in a tie,' with each party 'prevail[ing] in part and los[ing] in part on the significant issues,' the trial court is well within its discretion to deny attorney's fees to both parties.'"

5. "The trial court's well-reasoned rulings below present us with just such a 'tie' between the parties. There were two major issues in this litigation…. Neither party completely prevailed on either issue."

6. "Although [the Former Husband] ostensibly 'won' by receiving a substantial retroactive downward modification of his support obligation, the trial court declined to apply that modification for the 2009 calendar year. Instead, the trial court actually set [his] monthly support obligation amount to a value that was more favorable to [the Former Wife] according to the expert accountant's recommendations, so [he] did not obtain a complete victory as to his petition to modify his support obligation."

7. "And, although [the Former Wife] ostensibly 'won' by receiving a $22,000 judgment as to the equitable distribution delinquency, [the Former Husband] was able to offset this amount

by applying the credit from his now-overpaid support payments and other expenditures. Accordingly, [her] victory was similarly limited."

8. "'[W]here each claim is separate and distinct and would support an independent action… the prevailing party on each distinct claim is entitled to an award of attorney's fees for those fees generated in connection with that claim.' However, where the claims litigated are 'inextricably intertwined' or involve a 'common core of facts,' an award of attorney's fees may be appropriate as to the entire litigation."

9. "We need not determine whether these were two distinct and separable issues, or whether the issues are so inextricably intertwined as to be seen as one, because neither party clearly prevailed on either issue regardless of whether we view the litigation piecemeal or in total. Each party prevailed, and lost, on significant issues as to the support modification and the equitable distribution payments respectively, and each party prevailed and lost on significant issues as to the litigation in its entirety."

10. "Accordingly, the trial court did not abuse its discretion by finding that both parties prevailed and that neither was entitled to an award of attorney's fees."

Schoenlank v. Schoenlank, 128 So.3d 118 (Fla. 3d DCA 2013)

Fourth District

NOTICE OF APPEAL FROM ORDER DENYING HUSBAND'S MOTION FOR RECONSIDERATION OF A STATUS REPORT SHOULD HAVE BEEN FILED WITHIN THIRTY DAYS OF RENDITION OF STATUS REPORT ORDER AS SAID ORDER WAS A NON-FINAL ORDER, THUS MOTION FOR RECONSIDERATION DID NOT SUSPEND TIME FOR FILING APPEAL

A status report order was rendered herein on April 19, 2012. The Appellant moved for reconsideration of the status report order, and the trial court entered an order denying the motion. The order denying the motion for reconsideration was rendered on May 14, 2012. Less than thirty days later, the Appellant filed a notice of appeal, on June 8, 2012. This was, however, fifty-one days after the status report order was rendered. The District Court dismissed the appeal:

1. "[W]hile a timely motion for rehearing will suspend rendition of a final order until entry of the order disposing of the motion for rehearing, Fla. R. App. P. 9.020(h), a motion for rehearing does not suspend rendition of a non-final order because rehearing is not authorized for non-final orders."

2. "The status report order entered by the trial court was not a final order ending the reunification proceedings; the order provided in part that there would be no further efforts to have [the Appellant] spend time with the children 'until further written agreement of both parents and the GAL or until further Order of the court' and predicated future contact between [the Appellant] and the children upon the agreement of the therapists working with the children and [the Appellant]."

3. "Failing to file a notice of appeal within the time limits 'constitutes an irremediable jurisdictional defect.'"

4. "Because [the Appellant] failed to file the notice of appeal within thirty days of the rendition of the status report, we are required to dismiss his appeal for lack of jurisdiction."

Bak v. Bak, 110 So.3d 523 (Fla. 4th DCA 2013)

ORDER ESTABLISHING SUMMER VISITATION AFFIRMED WHERE ARGUMENTS WERE NOT PRESERVED BY PROPER OBJECTION AND ISSUES WERE MOOT AS TO PREVIOUS SUMMER VISITATION; HOWEVER, RESTRICTIONS REGARDING POSSESSION OF GUNS BY CHILD OR BY FATHER IN CHILD'S PRESENCE OVERLY BROAD BECAUSE NO EVIDENCE SHOWED CHILD SHOULD BE DISALLOWED TO PLAY WITH TOY GUNS.

On appeal by the Father herein, the District Court affirmed, but held as follows:

1. "We affirm the order establishing summer visitation, as none of the arguments made by the appellant on appeal were preserved by proper objection in the trial court."

2. "In addition, the issues are moot for the previous summer's visitation."

3. "Nevertheless, we take this opportunity to observe that the restrictions regarding the possession of guns by the child or by the father in the presence of the child are overly broad."

4. "Even though the guardian ad litem and mother sought a prohibition against the child handling a real gun, BB gun, or paintball gun because of the child's tender years and his unfortunate experience with a BB gun on a visit with the father, the trial court additionally included in the prohibition toy guns. No evidence showed that the child should be disallowed to possess or play with a pop gun, water pistol or some similar childhood toy."

Ingram v. Ingram, 110 So.3d 987 (Fla. 4th DCA 2013)

TRIAL COURT DID NOT ERR IN DETERMINING THAT IT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER DISSOLUTION OF MARRIAGE PETITION BECAUSE WIFE, WHO WAS IN THE U.S. ON NON-IMMIGRANT TOURIST VISA, HAD NOT ESTABLISHED ACTUAL RESIDENCY WITH AN INTENT TO REMAIN PERMANENTLY IN STATE; CLAIM THAT UNDER UCCJEA, TRIAL COURT HAD JURISDICTION INSOFAR AS SHE SOUGHT CHILD CUSTODY COULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

The parties and their child are all German citizens. Although the parties married in Florida in 2002 while on vacation, they executed a prenuptial agreement under German law and continued to live in Germany. The Husband owns an interest in a company in Germany, and all of the parties' income and property is located in Germany. In July 2009, the Wife and the daughter moved to Boca Raton for the daughter to study here and to distance themselves from the Husband, who the Wife accused of domestic violence. They entered the United States on a non-immigrant tourist visa. To maintain her status in this country, the Wife filed required certificates of eligibility with the immigration authorities every several months, including forms filed both before and after she filed the petition for dissolution of marriage. In renewing her tourist visa, she swore on each affidavit that she sought to remain in the United States temporarily and "solely for the purpose of pursuing a full course of study." To comply with the tourist visa, she would also leave the United States periodically and return to Germany. She returned to Germany in December 2009 and stayed until the end of January 2010.

When asked in her deposition whether she had filed any document with the United States indicating that she intended to stay permanently in this country, she testified that she had not. When asked whether she intended to do so, she answered "Maybe, yes." She also admitted that she had not notified the German government of her removal from her home district in Germany,

something she is required to do under German law when she moves out of a district. She also testified that she had not taken all of her personal effects when she left Germany.

The Husband had agreed to allow the child to come to Florida to attend school. He paid the lease on their rental and otherwise supported the Wife and his daughter. Originally, the agreement was for six months, but he later agreed to support the wife and child until the end of the school year. He testified that they had return airfare tickets home for the end of summer in 2010. The Husband visited the girls in Florida in October 2009 and March 2010; and the couple tried to reconcile, but after the March 2010 visit, the Wife determined that the marriage could not be saved.

In July 2010, the Husband filed a petition for dissolution of marriage in Germany. That suit remained active at the time of the appeal, although there were issues regarding proper service on the Wife. However, several emails between the parties indicated the Wife's desire to settle the dissolution proceeding filed in Germany without litigation. On August 6, 2010, the wife received an email from the Husband that he was flying into Miami International Airport on August 11, 2010, to pick up the child for a vacation to the Bahamas. She did not respond until August 10, telling him that they would meet him at the airport, although she had no intention of allowing the child to accompany the Father. On that same day, she filed a petition for protection from domestic violence, and the trial court granted an ex parte temporary injunction prohibiting the Husband from contact with the Wife or child. The next day, the Wife filed a petition for dissolution of marriage, and the Husband was served with the domestic violence petition, the temporary injunction, and the petition for dissolution of marriage upon arrival at the Miami airport on August 11th. The Husband then returned to Germany immediately.

The Husband moved to dismiss the Wife's petition for dissolution because of lack of subject matter jurisdiction, as the wife was not a domiciliary of the state, for lack of personal service on him, and for forum non conveniens. He also moved to abate the action because of his pending petition for dissolution in Germany. The trial court conducted an evidentiary hearing on the issues of subject matter and personal jurisdiction, and, over objection on grounds of lack of notice, on the issue of the domestic violence injunction. The Husband did not testify in order to preserve his objection to personal jurisdiction on which the trial court had not ruled. The court heard from experts on German law with respect to the forum non conveniens claim, as well as the testimony of the Wife and her friend as to her intention to stay in this country and her fear of her Husband. The court also heard testimony from the child's psychologist.

Based upon the facts, the court granted the motion to quash service of process and the motion to dismiss for lack of subject matter jurisdiction and personal jurisdiction over the Husband. It found that it did not have jurisdiction because the Wife had not proved her permanent residence or intention to remain in Florida when she filed repeated affidavits to renew her passport certifying that she was in the country temporarily. In addition, the court considered that her failure to notify the German government, as required by law, that she was no longer a resident. The court determined that it did not have jurisdiction over the Husband because service was obtained through the Wife's deceptive conduct in luring him to the jurisdiction. It also made findings that the German courts had jurisdiction over the marriage, the child, and the property of the parties, and the court declined to exercise jurisdiction under these circumstances. The Wife appealed. With regard to the jurisdictional issues, the District Court affirmed:

1. "The [W]ife argues that the court made an implicit finding that she could not have an intention to reside in Florida as a matter of law because of the various immigration forms she

signed indicating that she was only in the U.S. on a 'temporary' basis. The Wife argues that this is contrary to the holding of *Weber v. Weber*…."

2. "*Weber* looked to [earlier cases] as authority for its ruling…. [Those cases] stand for the proposition that a trial court does not lack subject matter jurisdiction as a matter of law based upon the non-permanent status of the petitioning party, but that status may be taken into consideration in the factual determination of domiciliary intent."

3. "We conclude that the trial court in this case did not determine that the Wife could not establish residency as a matter of law but determined based upon the facts presented that the Wife had not established actual residency with an intent to remain permanently."

4. "It emphasized, as powerful evidence of her lack of intent, the affidavits that the Wife signed as late as May 2010, in which she swore that she did not intend to remain permanently in the United States. The trial court is not compelled to disregard her sworn statements in determining her intent."

5. "Moreover, there was other evidence at the hearing which would support the trial court's conclusion."

6. "She had never notified the German government that she had moved from her home district, something she knew she was required to do. In her deposition, [she] was equivocal as to her intent to apply for permanent residency status in the United States. At the hearing as well as in her deposition, she testified that she and her daughter first came to Florida so her daughter could go to school and to put some distance between her and her husband. She did not state that she was intending at the time to move to Florida permanently, and she left personal possessions in Germany. She spent the month of January in Germany. When she returned, the Husband came for a visit in March at which time they were still trying to reconcile the marriage. Obviously, if they were attempting reconciliation, that would entail her moving back to Germany, the parties' home and workplace. Thus, the court could conclude that the Wife had not determined to stay in Florida until she filed for dissolution of marriage, and the intent and the act of residency had not concurred for the prescribed period."

7. "Because the trial court did not rule as a matter of law that the Wife's tourist visa prevented the court from acquiring subject matter jurisdiction but ruled, based upon the facts, that she had not established the intent to remain, we affirm the trial court's ruling dismissing the dissolution petition for lack of subject matter jurisdiction as it is supported by competent substantial evidence."

8. "With respect to the Wife's argument the trial court had jurisdiction that under the UCCJEA]… even if the trial court did have jurisdiction pursuant to section 61.514, Florida Statutes, it is apparent that the court dismissed the action on the grounds that Florida was an inconvenient forum…. At the hearing on the Husband's motions, the court heard evidence on the factors in section 61.520(2) that a court should consider in determining whether Florida is an inconvenient forum. Again, in ruling, the court found: 'There is no rational basis for this Court to assume jurisdiction over the German court in a case involving German citizens, a minor child who is a German citizen, and all marital real and personal property interests in Germany.' Therefore, we hold that the court did not err in dismissing the petition even as to child custody."
Rudel v Rudel, 111 So.3d 285 (Fla. 4th DCA 2013)

MOTHER'S CLAIM THAT SHE HAD INSUFFICIENT NOTICE OF RESCHEDULED CONTEMPT HEARING WAS NOT PRESERVED FOR APPEAL WHERE RECORD DID NOT SHOW PRE-APPEAL MOTION FOR CONTINUANCE, FOR REHEARING, FOR RELIEF FROM JUDGMENT, OR EVEN PRO SE NOTE FROM MOTHER TO JUDGE ALLEGING INSUFFICIENT NOTICE.

The parties were married and had a child. In June 2010, the trial court entered a final judgment of dissolution of marriage incorporating a marital settlement agreement (MSA), which provided that the Mother could relocate outside Florida, and that if she did "the [Father's] time sharing shall consist of Spring Break ... and four consecutive weeks each summer." The Mother relocated to Texas with the child. Subsequently, the Father filed a motion for contempt, alleging that the Mother failed to make the child available for summer timesharing. He requested that the Mother be found in willful contempt and that he be awarded "makeup time-sharing" and attorneys' fees. On August 13, 2012, the Father's attorney sent a notice of hearing to the Mother in Texas, advising her that a contempt proceeding would be conducted on August 28th. That hearing was later cancelled. On August 31, another notice of hearing was sent to the Mother informing her that the contempt hearing would be held on September 12. According to the Mother, however, she did not learn of the rescheduled hearing until September 6th. She claimed that she sent an email to the Father's counsel on September 11th informing him that she could not attend the hearing. The court held the contempt hearing on September 12th. The Father was present with his attorney, but the Mother was not. Thereafter, on September 21st, the court entered an order finding the mother in civil contempt of court, and ordering her to pay the Father's attorneys' fees. The Mother filed a notice of appeal. She then filed a motion to stay the order adjudicating her in contempt, which the trial court denied, and later a motion for rehearing on the motion to stay. On appeal, the Mother argued that she had insufficient notice of the contempt hearing. Finding that she had not preserved her objection to the issue of notice, the District Court affirmed:

1. "The record indicates that the second notice of hearing—made necessary because of the tropical storm—was delivered to the Mother's home twelve days before the day of the re-scheduled hearing. Taking the Mother's claims as true, she did not receive the notice until five days before the day of the hearing, and only three business days before the hearing (excluding the day she actually received the notice)."

2. "The Mother failed to preserve any objection to the date of the re-scheduled hearing…. The record before us includes no pre-appeal motion for continuance, motion for rehearing, motion for relief from judgment or even a pro se note from the Mother to the trial judge that alleged [she] had insufficient notice of the hearing."

3. "Because the Mother failed to preserve this issue in any discernable manner whatsoever and in the absence of fundamental error, we decline to review it further."

Nunes v. Nunes, 112 So.3d 696 (Fla. 4th DCA 2013)

WHERE EQUITABLE DISTRIBUTION REVERSED, AWARD OF FEES TO WIFE ALSO REVERSED BECAUSE A REDISTRIBUTION OF ASSETS AND LIABILITIES COULD IMPACT THE ULTIMATE DECISION ON A FEE AWARD.

In a case stating very little facts, the District Court reversed the trial court's decisions regarding equitable distribution:

1. "A trial court is obligated to identify, value, and distribute the marital and non-marital assets and liabilities."

2. "The temporary use of the marital home was awarded to Former Wife 'until the full implementation of the equitable distribution schedule" however, without Exhibit 'A' attached to the final order, no findings awarding the equity in the home can be discerned from the record."

3. "Moreover, even though the trial court awarded equity in the martial home to Former Wife, it failed to indicate if there was a shift in title."

4. "Also, the Former Wife requested partition. Where a request for partition complies with section 64.041, Florida Statues (2010), and is not contested by the opposing party, failure to divide the property is reversible error."

5. "Because the trial court did not properly rule concerning the marital residence, the entire scheme of equitable division devised by the trial court may need revision."

6. "We reverse on [the issue of the Former Wife's attorney's fees and costs as of the final hearing] because where equitable distribution is reversed on appeal, it may be appropriate to reexamine attorney's fees to determine if the redistribution of assets and liabilities affects the award for attorney's fees."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

WHERE AWARD OF ALIMONY AND CHILD SUPPORT IS REVERSED, DETERMINATION THAT FORMER HUSBAND WAS IN CONTEMPT FOR FAILURE TO PAY SAME MUST ALSO BE REVERSED.

Reversing the determination that the Former Husband was in contempt, the District Court held:

1. "This court has previously found that where an award is improper and requires reversal, a finding of contempt based upon such award must also be reversed."

2. "Because we reverse the award of alimony and child support, we reverse the determination that Former Husband is in contempt."

3. "On remand, we note that the trial court needs to identify the source of payment for the purge amount only if a coercive sanction is imposed."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

ORDER PROVIDING THAT CHILD WOULD ATTEND FIRST YEAR OF HIGH SCHOOL AT OUT-OF-STATE PRIVATE SCHOOL WAS NOT AN ORDER FOR RELOCATION UNDER SECTION 61.13001, BUT MERELY AN ORDER REGARDING EDUCATIONAL DECISION FOR CHILD, AND THUS NOT SUBJECT TO NON-FINAL APPEAL.

In an appeal from an order entered prior to a final judgment of dissolution of marriage providing that the parties' minor child would attend his first year of high school at an out-of-state private school, the District Court dismissed:

1. "We reject Appellant's assertion that the order is one for relocation under section 61.13001, Florida Statutes (2012), and hold that it is merely an order regarding an educational decision for the child."

2. "We find support in the trial court's own statement that its ruling was limited to what school the child would attend for his freshman year of high school."

3. "Thus, the order is not one of the appealable non-final orders found in Florida Rule of Appellate Procedure 9.130(a)(3), and is not otherwise appealable."

4. "Nor do we find a writ of certiorari to be appropriate were we to treat this appeal as a petition for one."

Blakely v. Blakely, 123 So.3d 662 (Fla. 4th DCA 2013)

MONEY WITHDRAWN TO PAY FOR ADULT CHILD'S TUITION WAS IMPROPERLY DETERMINED TO HAVE BEEN SPENT ON MARITAL OBLIGATIONS AS NO LEGAL OBLIGATION EXISTS TO SUPPORT A GROWN CHILD AND THE ONLY EVIDENCE SHOWING HOW THE FUNDS WERE SPENT WAS THE ARGUMENT OF COUNSEL, WHICH DOES NOT CONSTITUTE EVIDENCE.

The General Magistrate herein, in fashioning its equitable distribution scheme, held that two withdrawals made by the Former Husband from joint checking accounts— which amounts totaled $4600—were used to pay marital obligations and thus were not subject to equitable distribution. At trial, the Former Husband presented evidence that $1,400 was used to pay for the minor child's attorney in a criminal case, and that $728.60 was spent on tuition for an adult child. His attorney then explained that the remainder of the money was spent on miscellaneous family expenses, but no other evidence showing how the funds were actually spent was presented. On appeal, the District Court affirmed the trial court's determination regarding the money spent on the minor child's criminal defense, but reversed in every other regard:

1. "We find no error in determining the $1400 was spent on marital obligations."

2. "Regarding the payment of tuition to an adult child, the marital settlement agreements or temporary support order did not require [the Former Husband] to pay the adult son's tuition. 'Any duty a parent has to pay an adult child's college expenses is moral rather than legal.' This court has previously held that 'since a parent has no obligation to support a grown child, any expenses associated with that child are not properly considered in awarding alimony.'"

3. "It follows that since there is no legal obligation to support a grown child (absent a contractual arrangement not present here), [the Former Husband's] expenditure of marital funds on the adult child should not have been considered a marital obligation, and the $728.60 in marital funds spent by [him] should be equitably divided."

4. "Regarding the remaining $2471.40 for miscellaneous family expenses, the only evidence showing how these marital funds were spent was argument of counsel. '[A]rgument of counsel does not constitute evidence.'"

Kunsman v. Wall, 125 So.3d 868 (Fla. 4th DCA 2013)

Fifth District

ARGUMENTS NOT RAISED IN TRIAL COURT MAY NOT BE RAISED FOR FIRST TIME ON APPEAL

In this paternity action, the Father raised two issues on appeal, neither of which were properly preserved for appeal. In that regard, the District Court affirmed and held as follows:

1. "It is axiomatic that our review is limited to the issues properly presented to the trial court and that Appellant raised in his brief."

2. "Absent fundamental error, arguments not presented to the trial court may not be considered for the first time on appeal…. Nor can we consider errors that the complaining party invited."

3. "[The Father] presents a generalized claim that the trial court erred by not taking evidence at the August 2, 2011 hearing. This claim of error is not preserved for review because [he] did not object when the court considered the verified motion and counsel's factual assertions at the hearing."

4. "[The Father] argues that venue was proper in Putnam County because a modification of a paternity support order is maintained under section 61.14, Florida Statutes, which provides several alternative venues, including where either party resides. Although this argument is premised on a correct statement of the law, it is not preserved for our review because it was not argued below, and the purported error was invited by [the Father's] incorrect argument to the trial court."

5. "[The Father's] entire argument below was based on his assumption of the burden to justify a transfer of the action from Hillsborough County to Putnam County. [He] never argued that his petition was a new action and that venue was proper in Putnam County. The trial court ruled that [the Father's] request for transfer should have been made in Hillsborough County. That was the correct ruling on the argument presented."

Mann v. Yeatts, 111 So.3d 934 (Fla. 5th DCA 2013)

WHERE APPELLATE COURT REMANDED FOR RECALCULATION OF FATHER'S INCOME FOR PARTICULAR YEAR BASED ON FINDING THAT TRIAL COURT ERRONEOUSLY ATTRIBUTED HIS WIFE'S INCOME TO HIM, TRIAL COURT EXCEEDED SCOPE OF MANDATE BY GOING BEYOND DELETION OF WIFE'S INCOME AND COMPLETELY RECALCULATING FATHER'S INCOME, CREDITING HIM WITH BUSINESS LOSSES PREVIOUSLY CONSIDERED AND REJECTED.

In the underlying action herein, the trial court went beyond the dictates of the appellate court's mandate on remand by delving into matters previously reviewed and affirmed by the District Court in an earlier appeal between the parties. In the original case, the trial court failed to use the Father's 2006 income tax return to calculate his support obligation for that year, and attributed his wife's income ($89,915) to him in calculating his 2007 income. On remand, while the trial court did use the Father's 2006 tax return to calculate his support obligation for that year, the court's reconsideration of his 2007 income went beyond the deletion of his wife's income and instead was completely recalculated by crediting him with business losses previously considered and rejected in the original proceedings.

With regard to the consideration of the Father's medical insurance costs in calculating his income, the record showed that he testified at the initial hearing, and on remand, regarding the amount he paid for his health insurance and yet, despite his repeated requests that this cost be included in the calculation, it was not deducted from his gross income. On appeal, the Father noted the inherent unfairness in denying him that deduction while allowing the Mother to deduct the cost of hers from her gross income. On these two points, the District Court reversed:

1. "Because we examined the calculation of Father's 2007 income and affirmed that calculation (except for the improper inclusion of his wife's income) in the first appeal, the

correction on remand only required the simple mathematical task of subtracting her income from Father's income for 2007."

2. "[W]e acknowledge, in fairness to the trial court, that [the earlier opinion] spoke in terms of failing 'to include the cost to Father of the health insurance that covered his child in calculating child support.' Therefore. [the earlier appeal] and the mandate that emanated from that appeal did not require inclusion of Father's health insurance in the calculation."

3. "We believe [the failure to allow the Father a deduction for his medical insurance costs] constitutes an error in need of correction based on notions of fairness and the statutory provisions that require the trial court 'to determine net income based upon section 61.30, Florida Statutes, by determining gross income as defined in subsection (2)(a) 1–14 and then subtracting from this figure allowable deductions as defined in subsection (3)(a)-(g).'"

4. "On remand, the trial court should allow the deduction to Father, just as it was allowed to Mother."

Russell v. McQueen, 115 So.3d 1084 (Fla. 5th DCA 2013)

IV. ATTORNEY'S FEES

A. Basis for Requiring Other Party to Pay: Need/Ability to Pay

First District

TRIAL COURT ERRED IN REQUIRING FORMER WIFE TO PAY ATTORNEY'S FEES FORMER HUSBAND INCURRED IN CONTEMPT PROCEEDINGS WITHOUT A DETERMINATION OF NEED AND ABILITY TO PAY.

The final judgment of dissolution was entered in this case in October 2004. The parties continued to litigate thereafter. In addition to numerous post-dissolution motions and petitions filed by both parties, a dependency action was initiated by the Florida Department of Children and Families ("DCF"), which twice resulted in temporary orders severely limiting Former Husband's contact with his sons. Further, Former Wife and her current husband have been named the eldest son's guardians in a separate guardianship proceeding in the State of Washington due to the son's severe medical conditions.

On July 9, 2010, the circuit court entered an order on various motions and addressed contact between two of the sons and Former Husband. The order provided that Former Husband was entitled to a minimum of four days per month of unsupervised "visitation" with the youngest son (then still a minor) during daytime hours of each day, and "visitation" with the eldest son under "the same parameters" as for the youngest son. The contact was to take place in the Seattle, Washington area, where the sons resided. That order was affirmed on direct appeal.

Former Husband visited his sons pursuant to the July 9, 2010 order during October 2010 and April 2011. Thereafter, he filed his motion for contempt against Former Wife and amended the motion twice. Former Husband alleged that Former Wife was in contempt of court because she had refused to agree to more than the minimum time provided in the order, including overnight visits, as was encouraged in the order. He sought "expanded and extended visitation"

with his sons and sought sanctions against Former Wife for her failure to negotiate such additional time with his sons.

After an evidentiary hearing on Former Husband's motion, the circuit court found Former Wife in contempt because she "prevented the Former Husband from having normal and usual routine contact with both" the eldest and youngest son. In addition, the court granted Former Husband's request to sanction Former Wife by requiring her to pay his attorneys' fees incurred in the contempt proceedings, in the amount of $1325.00. The court did not conduct any inquiry of the parties' current financial situations, needs or abilities. Former Wife appealed. The District Court reversed:

1. "It is well settled that '[o]ne may not be held in contempt for violating something that an order does not say.' *Keitel v. Keitel*, ... The order entered July 9, 2010 does not require [Former Wife] to provide [Former Husband] with 'normal and usual routine contact' with his sons."

2. "The provisions of the order regarding contact between [Former Husband] and sons entitle [Former Husband] to 'unsupervised visitation' to be located 'in the Seattle area' during daytime hours for a minimum of 'once per month for a minimum of four days.' No other directive about [Former Husband's] contact with his sons is contained in the July 9, 2010 order."

3. "There was no evidence of Former Wife's violation of any specific provision of the July 9, 2010 order."

4. "Although the July 9, 2010 order contained aspirational goals encouraging the parties to agree to additional contact without court involvement, 'implied or inherent provisions of a final judgment cannot serve as a basis for an order of contempt.'"

5. "While reversal of the contempt order necessarily results in reversal of the sanction, we also note that the lack of a purge provision in the order on appeal indicates that the court found a criminal contempt. Because the contempt action arose in the context of a dissolution action, the trial court was required to determine need and ability to pay before imposing this monetary sanction . . . The failure to make this determination was reversible error."

Hardman v. Koslowski, 107 So.3d 1246 (Fla. 1st DCA 2013)

WHERE MSA PROVIDED FOR AWARD OF ATTORNEY'S FEES TO PREVAILING PARTY IN ACTION TO ENFORCE MSA AND CENTRAL ISSUE BELOW WAS WHETHER WIFE WAS DUE ADDITIONAL ALIMONY PURSUANT TO THE MSA TERMS WIFE WAS PREVAILING PARTY ON SIGNIFICANT ISSUE AND WAS THUS ENTITLED TO ATTORNEY'S FEES AWARD.

The Former Wife filed a motion to enforce the terms of a Marital Settlement Agreement (MSA) that was incorporated in the Final Judgment of Dissolution of Marriage. Under the MSA, the Former Husband was required to pay the Former Wife 30% of "any bonuses he receives" in 2004, and 20% of any bonuses received each year thereafter as long as his alimony obligation persisted. Resolution of the case was largely determined by what the parties meant in using the terms "bonus" and "receives" in the MSA. The trial court decided against the Former Wife's interpretation of the MSA but additional alimony was awarded to her based on the Former Husband's non-payment. The MSA provided, "[i]n any action to enforce the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees and costs." However, the trial court concluded that neither party had prevailed and denied the Former Wife attorney's fees under the MSA. The Former Wife appealed. The District Court reversed:

1. "Here, the MSA provides for an award of attorney's fees to the prevailing party in an action to enforce the MSA. The Former Wife brought a motion to enforce the MSA."

2. "The central issue below was whether the Former Wife was due additional alimony from the Former Husband pursuant to the MSA. The trial court found that the Former Wife was entitled to over $30,000 in additional alimony from the Former Husband. Thus, we conclude that the Former Wife was the prevailing party on the significant issue of the underlying action."

3. "Accordingly, the trial court erred when it concluded that neither party prevailed and denied the Former Wife attorney's fees under the MSA."

Conway v. Conway,111 So.3d 925 (Fla. 1st DCA 2013)

Second District

TRIAL COURT ABUSED ITS DISCRETION IN AWARDING FEES INCURRED IN DOMESTIC VIOLENCE CASE INVOLVING PARTIES WHICH WERE NOT PART OF THE FAMILY LAW CASE.

In post-judgment proceedings temporarily modifying a parenting plan, the trial court also ordered that the Mother to reimburse the Father for attorney's fees in the amount of $6,610.50, an amount that included $4,811.94 for fees incurred in three domestic violence cases that were not a part of the family law case. The Mother appealed and the District Court reversed:

1. "The statute creating a cause of action for an injunction for protection against domestic violence, § 741.30, Fla. Stat. (2011), does not provide for an award of attorney's fees."

2. "In an appeal of a final judgment of dissolution of marriage, this court has specifically held that '[a]ttorney's fees cannot be awarded for services rendered by counsel in a separately filed domestic violence injunction case.'"

3. "Therefore, the trial court abused its discretion in awarding fees to the Father for work related to the petitions for domestic violence injunctions filed by the Mother."

4. "Although we reverse the award of fees for the injunction cases, we recognize that the power to amend section 741.30 to allow an award of attorney's fees rests with the legislature."

5. "As the First District stated in [an earlier case] 'many of the public policy reasons for granting attorney's fees in a chapter 61 proceeding exist in a domestic violence proceeding. This is a matter, however, that should be dealt with by the Legislature rather than the courts.'"

6. "[T]hat part of the order awarding the Father $1798.56 for attorney's fees incurred in this family law case is affirmed, but the award of $4811.94 for attorney's fees incurred in the domestic violence injunction cases is reversed."

Fernandez v. Wright, 111 So.3d 229 (Fla. 2d DCA 2013)

Third District

Fourth District

AWARD OF ATTORNEY'S FEES REQUIRED RE-DETERMINATION WHERE PROVISION IN MSA, WHICH TIED THE OBLIGATION TO PAY ATTORNEY'S FEES TO CIRCUMSTANCES IN WHICH PARTY DEFAULTED ON DUTY OR OBLIGATION ARISING UNDER THE AGREEMENT, DID NOT APPLY AS NEITHER PARTY DEFAULTED ON AN OBLIGATION UNDER THE AGREEMENT, AND WHERE PROVISION APPLIED TO BOTH PARTIES EQUALLY AND THUS WAS NOT A UNILATERAL PROVISION NECESSITATING THE APPLICATION OF §57.105(7) FOR RECIPROCITY PURPOSES.

The final judgment of dissolution of marriage herein incorporated the parties' marital settlement agreement, which included the following provision regarding attorney's fees and costs: "Except as otherwise provided in this Agreement, should either party to this agreement default in his or her obligation hereunder, the party in default shall be liable to the other party for all reasonable expenses, including attorney's fees, incurred by the other party with regard to the enforcement of the obligations created in this Agreement, whether suit be brought or not."

The Former Wife filed an emergency motion for temporary sole custody and parental responsibility and for contempt against the Former Husband, and therein requested that the trial court order the Former Husband to pay attorney's fees and costs related to the filing. An evidentiary hearing was held on the emergency motion. Later, the trial court held a hearing on the issue of attorney's fees and costs, after which the trial court found: "Since the Former Husband prevailed on the Former Wife's Motion for Contempt, the Former Wife's request for fees and costs in reference to that motion is denied. Because the Former Wife's Motion for Contempt was in the nature of an enforcement of a provision in the Marital Settlement Agreement, and because of the language contained in Florida Statute 57.105(7) making a provision for attorney's fees to enforce a contract provision bilateral, the Former Husband is entitled [to] an award of fees and costs in a successful defense of the Former Wife's Motion for Contempt."

The trial court also stated that the provision was not a prevailing party provision, and therefore, the Former Wife was entitled to temporary attorney's fees without regard to whether she prevailed on her request for permanent modification. The court found that $6,932 was a reasonable fee for the Former Husband's defense of the contempt motion and setoff this amount from the $20,000 it awarded to the Former Wife as temporary fees and costs in connection with her pending request for permanent modification. The Former Wife appealed. Reversing the trial court's order as to attorney's fees in part, the District Court held:

1. "In [an earlier case] we were faced with a similar provision in a marital settlement agreement…. Concerning this provision, we reasoned: 'We do not read this particular provision to base entitlement to fees on whether the party prevailed, although the party would have to successfully enforce performance against the defaulting party. Here the parties' agreement tied the contractual obligation to pay fees to whether one of them has "defaulted" on a duty or obligation arising under their settlement agreement.'"

2. "In the present case… the clause in the parties' marital settlement agreement tied the Former Wife's obligation to pay attorney's fees to a 'default' in one of the Former Wife's obligations under the marital settlement agreement. The Former Wife was unsuccessful in her attempt to obtain temporary sole custody and parental responsibility, and in her attempt to hold the Former Husband in contempt; thus, the trial court found that the Former Husband did not 'default' by failing to comply with the timesharing schedule. However, nor did the Former Wife

'default' in an obligation under the agreement simply because the Former Husband 'prevailed' in defending against her emergency motion."

3. "Accordingly, since there was no 'default,' and a 'default' was necessary to trigger application of the fees provision in the marital settlement agreement, we find that the attorney's fees provision in the marital settlement agreement was not applicable."

4. "The trial court, therefore, erred in finding a contractual basis to require the Former Wife to pay the Former Husband's attorney's fees under the circumstances of this case."

5. "Further, we note that section 57.105(7), Florida Statutes (2011), 'renders bilateral a unilateral contractual clause for prevailing party attorney's fees.' The attorney's fees provision in the marital settlement agreement applied to both parties equally, and was therefore not a unilateral provision necessitating the application of section 57.105(7) for reciprocity purposes, and as such, the trial court also erred in relying on section 57.105(7)."

6. "Therefore, we reverse the $6,932 in attorney's fees that was awarded to the Former Husband as a credit against the temporary fee of $20,000 awarded to the Former Wife in connection with her request for permanent modification."

7. "We direct the trial court to re-determine the Former Wife's entitlement to attorney's fees for the work performed on her emergency motion, using the standard for attorney's fees awards under section 61.16, Florida Statutes, for the entirety of the motion."

8. "If the trial court again determines that the Former Wife is entitled to attorney's fees, it should determine the reasonable amount of fees incurred in connection with the emergency motion, and set the manner in which the Former Husband will pay those fees."

Sacket v. Sacket, 115 So.3d 1069 (Fla. 4th DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN DENYING ANY FURTHER AWARD OF FEES TO WIFE WHERE HUSBAND CLEARLY HAD THE FINANCIAL ABILITY TO CONTRIBUTE AND THE WIFE'S EQUITABLE DISTRIBUTION AWARD WOULD HAVE BEEN INEQUITABLY DIMINISHED WERE SHE NOT TO RECEIVE SUCH AN AWARD.

The Husband filed for divorce after twelve years of marriage. The Wife, a registered nurse and medical case manager in her mid–40s, had a net monthly income of about $3,851. The Husband, a 50-year-old medical doctor, had a net monthly income of $31,833 per month. In a temporary relief order, the Wife was awarded $50,000 in attorney and accountant fees. The funds to pay these expenses were to come from the cash surrender value of insurance policies as well as the parties' respective retirement accounts. A subsequent order awarded the Wife additional attorney's fees to be paid through a QDRO on the Husband's 401(k) account, another marital asset.

In the final judgment, the court's equitable distribution plan resulted in both parties receiving about $332,000 in equitable distribution of marital assets. The court also ordered the Husband to pay durational alimony of $5,000 per month for ten years and child support of $2,748 per month, with the amount to change upon the termination of the durational alimony and the oldest child reaching the age of majority. The Wife's request for attorney's fees and costs was denied based on the trial court's finding that, after considering the Husband's alimony obligation, his equitable distribution equalizing payment obligation, his child support obligation, his expenses while he is caring for the children, and the significant carrying costs associated with the marital residence, he would be in no position to contribute to the Wife's attorney's fees and

costs. The trial court also found that it was not appropriate to award the wife fees based upon the Husband's future superior income and further determined that $50,000 of the Wife's fees had already been paid out of the parties' assets, and she no longer had a need for fees. The Wife appealed, arguing that it was inappropriate to cause her to diminish her award of equitable distribution when the Husband earned so much more than she did. The District Court reversed:

1. "In considering a party's financial need for attorney's fees, it is proper 'to prevent the inequitable diminution' of a spouse's share of an equitable distribution."

2. "Notwithstanding an equal distribution of assets, a significant income disparity can justify an award of attorney's fees and costs."

3. "In the present case, the trial court abused its discretion in failing to award the Wife at least a portion of her fees and costs."

4. "Contrary to the trial court's ruling, it is apparent that the Wife did have a need for attorney's fees and costs.

5. "The denial of fees and costs to the Wife will result in an inequitable diminution in [her] equitable distribution award, while the Husband can preserve his entire distribution."

6. "Although the trial court equalized the property division, the parties are not close in having similar resources with which to pay attorney's fees."

7. "Even after deducting alimony and child support from the Husband's income and adding them to the Wife's income, the Husband still has more than twice as much income as the Wife."

8. "The Husband is able to pay the equalizing payment for property distribution from his current income, and the expenses of the marital home will end as soon as the home is sold, as it has been listed for sale. Thus, within about two years, the Husband will have $584,000 in assets and an income of about $24,000 per month, after paying alimony and child support. The Wife, on the on the other hand, will have a monthly income, including child support, of $11,600 and will have to pay her attorney's fees from her equitable distribution, ending up with about $200,000 in assets."

9. "The trial court's finding that the Husband does not have the ability to pay attorney's fees gives too much weight to the costs associated with the debt on the marital home as well as to the $10,000 monthly equitable distribution payments, which are being paid out of current income but will end within two years."

10. "Although the Husband does have substantial monthly expenses currently, the trial court could have simply adjusted [his] required monthly payments so that the equalizing payment and any award of attorney's fees would be paid off over a longer duration, or the court could have made part of the equitable distribution or attorney's fees award payable upon the sale of the marital residence, in which there is substantial equity."

11. "The Husband clearly has the ability to pay at least a substantial portion of the Wife's fees from his income and should be required to do so."

12. "The trial court misapplied [an earlier case] in finding that an award of fees would be inappropriate. Unlike the present case, . . . the 'superior future income prospects' discussed in [the earlier case] referred to 'speculative increases in earnings' that did not translate into a present ability to pay. This case, by contrast, involves a present ability to pay, based on a regular and continuous income derived from a well-established medical practice."

13. "In sum, the court abused its discretion in denying any further award of fees to the Wife, where the Husband clearly had the financial ability to contribute to the Wife's fees and the

Wife's equitable distribution award would be inequitably diminished should she not receive an award of fees."
Duncan-Osiyemi v. Osiyemi, 117 So.3d 882 (Fla. 4th DCA 2013)

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING HUSBAND'S REQUEST FOR FEES WHERE HUSBAND RECEIVED A SUBSTANTIAL DISTRIBUTION OF ASSETS.

In these dissolution of marriage proceedings, notwithstanding the disparity in the parties' incomes, the trial court declined to award the Husband attorney's fees and costs. The Husband did receive, however, a substantial distribution of assets. The Husband appealed various aspects of the final judgment entered. With respect to the denial of attorney's fees and costs, the District Court affirmed:

1. "In cases where the divorce leaves the 'poorer' spouse 'with a substantial equitable distribution, courts have either reversed a total or partial award of attorney's fees or affirmed a denial of attorney's fees.'"
2. "Here, notwithstanding the disparity in income (a disparity that will be reduced once the trial court awards alimony on remand), we find no abuse of discretion in the denial of the Husband's request for fees and costs."
3. "The Husband received a substantial distribution of assets based on the parties' Partial Agreement and the final judgment."
4. "It cannot be said that no reasonable judge would have denied the Husband's request for fees, particularly in light of [his] failure to be forthcoming on his financial affidavits about the value of his assets."
5. "In short, we conclude that the Husband failed to meet his burden of proving that he had a need for the wife to contribute to his fees."

Addie v. Coale, 120 So.3d 44 (Fla. 4th DCA 2013)

WHERE EQUITABLE DISTRIBUTION REVERSED, AWARD OF FEES TO WIFE ALSO REVERSED BECAUSE A REDISTRIBUTION OF ASSETS AND LIABILITIES COULD IMPACT THE ULTIMATE DECISION ON A FEE AWARD.

In a case stating very little facts, the District Court reversed the trial court's decisions regarding equitable distribution:

1. "A trial court is obligated to identify, value, and distribute the marital and non-marital assets and liabilities."
2. "The temporary use of the marital home was awarded to Former Wife 'until the full implementation of the equitable distribution schedule' however, without Exhibit 'A' attached to the final order, no findings awarding the equity in the home can be discerned from the record."
3. "Moreover, even though the trial court awarded equity in the martial home to Former Wife, it failed to indicate if there was a shift in title."
4. "Also, the Former Wife requested partition. Where a request for partition complies with section 64.041, Florida Statues (2010), and is not contested by the opposing party, failure to divide the property is reversible error."
5. "Because the trial court did not properly rule concerning the marital residence, the entire scheme of equitable division devised by the trial court may need revision."

6. "We reverse on [the issue of the Former Wife's attorney's fees and costs as of the final hearing] because where equitable distribution is reversed on appeal, it may be appropriate to reexamine attorney's fees to determine if the redistribution of assets and liabilities affects the award for attorney's fees."
Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

ERROR TO REQUIRE FORMER HUSBAND TO PAY FORMER WIFE'S ATTORNEY'S FEES FOR ENFORCEMENT OF ADDITIONAL PURGE AMOUNT WHERE FORMER WIFE DID NOT ADEQUATELY DEMONSTRATE NEED FOR ATTORNEY'S FEES.

Reversing the order requiring the Former Husband to pay the Former Wife's attorney's fees for enforcement as an additional purge amount, the District Court held:

1. "The record does not contain a current financial affidavit for the Former Wife as of the contempt hearings."

2. "She testified regarding her current financial circumstances, and she testified about her inability to meet bills as they become due. However, she failed to testify as to the assets she currently possessed, her current monthly income, or any additional liabilities above her mortgage and home equity loan."

3. "Thus, she did not adequately demonstrate her need for attorney's fees."
Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

AWARD OF ATTORNEY'S FEES REQUIRED RE-EVALUATION WHERE EQUITABLE DISTRIBUTION AND ALIMONY WERE ALTERED ON APPEAL.

Reversing the award of attorney's fees, the District Court held:

1. "Where equitable distribution or alimony is disturbed due to a reversal on appeal, it may be appropriate to re-examine attorneys' fees to determine if the redistribution of assets and liabilities affects the award."

2. "The trial court may determine the parties' relative needs and ability to pay, but only after the trial court clarifies the equitable distribution scheme and alimony."

3. "If, after reexamination of the equitable distribution scheme, the trial court redistributes the parties' assets and liabilities and adjusts incomes through alimony, it may also be necessary to reexamine the parties' need and ability to pay attorneys' fees. Therefore, we reverse the award of attorneys' fees so that the trial court may have such an opportunity."
Patino v. Patino, 122 So.3d 961 (Fla. 4th DCA 2013)

GENERAL MAGISTRATE ERRED IN AWARDING ATTORNEY'S FEES TO HUSBAND ASSOCIATED WITH MOTION TO COMPEL DELIVERY OF QUIT-CLAIM DEED WHERE HUSBAND DID NOT PLEAD THAT BASIS FOR HIS ENTITLEMENT TO FEES IN HIS ORIGINAL MOTION TO ENFORCE FINAL JUDGMENT AND DID NOT PROVIDED THE REQUIRED NOTICE PURSUANT TO §57.105.

The magistrate awarded the Former Husband herein $1,010 in attorney's fees and costs pursuant to sections 57.105(1) & (2), and section 61.16, Florida Statutes, holding the Former

Wife's actions forced the Former Husband to file a motion to compel delivery of a quit-claim deed for her share of the marital home as required by the parties' marital settlement agreement. The Former Husband sought sanctions for having to file a motion to enforce the final judgment, but did not plead the statute under which he sought fees in his original motion. Further, although he plead sections 57.105 and 61.16 as a basis for his entitlement in his amendment to his motion to enforce, he sought fees only for the Former Wife's filing of frivolous motions, not for her actions in refusing to sign the deed. On appeal, the District Court reversed in this regard and held:

1. "The magistrate erred in awarding fees because [the Husband] did not plead the basis for his entitlement to fees in his original motion to enforce."

2. "Further, in regard to section 57.105 fees, Wall failed to provide Kunsman with twenty-one days notice as required by section 57.105(4), Florida Statutes."

3. "Therefore, we strike the award of attorney's fees."

Kunsman v. Wall, 125 So.3d 868 (Fla. 4th DCA 2013)

Fifth District

IN DENYING FORMER WIFE'S REQUEST FOR ATTORNEY'S FEES, COURT ERRONEOUSLY BASED ITS DECISION ON FORMER WIFE'S ABILITY TO DRAW FROM HER NON-MARITAL BANK STOCKS AND ON SPECULATION THAT PARTIES WOULD BE ON NEAR-EQUAL FOOTING DUE TO FORMER HUSBAND'S EXPECTED RETIREMENT; REQUEST FOR FEES SHOULD HAVE BEEN EVALUATED BASED ON PARTIES' FINANCIAL RESOURCES AS OF THE TIME OF THE FINAL JUDGMENT.

During the dissolution of marriage proceedings, the Former Wife retained five attorneys. She sought $24,689.26 in attorney's fees—all related to the fifth attorney's representation of her in three months' time—because of the substantial disparity between the incomes of the parties. The trial court denied her request. In evaluating the request, the trial court appeared to have based its decision on Former Wife's ability to draw from her non-marital bank stocks and on speculation that the parties would be on near-equal footing, as Former Husband was expected to retire a few months after trial. The District Court reversed:

1. "[T]he lower court should have evaluated Former Wife's request for fees based on the parties' financial resources as of the time of the final judgment."

2. "While it can be an abuse of discretion to fail to award attorney's fees where there is a substantial disparity between the parties' income, the court must consider the 'overall relative financial positions and resources of the parties, and not just an isolated factor such as income or earning capacity.'"

3. "On remand, the trial court should reconsider Former Wife's request for attorney's fees in light of this Court's ruling and the applicable factors, articulate the basis for its conclusion, and, if awarded, make the requisite findings as to the reasonableness of the attorney's fees."

4. "The trial court can certainly consider the reasonableness of the fees in the context of Former Wife's repeated changes of counsel, which no doubt contributed to the accumulation of fees."

Davis v. Davis, 108 So.3d 660 (Fla. 5th DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION BY DENYING WIFE'S MOTION FOR ATTORNEY'S FEES WHERE EVEN WITH IMPUTED INCOME, SHE WAS LEFT WITH NEGLIGIBLE SURPLUS FUNDS EACH MONTH, WHILE HUSBAND WAS LEFT WITH HEALTHY SURPLUS EACH MONTH

In the final judgment dissolving the parties' marriage, the trial court imputed income to the Wife. As a result, she was not awarded permanent periodic alimony; nor was she awarded even $1 in nominal permanent periodic alimony. Finally, the trial court did not award the Wife her attorney's fees, premised upon the imputation of income. The Wife appealed. Regarding the trial court's failure to award the Wife attorney's fees, the District Court reversed:

1. "The trial court's decision to deny the [Wife's] attorney's fee motion was premised upon the imputation of income to her, which is allowed by law."

2. "However, even with her imputed income, the [Wife] is left with a negligible surplus of available funds each month (accepting the trial court's findings as to her reasonable and necessary monthly expenses), which is clearly insufficient to pay her trial counsel's fees."

3. "In contrast, the [Husband] was left with a healthy surplus each month, from which he has the ability to pay the [Wife's] fees."

4. "Under these circumstances, the trial court's denial of the [Wife's] motion for fees was an abuse of discretion."

Quintero v. Rodriguez, 113 So.3d 956 (Fla. 5th DCA 2013)

TRIAL COURT REQUIRED TO RECONSIDER WHETHER IN LIGHT OF ERRONEOUS CALCULATIONS THAT MORE THAN DOUBLED FATHER'S INCOME, SIGNIFICANT DISPARITY IN PARTIES' INCOMES STILL EXISTED WARRANTING AN AWARD OF ATTORNEY'S FEES TO MOTHER.

When the trial court rendered its original final judgment, it reserved the issue of the Mother's request for attorney's fees for a hearing at a later time. That hearing occurred at a time while the first appeal in the case remained pending. Over a year after that hearing, the trial court rendered its order granting the Mother's motion for fees, concluding that the Father had the ability to satisfy her need for fees based on his computed annual income of approximately $152,000 and her income of $46,000. Coincidentally, on the same day the decision in appellate case was rendered. The Father filed a motion for rehearing, contending that the amount of his annual income was at issue in the appeal, which issue was ultimately reversed as the District Court held that the trial court's calculation erroneously included his wife's salary of $89,915. Three days later, the Father filed a motion to stay the fee order, noting the reversal of the erroneous calculation of his income. Shortly thereafter, the mandate issued from this court and the trial court scheduled a hearing for the purpose of recalculating child support in accordance with the mandate and to rehear "the issue of attorney fees since the parties' income, especially the father's income is at issue which affects this Court's past appeal ruling on attorney's fees." In the order rendered after that hearing, however, the trial court decided that the appellate decision precluded it from doing so, stating that "the issue of past attorney fees was not addressed in the appellate [realm]." The District Court reversed:

1. "The readily apparent fact is that this court did not address the issue of fees because that issue was not raised in the *Russell I* appeal."

2. "Equally important, the trial court did not derive its authority to review the award of attorney's fees from this court's mandate in *Russell I,* but rather from its prior order granting rehearing as to the issue of attorney's fees."

3. "After this court's opinion made clear that the trial court's erroneous calculations more than doubled Father's income, the trial court should have reconsidered whether, in light of the corrected amount, there is still a significant disparity in the parties' incomes such that Father should be required to pay Mother's attorney's fees."

Russell v. McQueen, 115 So.3d 1084 (Fla. 5th DCA 2013)

TRIAL COURT ERRED IN DENYING FORMER WIFE'S ATTORNEY'S FEES WHERE HUSBAND'S NET INCOME AND NET WORTH FAR EXCEEDED THE WIFE'S; PROCEEDING WAS TO ESTABLISH CHILD SUPPORT; NO LANGUAGE IN MSA WAIVED RIGHT TO SEEK ATTORNEY'S FEES IN SUBSEQUENT ACTION, AND MONIES PROVIDED BY PARENTS TO PAY WIFE'S LITIGATION EXPENSES WERE NOT A GIFT, BUT A LOAN.

The parties had two children. The final judgment of dissolution of marriage, entered on November 29, 2005, incorporated the parties' MSA, which provided, in relevant part, that: "Upon the termination of the Former Husband's unallocated family support payments, the Former Husband would pay the Former Wife child support in an amount to be calculated in accordance with Florida child support guidelines." As the July 10, 2010 date for termination of the unallocated family support payments approached, the parties attempted unsuccessfully to negotiate a child support amount. Ultimately, both parties filed petitions seeking the establishment of a child support amount.

Throughout much of the proceedings, the Former Husband was not forthcoming as to the true nature of his financial condition. After being compelled by the court, he eventually filed an amended financial affidavit reflecting that a net worth of approximately $4.6 million—an amount far exceeding his net worth at the time of the dissolution. However, he continued to maintain that he had little or no income. Ultimately, the trial court found that the Former Husband's net income was to be calculated at $25,000 per month. By contrast, the Former Wife's financial affidavit reflected that her liabilities exceeded the value of her assets. The trial court found her net income was $1,877 per month, and imputed an additional $1,900 per month to her based on ongoing financial support from her parents.

The trial court denied the Former Wife's motion for attorney's fees, despite that the Former Husband's net income and net worth far exceeded her own, determining that: (1) attorney's fees were not recoverable because the proceeding was in the nature of a declaratory judgment action; (2) the attorney's fees provision in the MSA—"The parties shall each be responsible for his or her own attorneys' fees and costs associated with this matter"—precluded an award of attorney's fees; and (3) the Former Wife did not have a need for an award of attorney's fees because her parents had provided funds to pay for litigation expenses. The Former Wife appealed. The District Court disagreed with the trial court's analysis and reversed:

1. "The instant case was not an equitable declaratory action to resolve the distribution of proceeds from the sale of jointly owned property. Rather, it was a proceeding to establish a child support obligation—the type of action that falls squarely within the ambit of section 61.16."

2. "Additionally, we question (but need not resolve) the continuing viability of [the decision relied upon by the trial court] in light of the Florida Supreme Court's later decision in

Bane v. Bane, 775 So.2d 938 (Fla. 2000). There, the supreme court determined that section 61.16 authorized an award of attorney's fees to a party that was successful on a motion to set aside a property settlement agreement filed pursuant to Florida Rule of Civil Procedure 1.540(b). In doing so, the court emphasized that section 61.16 should be 'liberally—not restrictively—construed to allow consideration of any factor necessary to provide justice and ensure equity between the parties.'"

3. "When an attorney's fees provision in a marital settlement agreement does not contain specific language waiving attorney's fees in future enforcement or modification proceedings, Florida courts have found that these fees are not waived."

4. "Here, there was no language in the MSA reflecting an intent by either party to waive the right to seek an attorney's fee award in a subsequent action to establish the former husband's child support obligation upon the termination of his obligation to pay unallocated family support."

5. "The purpose of section 61.16 is to ensure that both parties have similar ability to secure legal counsel . . . However, a litigant should not have to deplete his or her assets in order to pay legal fees when the other party has a far superior financial ability to pay for these costs."

6. "[T]he trial court's conclusion that the Former Wife did not have a 'need' for an award of attorney's fees is not supported by the record."

7. "The litigation below was contentious and protracted, in significant part because of the Former Husband's reluctance to fully and accurately disclose his financial status."

8. "While the evidence did establish that the Former Wife's parents had provided the funds to pay her litigation expenses, the uncontroverted testimony was that those monies were provided as a loan. The fact that the Former Wife had not repaid any of the monies as of the date of the evidentiary hearing on the petition to establish child support is, under the facts of this case, indicative of [her] inability to do so and not, as the Former Husband argues, substantial proof of a gift."

9. "On remand, the trial court is directed to award the Former Wife the entire amount of attorney's fees she reasonably incurred in those proceedings below relating to the establishment of the Former Husband's child support obligation."

Caryi v. Caryi, 119 So.3d 508 (Fla. 5th DCA 2013)

B. Basis for Requiring Other Party to Pay: Sanctions

First District

Second District

TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES TO WIFE AS A SANCTION FOR HUSBAND'S MISCONDUCT DURING LITIGATION, BUT ERRED IN ORDERING HUSBAND TO PAY 100% OF SAID FEES AS COURT WAS REQUIRED TO APPORTION WIFE'S FEE AWARD BASED ON ADDITIONAL WORK CAUSED BY HUSBAND'S MISCONDUCT.

In these dissolution of marriage proceedings, the trial court ordered the Husband to pay 100% of the Wife's reasonable attorneys' fees, totaling $210,810, as a sanction for his misconduct in the underlying litigation. Both parties appealed several aspects of the final judgment. The Husband contended that the trial court erred in failing to consider the amount of increased litigation caused by the Husband's misconduct. The District Court concluded that the trial court erred in ordering the Husband to pay 100% of the Wife's fees and reversed:

1. "We note that the misconduct of the [H]usband in this case is obvious, and we affirm the trial court's finding in that regard."

2. "Nonetheless, after finding that the [H]usband engaged in misconduct, the trial court was required to apportion the [W]ife's award of fees based on the additional work caused by the [H]usband's misconduct."

3. "The trial court found that the dissolution should not have taken four years to resolve, noting the [H]usband's various instances of litigation misconduct, but as indicated by this court's decision, the [H]usband raised legitimate legal arguments in the dissolution proceedings. Considering the legitimate issues before the trial court, the entirety of the Wife's legal fees could not have been the direct result of the Husband's misconduct."

Heiny v. Heiny, 113 So.3d 897 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN CONCLUDING THAT FATHER ENGAGED IN VEXATIOUS LITIGATION BY CHALLENGING FINDINGS AND CONCLUSIONS IN A SOCIAL INVESTIGATION REPORT AND IN REQUIRING THAT HE PAY ATTORNEY'S FEES INCURRED BY MOTHER AFTER REPORT WAS COMPLETED AS SANCTION FOR HIS CONDUCT WHERE DUE PROCESS REQUIRES THAT A PARTY BE GIVEN OPPORTUNITY TO CHALLENGE CONCLUSIONS OR RECOMMENDATIONS IN REPORT.

The Father filed a paternity action concerning the parties' minor child. The Father requested that the child reside primarily with him or, alternatively, that he be granted three weekends per month with the child. The Mother filed an answer and counter-petition admitting the Father's paternity, but seeking to retain majority timesharing with the child. The Father moved for appointment of a psychologist to conduct a social investigation and make recommendations for a parenting plan. The trial court granted his request. After conducting the investigation, the psychologist produced a report containing findings that both parents loved and cared for the child, but that the child was more attached to the Mother; and that both parents admittedly had a tense relationship and ongoing conflict, particularly regarding scheduling time with their child. Ultimately, the report concluded that despite the parties' serious communication issues, it did not warrant changing the Mother's majority timesharing.

The matter proceeded to a two-day trial, each party maintaining their respective positions. The trial court subsequently entered a final judgment finding that it was in the child's best interest that the parents share parental responsibility and formalizing the parties' previous timesharing arrangement, with the Father receiving two weekends per month. The Father was also ordered to pay retroactive and ongoing child support and all of the Mother's attorney's fees incurred after the investigation report was completed, the basis for which was the trial court's finding that by continuing to litigate after receiving the unfavorable results of the report, the Father had engaged in vexatious litigation. The Father timely appealed. Finding error in the trial court's conclusion that the Father had engaged in vexatious litigation, the District Court reversed:

1. "Pursuant to statute, a trial court may order a social investigation and recommendations where parents are unable to agree on a parenting plan and may use the information and recommendations in making a decision on the parenting plan. But that section contains 'a procedural due process requirement that when the trial court relies on such investigative reports, counsel for the parties should be given an opportunity to review the reports for purposes of introducing any evidence that might rebut the conclusions or recommendations which the reports contained….' Consequently, a party cannot be forced to accept the findings and recommendations in such a report without first being given the opportunity to challenge them."

2. "Here, although it is undisputed that the Father was given the report and was permitted to introduce evidence rebutting it, the trial court punished him for doing so…. This is troubling for two reasons. First, in the alternative to his request for primary time-sharing, the Father sought three weekends per month with his child -a request which did not conflict with the recommendations in the report. But second, and much more important, is that in challenging the findings and conclusions in the social investigation report, the Father was exercising a due process right. Therefore, the trial court's conclusion that the Father engaged in vexatious litigation by continuing with the paternity action is not supported by the record."

3. "On remand, we urge the trial court to apply the correct standard in determining the impact of financial assistance the Father receives from family members."

4. "In assessing the Father's ability to pay the attorney's fees award, the trial court imputed as income past financial assistance he received from his mother because 'there was no evidence that the gifts will not continue….' This language suggests the trial court applied a presumption that the gifts would continue, absent affirmative evidence to the contrary."

5. "Although our reversal of the award of attorney's fees renders moot the issue of whether the Father had the ability to pay it, we note that the standard is actually the converse of that described in the order…."

J.D.C. v. M.E.H., 118 So.3d 933 (Fla. 2d DCA 2013)

Third District

TRIAL COURT ERRED IN AWARDING WIFE ATTORNEY'S FEES AND COSTS AS SANCTION FOR HUSBAND'S CONTEMPTUOUS BEHAVIOR WITHOUT CONSIDERING FINANCIAL RESOURCES OF PARTIES AND OTHER RELEVANT CIRCUMSTANCES, AS REQUIRED BY STATUTE.

The Former Husband appealed from an order below that found him in contempt for intentionally frustrating a prior court order regarding parental timesharing, ordered make-up

timesharing for the Former Wife as a sanction, and awarded fees and costs as a sanction for his contemptuous behavior. Regarding the fees ordered, the District Court reversed:

1. "Here, the record makes brief mention of the Former Wife's financial position but makes no reference to the Former Husband's financial resources."

2. "The record reflects no consideration of the hours the Former Wife's counsel spent on the matter or his hourly rate, and fails to demonstrate any 'apportionment.'"

3. "The trial judge asked the Former Wife's counsel how much he was due and the trial judge simply ordered the Former Husband to pay that amount."

4. "For these reasons, that part of the order under review requiring the Former Husband to pay the Former Wife's fees cannot stand."

5. "Accordingly, the order under review is affirmed in part, reversed in part, and remanded for compliance with section 61.16…."

Moya v. Moya, 118 So.3d 916 (Fla. 3d DCA 2013)

Fourth District

Fifth District

TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES TO WIFE IN CONNECTION WITH A NUMBER OF POST-DISSOLUTION MOTIONS FILED BY HUSBAND, AS HUSBAND'S CONDUCT WAS NOT SUFFICIENTLY VEXATIOUS TO JUSTIFY THIS AWARD.

The Husband is a former broker who is currently employed as a police officer. The Wife works for St. Johns County as an office assistant. They originally divorced on February 6, 2009, pursuant to a final consent judgment which disposed of many of the issues related to their 13-year marriage, including custody and visitation issues relating to their minor children. A supplemental final judgment was later entered that dealt with the outstanding issues, including the equitable distribution of the parties' property.

The Husband appealed, and the District Court reversed and remanded for reconsideration because of the lack of findings sufficient to justify an inequitable distribution of the marital home and an income-producing loan related to the home. On remand, the court redistributed the property, achieving a roughly 50/50 split of the parties' assets, but gave the Wife credit for her one-half of $40,000 the Husband received upon selling an income-producing loan. The Husband did not appeal the award but, acting pro se, did appeal an order requiring him to pay the Wife $5,000 for attorney's fees she had incurred in the first appeal. The fee award was affirmed.

The Husband filed a "supplemental" petition to modify the final consent judgment on July 30, 2010, wherein he sought to obtain custody of the parties' children. He also filed a motion for contempt and for enforcement of the final consent judgment. On May 11, 2011, the lower court denied the Wife's motion to dismiss the petition for modification, but observed that the motion was likely stale due to a stay while the case was on appeal.

On May 11, 2011, the Husband's motions were referred to a magistrate for a hearing to be held September 22, 2011. Immediately prior to the hearing, the magistrate denied the Husband's motion for a continuance to ascertain the effect testifying would have upon one of his children. Upon the denial of his motion, the Husband opted to dismiss all three motions set for the hearing. On September 30, 2011, the Wife then moved to be awarded $5,200 in attorney's fees incurred

while defending the Husband's motion for modification. No grounds for a fee award were alleged in the motion other than that the Husband had withdrawn his pending motion.

The trial court awarded the Wife $5,200 in attorney's fees for her defense of the petition for modification. The basis of the award was the Husband's withdrawal of the petition for modification, which the court implied showed that he was acting in "bad faith." The court explained that the withdrawal of the petition was a "de facto voluntary dismissal," but that the Husband had nonetheless said he might again call up the petition for hearing at some later date. The court found that this "whip sawing" of the Wife was "unwarranted and unconscionable under the circumstances." The only finding on the issue of need and ability to pay was that the Husband was being represented in the trial court by private counsel, he had appealed the earlier attorney's fee award acting pro se, and he owned a motorcycle valued at over $9,000.

The Husband moved for rehearing, arguing that the evidence did not support a finding that the petition was frivolous or that he had an ability to pay. He averred that he had previously sold the motorcycle listed on his financial affidavit, his attorney had not been paid, and that the $9,350 shown on the affidavit was attributable to his only vehicle. The Husband also contended that he had just been informed of a cut in benefits and pay. Still, the trial court summarily denied the motion. The Husband appealed. The District Court reversed:

1. "Generally, it is an abuse of discretion to award attorney's fees if the dissolution decree leaves both parties in equal financial positions."

2. "However, as this Court explained in [an earlier case], conduct which causes the opposing party to unreasonably incur fees will support a fee award[.]"

3. "Specific findings are required to support such an award."

4. "We have carefully reviewed the record and conclude that there is no evidence that [the Husband] engaged in unnecessary or vexatious litigation."

5. "The only finding made by the trial court relative to this issue was that [the Husband] had withdrawn the petition, which the court equated with a voluntary dismissal. This is insufficient, standing alone, to show bad faith or other vexatious conduct."

6. "Moreover, the claims contained in the motions do not appear frivolous, and [the Husband] offered a valid excuse for his withdrawal of the motion."

7. "There is also no evidence that the petitions were filed for purposes of harassment."

8. "Given the lack of any evidence to support the award of attorney's fees and costs to [the Wife], we reverse the judgment."

Dybalski v. Dybalski, 108 So.3d 736 (Fla. 5th DCA 2013)

C. Standard for Award/Amount

First District

Second District

TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES TO WIFE AS A SANCTION FOR HUSBAND'S MISCONDUCT DURING LITIGATION, BUT ERRED IN ORDERING HUSBAND TO PAY 100% OF SAID FEES AS COURT WAS REQUIRED TO APPORTION WIFE'S FEE AWARD BASED ON ADDITIONAL WORK CAUSED BY HUSBAND'S MISCONDUCT.

In these dissolution of marriage proceedings, the trial court ordered the Husband to pay 100% of the Wife's reasonable attorneys' fees, totaling $210,810, as a sanction for his misconduct in the underlying litigation. Both parties appealed several aspects of the final judgment. The Husband contended that the trial court erred in failing to consider the amount of increased litigation caused by the Husband's misconduct. The District Court concluded that the trial court erred in ordering the Husband to pay 100% of the Wife's fees and reversed:

1. "We note that the misconduct of the [H]usband in this case is obvious, and we affirm the trial court's finding in that regard."

2. "Nonetheless, after finding that the [H]usband engaged in misconduct, the trial court was required to apportion the [W]ife's award of fees based on the additional work caused by the [H]usband's misconduct."

3. "The trial court found that the dissolution should not have taken four years to resolve, noting the [H]usband's various instances of litigation misconduct, but as indicated by this court's decision, the [H]usband raised legitimate legal arguments in the dissolution proceedings. Considering the legitimate issues before the trial court, the entirety of the Wife's legal fees could not have been the direct result of the Husband's misconduct."

Heiny v. Heiny, 113 So.3d 897 (Fla. 2d DCA 2013)

Third District

Fourth District

Fifth District

TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO WIFE AS SANCTION WHERE AFFIDAVIT WAS NEVER OFFERED TO SUPPORT AWARD AND WIFE'S COUNSEL PRESENTED THE ONLY TESTIMONY STATING THE AMOUNT OF FEES HE WAS SEEKING.

The parties were divorced on April 28, 2009. The final judgment gave a portion of the Former Husband's 401(k) to the Former Wife and required her to prepare the Qualified Domestic Relations Order ("QDRO"). The Former Husband was required to execute and provide all the documents necessary to facilitate the preparation of the QDRO, including monthly and year-end statements for his 401(k) account if he had access to them. In the over three years since the final judgment, the Former Husband still had not provided any records so that the QDRO could be completed. So, the Former Wife filed a motion for contempt. At the contempt hearing, the Former Wife's counsel explained the posture of the case and what she was seeking. The Former Husband appeared by phone and was unsworn. He testified, albeit not under oath, that he did not

have the records, that he only had access to the 401(k) records through a computer link, and that they went back only two years. The trial court held him in contempt for failure to comply with the final judgment and awarded the former wife $2,500 in attorney's fees, an award that was not based on evidence presented at the hearing, rather solely on the Former Wife's attorney's response of how much he wanted. The Former Husband appealed. The District Court affirmed the finding of contempt, but reversed as to the attorney's fees award:

1. "An affidavit was never offered to support the award, and the Former Wife's counsel presented the only testimony stating he was seeking $2,500 in fees."

2. "Fees are available as a sanction in civil contempt cases, but they must be based on actual damages and supported by findings."

3. "For these reasons, we affirm the contempt order and reverse the order awarding attorney's fees."

Ingram v. Ingram, 115 So.3d 1107 (Fla. 5th DCA 2013)

D. Enforcement and Liens

First District

Second District

TRIAL COURT NOT FORECLOSED FROM CONSIDERING CHARGING LIEN WHERE ISSUES OF FEES AND COSTS HAS NOT BEEN FINALIZED AND TRIAL COURT RESERVED JURISDICTION FOR THAT PURPOSE.

The Former Wife argued on appeal that the trial court erred by not reserving jurisdiction to address a charging lien that was filed by counsel prior to the entry of original final judgment. Trial court reserved jurisdiction in final judgment to determine the amount of fees to be awarded. The District Court held:

1. "There is no dispute that counsel filed the notice and claim of charging lien before the original final judgment was entered. Thus, counsel perfected his charging lien by providing timely notice."

2. "Notwithstanding a lack of express reservation of jurisdiction over the charging lien, the trial court is not foreclosed from considering the charging lien in this action because the issue of attorney's fees and costs has not been finalized and the trial court reserved jurisdiction for that purpose."

Card v. Card, 122 So.3d 436 (Fla. 2d DCA 2013)

Third District

Fourth District

TRIAL COURT DID NOT ERR IN DENYING MOTION TO ADJUDICATE CHARGING LIEN WHERE COURT FOUND THAT THE ATTORNEY'S LABOR PRODUCED ONLY VALUELESS ASSETS, THUS LEAVING NO "TANGIBLE FRUIT" TO WHICH A CHARGING LIEN COULD ATTACH.

In a brief opinion setting forth no specific facts, the Fourth District affirmed the trial court's denial of a motion to adjudicate an attorney's charging lien, stating:

1. "An 'essential prerequisite to imposition of a charging lien is that the underlying litigation produces a positive judgment or settlement – in other words, some tangible fruits of the attorney's services for the benefit of the client.'"

2. "Whether an attorney's services produced 'tangible fruits' is an issue of proof."

3. "Excluding those accounts that are protected from creditors liens by operation of statute, the record supports the trial court's finding that [the attorney's] labor produced only valueless assets, thus leaving no 'tangible fruits' to which a charging lien may attach."

Joel Weissman, P.A. v. Sayed, 107 So.3d 1163 (Fla. 4th DCA 2013)

Fifth District

E. Judgment

First District

ERROR TO AWARD ATTORNEY'S FEES IN ALIMONY MODIFICATION CASE WITHOUT SUPPORTING FINDINGS.

The Husband appealed from the trial court's order modifying his alimony obligation and requiring him to pay his wife's attorney's fees and costs. The District Court held:

1. "Because the trial court made no findings to support the fee and cost award, we reverse the order granting fees and costs and remand for further proceedings."

2. "Here, the trial court's order found that the former wife had a need for contribution to her attorney's fees and costs and the former husband had an ability to pay. This finding is supported by the parties' respective financial affidavits, which show the former husband with a monthly surplus, while the former wife carries a monthly deficit, in addition to being the primary residential parent for the two minor children."

3. "The former wife submitted an affidavit from her attorney's law firm attesting to the fees and costs incurred by appellee in the case, as well as detailed records of the hourly rate and hours expended for her case. However, there is no indication that the court considered the *Rowe* factors in reaching its decision to award fees and costs. Thus, the order requiring the former husband to contribute $3,000 towards the former wife's attorney's fees and costs must be reversed and remanded for the court to properly evaluate the issue."

Bradham v. Bradham, 120 So.3d 1274 (Fla. 1st DCA 2013)

Second District

TRIAL COURT'S PARTIAL ATTORNEY'S FEE AWARD REVERSED WHERE NEITHER THE RECORD ON APPEAL NOR THE TRIAL COURT'S FEE ORDER CONTAINED SUFFICIENT FACTUAL FINDINGS TO SUPPORT THE AWARD WHICH REQUIRED THE HUSBAND, HAVING GREATER FINANCIAL ABILITY THAN THE WIFE, TO PAY ONLY A PORTION OF THE WIFE'S FEES.

In the final judgment of dissolution of marriage, the trial court found that each party would leave the marriage with $296,000 in assets, including a substantial amount of cash from the sale of the marital home. It also found that the Former Husband's gross annual income was $152,000 and imputed income to the unemployed Former Wife in the range of $70,000 to $80,000 annually. The trial court also concluded that the Former Wife should be able to obtain employment in three to nine months, if she made a diligent effort. More than six months after the final hearing, the trial court held a two-day hearing on attorney's fees. Its subsequent fee order noted that the Former Wife was still unemployed, but also concluded that she had "limited assets remaining" and that she had demonstrated "a need for assistance in paying her attorney's fees and costs." It also noted the obvious: that the Former Husband's income was substantially greater than the income imputed to the Former Wife and that therefore, he had the ability to contribute to her attorney's fees and costs. Without further elaboration, the court concluded that the Former Husband was required to pay 60% of the Former Wife's $45,816 total fees and costs ($27,489.60) and that the Former Wife was responsible for the remaining 40%. The Former Wife appealed. Regarding the attorney's fee award, the District Court reversed:

1. "While exceedingly broad and diverse, factors considered in attorney's fees determinations are not without limitations."

2. "To begin, it *can* be an abuse of discretion to grant only a partial attorney's fee award where, on balance, there is a substantial disparity between the parties' incomes . . . But the trial court cannot award fees based solely on disparity of income . . . Rather, the trial court must consider need and ability to pay attorney's fees, i.e., 'the overall relative financial positions and resources of the parties,' and not just an isolated factor such as income or earning capacity."

3. "Distinct findings regarding an award of fees in dissolution proceedings are imperative because a trial court's vague findings present an obstacle to meaningful appellate review."

4. "[W]ithout further elaboration, the court concluded that the [Former] Husband was required to pay only 60% of the [Former] Wife's $45,816 total fees and costs ($27,489.60), and that the [Former] Wife was responsible for 40% of her own fees and costs. This was error because the court's award failed to set forth factual findings regarding any factors that justified *the specific amount awarded*, and we have been otherwise unable to discern the basis for the award."

5. "While the trial court may have had a rationale in mind for its award, without either an oral or written explanation, on the record before us the 60% award thus appears arbitrary."

6. "The [Former] Husband contends that the trial court considered the [Former] Wife's actions in the litigation in determining that he should only pay 60% of her fees and costs. But, if the trial court did so, its order does not explain that. In fact, the only discussion of litigation behavior in the order pertains to the [*Former*] *Husband's* actions, not the [Former] Wife's."

7. "And even if the trial court had intended to award some portion of the [Former] Wife's fees and costs as a sanction for the [Former] Husband's litigation misconduct, the fee order contains insufficient findings."

8. "In any event, the [Former] Husband's contumacious litigation behavior would not justify reducing the fees awarded to the [Former] Wife."

9. "Therefore, we reverse the trial court's fee order and remand with directions that the trial court reconsider fees and make findings of fact sufficient to permit review of its decision." ***Arena v. Arena***, 103 So.3d 1044 (Fla. 2d DCA 2013)

ERROR TO DENY FORMER HUSBAND'S MOTION TO ENFORCE ATTORNEY'S FEES AWARD ON GROUND THAT FORMER HUSBAND LACKED STANDING BECAUSE ORDER DIRECTED THAT FEES BE PAID DIRECTLY TO HIS ATTORNEY WHERE THE ORDER ADOPTED MAGISTRATE'S REPORT AND RECOMMENDATION THAT FORMER WIFE PAY ATTORNEY'S FEES TO FORMER HUSBAND.

Following the parties' dissolution of marriage, the Former Husband experienced a material change in circumstances that resulted in the trial court's reducing his alimony obligation to $1 per month. As a result of the ongoing litigation between the parties, the trial court entered an order adopting the general magistrate's report and recommendation ordering the Former Wife to pay $31,163.36 of the Former Husband's attorney's fees. That report and recommendation specifically stated as follows: "The former husband's request for an award of attorney's fees and costs is hereby granted and the former wife shall, within thirty (30) days of this order, pay to the former husband $31,163.36. Payment shall be made to the former husband's legal counsel at the address set forth within the certificate of service below."

Following the entry of the order, the Former Husband filed numerous pleadings seeking the payment of the attorney's fees. The trial court held a hearing on these motions' and on December 22nd, the court issued the order on appeal, wherein the trial court made a factual finding that the report and recommendation upon which the attorney's fee order was based "concluded that the Former Wife should pay direct to the Former Husband's legal counsel the amount of $31,163.36. The judgment was not in favor of the Former Husband' rather, it was in favor of his attorneys." Based on this, the court concluded that "[t]he Former Husband has no standing or right to collect a judgment for fees that was ordered to be paid directly to his attorneys." The Former Husband appealed. The District Court reversed:

1. "While the report and recommendation does direct that the payment should be sent to the Former Husband's attorney's office, it also plainly states that 'the former husband is hereby awarded… $31,163.36' and that 'the former wife shall, within (30) days of this order, pay to the former husband $31,163.36.'"

2. "The findings of fact included in the report and recommendation further support that the award was made to the Former Husband. The general magistrate found that the Former Husband was seeking $60,000 in fees, that roughly $55,000 in fees was a reasonable attorney's fee, and that the Former Husband already had paid approximately $49,295 in fees to his own attorney. Based on these findings, only approximately $5000 was due the attorney."

3. "As such, the record before us does not support the trial court's finding that the fee award imposed against the Former Wife was to be paid directly to the Former Husband's attorney."

Coppola v. Coppola, 122 So.3d 474 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES WITHOUT MAKING SPECIFIC FACTUAL FINDINGS TO SUPPORT AWARD.

In this appeal from a an order modifying a final judgment of dissolution of marriage and a corrected order granting attorney's fees and costs, the District Court reversed the order granting attorney's fees and costs because of the trial court's failure to make specific factual findings to support its award and held as follows:

1. "'[T]he trial court must make specific factual findings—either at the hearing or in the written judgment—supporting its determination of entitlement to an award of attorney's fees.'"

2. "And 'if the trial court determines that there is an entitlement to fees, the court must set forth findings regarding the factors that justify the specific amount awarded.'"

3. "Though the parties' financial resources are the primary factor, the court may also consider other relevant factors, such as those set forth by the Florida Supreme Court in *Rosen v. Rosen*, 696 So.2d 697, 700 (Fla.1997)."

4. "Here, the court did not make any specific factual findings at the final hearing on attorney's fees. In the order granting Ms. Rowe's motion for attorney's fees and costs, the court found that Ms. Rowe had a need for contribution and that Mr. Rodriguez–Schmidt had a limited ability to pay. The court delineated the fees and costs that it determined to be reasonable. But the order did not include specific factual findings to justify a determination of entitlement to fees or the amount of fees awarded. Thus, we must reverse and remand for the trial court to set forth specific factual findings."

5. "And though the court is not required to address the factors set forth in *Rosen*, we note that the court may consider *Rosen* factors and include them in its written findings if they are used to justify the award."

Rowe v. Rodriguez-Schmidt, 128 So.3d 158 (Fla. 2d DCA 2013)

Third District

Fourth District

Fifth District

F. Jurisdiction

First District

WHERE WIFE FAILED TO INCLUDE A REQUEST FOR ATTORNEY'S FEES AND COSTS IN HER PLEADINGS AND HUSBAND WAS NOT OTHERWISE ON NOTICE THAT SUCH AN AWARD WAS BEING SOUGHT, WIFE WAS NOT ENTITLED TO SAME.

Pursuant to the final judgment in these dissolution of marriage proceedings, the Former Husband was ordered to pay alimony and child support to the Former Wife, and to contribute to her attorney's fees and costs, based on her need and his ability to pay. The trial court reserved jurisdiction to set the amount. Thereafter, the Former Wife filed her motion to tax attorney's fees and costs, which constituted her first request for attorney's fees and costs. Her motion was filed on October 22, 2012, eleven days after the trial court issued the final judgment awarding her fees and costs and the same day as the Former Husband filed his motion for rehearing. The Former Wife had not previously made such a request in her answer to the petition for dissolution, nor were fees and costs even discussed or litigated at the final hearing. Following the denial of his motion for rehearing, the Former Husband appealed. With regard to the award of attorney's fees, the District Court reversed:

1. "As stated by the Florida Supreme Court in *Stockman v. Downs*… in general, 'a claim for attorney's fees, whether based on statute or contract, must be pled. Failure to do so constitutes a waiver of the claim.'"

2. "The Court instructed that '[t]he fundamental concern is one of notice. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise. Raising entitlement to attorney's fees only after judgment fails to serve either of these objectives.'"

3. "The Court went on to craft an exception to this general rule: '[w]here a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees.'"

4. "Contrary to the Former Wife's assertion in her Answer Brief, it is not clear from the record that the Former Husband knew she was seeking fees and costs, or how he reasonably could have known she would be seeking them."

5. "This is a case where the general rule from *Stockman* applies; the Former Wife is not entitled to fees or costs because she failed to include a request for the same in her pleadings and the Former Husband was not otherwise on notice that fees and costs were being sought."

Watson v. Watson, 124 So.3d 340 (Fla. 1st DCA 2013)

Second District

ALTHOUGH SECTION 742.045 DOES NOT EXPRESSLY AUTHORIZE AN AWARD OF APPELLATE ATTORNEY'S FEES IN PATERNITY ACTIONS, RELATED CASE LAW SHOULD BE APPLIED TO ALLOW FOR SAME.

In this appeal for review of a final judgment entered in an underlying paternity action, the Mother timely filed a motion for appellate attorneys' fees and costs. Remanding for the trial court to determine her entitlement to same, the District Court held:

1. "Section 742.045 does not expressly authorize an award of appellate attorneys' fees in paternity actions. But, when section 742.045 was enacted in 1991, it mirrored the attorneys' fees provision of section 61.16, Florida Statutes (1991). At that time, Florida courts interpreted section 61.16 to allow for appellate attorney fees even though it contained no such express language…. In 1994, the legislature codified this case law by amending chapter 61 to be consistent therewith."

2. "With or without the amendment it is apparent to us that this same case law, for the sake of consistency and logic, should be applied to allow appellate fees under section 742.045, and we now so hold. Not to do so would likely run afoul of equal protection concerns."

3. "For reasons further outlined below, we certify conflict with sister district court holdings to the contrary."

4. "In *Starkey v. Linn*.... the Fifth District based its determination that section 742.045 does not provide for appellate attorney's fees on the 'conspicuous absence of authority to award appellate fees' when compared with section 61.16….' However, 'the legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute….' Therefore, in enacting section 742.045, the legislature is presumed to have known and approved of the judicial construction of section 61.16 to include appellate attorneys fees."

5. "Had the legislature intended the statutes to be interpreted differently, it would have expressed such an intent in enacting section 742.045; instead it chose to mirror the language of section 61.16."

6. "Hence, we hold that an award of appellate attorneys' fees may be obtained under section 742.045."

B.K. v. S.D.C., 122 So.3d 980 (Fla. 2d DCA 2013)

Third District

Fourth District

Fifth District

G. Temporary

First District

TRIAL COURT ABUSED ITS DISCRETION IN ORDERING HUSBAND TO MAKE SUPPORT AND ATTORNEY'S FEE PAYMENTS THAT CONSUME MORE THAN 80% OF HIS NET MONTHLY INCOME AND IN REQUIRING HIM TO PAY ALL OF WIFE'S TEMPORARY ATTORNEY'S FEES.

During the underlying dissolution of marriage proceedings, in making its temporary support determination, the trial court found the Husband's net monthly income to be $6,030.11, and determined that he had the ability to provide the Wife with $3,500 per month in temporary spousal support. The trial court further found that the Husband owed the Wife $22,730 in retroactive spousal support and directed him to pay an additional $350 per month until that amount was paid in full. Based on the child support guidelines, the trial court found that the Husband's child support obligation was $502.90 per month. Finally, the trial court granted the Wife's request for $25,960.50 in temporary attorney's fees and costs, and directed the Husband to pay another $500 per month until those fees and costs were paid in full. The total of the monthly court-ordered payments that the Husband was directed to make was $4,852.90, representing 80.48% of his net monthly income and leaving him with only $1,177.21 to meet his monthly needs.

There were no findings in the order under review about the Husband's monthly expenses, but his financial affidavit reflected $5,761 in monthly expenses. His reported monthly rent alone was $1,200; thus, he did not have enough remaining income to cover even that. The trial court found that the Wife's total monthly needs were $4,415.70 and awarded her $4,352.90 in the form of temporary spousal support, retroactive support, and child support. The Husband appealed, and the District Court reversed:

1. "Although the order under review is a temporary support order in which the circuit court has broad discretion, we conclude that the circuit court abused its discretion in requiring the Husband to virtually exhaust his monthly income to make the ordered payments, leaving him with insufficient funds to support himself."

2. "The order's requirement that the Husband spend in excess of 80% of his income in monthly support and temporary attorney's fee payments reflects an abuse of discretion on its face."

3. "The Husband does not challenge, and we do not find error in, the circuit court's decision to award the Wife $3500 per month in temporary spousal support or in directing the Husband to pay his share of the child support obligation in the amount of $502.90 per month. Although these two payments represent more than one-half of the Husband's net monthly income, we note that based upon the relatively short duration of the parties' marriage, it seems unlikely that the circuit court will ultimately award any long-term alimony. Thus it does not appear that the Husband will be paying spousal support for an extended period."

4. "The Husband also does not challenge the amount awarded for retroactive support…. We find no error in the circuit court's determination of the amount of retroactive support. But we observe that the court-ordered payments of $350 and $500 per month toward retroactive support and temporary attorney's fees tip the scale to the extent that the Husband is deprived of sufficient funds to support himself."

5. "In his current predicament, the Husband cannot even make his reported monthly rental payment. Even if the Husband were able to secure a residence at the same monthly rate as

that disclosed on the Wife's financial affidavit in the amount of $900 per month, he would still have only $277.21 remaining to pay the rest of his monthly expenses."

6. "On the other hand, the total payments to be made to the Wife nearly meet her monthly needs as found by the circuit court. This apparent 'imbalance' is grossly unfair and reflects a failure to 'balance needs, as fixed by the parties' standard of living on the one hand, and ability to pay, on the other."

7. "Accordingly, because the circuit court ordered the Husband to make payments in excess of 80% of his income and failed to balance the parties' needs and ability to pay, we conclude that the circuit court abused its discretion in entering the order under review."

8. "We observe that instead of impairing the Husband's ability to support himself, the circuit court could temporarily lower the amounts that the Husband is required to pay towards retroactive support and the Wife's temporary attorney's fees and costs. The circuit court could provide for an increase in these payments if the Husband's spousal support obligation ends or is reduced upon the entry of a final judgment dissolving the parties' marriage."

9. "Finally, as argued by the Husband, it appears that the circuit court may not have considered the effect of the court-ordered spousal support on the Wife's ability to pay her temporary attorney's fees, particularly in light of the retroactive support award totaling $22,730."

10. "Because the circuit court abused its discretion in ordering the Husband to make monthly payments that exceed 80% of his net monthly income and deprive him of the ability to support himself, we reverse the order on review to the extent that it requires the Husband to pay $300 per month in retroactive spousal support and $500 per month towards the Wife's temporary attorney's fees."

11. "We remand for the circuit court to reduce, at least temporarily, the amounts that the Husband is required to pay in retroactive spousal support and for any temporary attorney's fees awarded so that he has sufficient monthly income to support himself."

12. "The circuit court shall also reconsider the award of temporary attorney's fees and costs to the Wife. In so doing, the circuit court must consider whether the Wife has the ability to pay some or all of her fees in light of the support awarded to her and whether the Husband has the ability to pay after making his support payments."

Hoffman v. Hoffman, 127 So.3d 863 (Fla. 2d DCA 2013)

Third District

WHERE AGREEMENT PROVIDED FOR HUSBAND TO PAY WIFE'S TEMPORARY ATTORNEY'S FEES "SO LONG AS THE MATTER IS PENDING," IT WAS AN ABUSE OF DISCRETION FOR COURT TO TERMINATE TEMPORARY ATTORNEY'S FEES WHILE MATTER WAS PENDING AND WITHOUT DEMONSTRATION BY HUSBAND THAT CONSIDERATION OF FINANCIAL RESOURCES OF BOTH PARTIES OR SOME OTHER EQUITABLE IMPERATIVE MANDATES TERMINATION OF PAYMENTS

In July 2002, after an eighteen year romantic relationship, the parties executed a prenuptial agreement in which the Husband, then with a disclosed net worth approaching $160 million, and the Wife, then with a worth of almost $1 million, agreed that in the event their contemplated marriage ended in a divorce, the Wife would receive only $260,000 from the Husband. In February 2010, the Husband filed for a divorce and sought to enforce the prenuptial

agreement, while the Wife sought to set it aside. During the course of the proceedings, the parties entered into two agreements to provide for temporary support and attorney's fees for the Wife. Both agreements, or stipulations, were spread on the record in the form of agreed orders.

The first agreement required the Husband to pay temporary support to the Wife. The second required the Husband to pay a percentage of the Wife's monthly attorney's fees "for every month… so long as this matter is pending." Thereafter, the parties' marriage was dissolved in a bifurcated proceeding with the court below retaining jurisdiction to determine whether the parties' prenuptial agreement was valid and binding.

On April 10, 2012, following a three-week trial, the court below orally announced that it had determined that the parties' prenuptial agreement was valid and enforceable. The court advised, however, that it would take "several months" before a written judgment would be entered. No determination was made as to the Wife's entitlement to attorney's fees or the reasonableness of any previously awarded fees. A little less than three weeks later, the Husband filed a "Motion to Terminate Temporary Support, Temporary Attorney's Fees and Costs, for the Immediate Return of Automobile, and for Other Relief" which the trial court granted and terminated both the Husband's temporary support and attorney's fees obligations. The District Court reversed as to the termination of the obligation to pay the Wife's temporary attorney's fees:

1. "In this case, the parties made no attempt to contract away or to waive the entitlement to temporary support, including temporary attorney's fees, pending entry of a final judgment."

2. "Indeed, the parties entered into not one but two agreements providing for [the Wife] to receive temporary attorney's fees, the first for '*every month ... so long as this matter is pending*,' (emphasis added), the second addressed a 15% hold back. The parties agreed that 15% of the fees that she was to incur would be reviewed after judgment was entered to determine if those fees were reasonable and that the court below would ultimately determine the total amount for fees and costs to which she would be entitled."

3. "There is no dispute that this matter still is pending and no dispute that an 'ultimate' reckoning as to the amount to which Mrs. Schecter is entitled for her fees and costs has yet to be determined."

4. "Also, while an agreement concerning the payment of temporary attorney's fees need not be deemed controlling, it also should not be ignored . . . Here, the parties made a deal—that [the Husband] would pay [the Wife's] temporary attorney's fees 'so long as [the] matter is pending.' As this appeal confirms, this matter still is 'pending' and [the Husband's] belief that his promises allow a 'windfall,' failed to provide a sufficient basis for terminating that obligation."

5. "In short, legally and equitably, [the Wife] is entitled to receive temporary attorney's fees and costs, unless, that is, [the Husband] can demonstrate that consideration of the financial resources of both parties or some other equitable imperative mandates termination of those payments. To date, [the Husband] has made no such showing. Thus, we conclude the trial court abused its discretion in deciding to terminate this obligation."

Schecter v. Schecter, 109 So.3d 833 (Fla. 3d DCA 2013)

Fourth District

ERROR FOR TRIAL COURT TO AWARD FORMER WIFE TEMPORARY ATTORNEY'S FEES IN MODIFICATION PROCEEDINGS WITHOUT CONSIDERING THE AGREED UPON INCOME IMPUTED TO HER IN MARITAL SETTLEMENT AGREEMENT; WIFE HAD THE BURDEN OF ESTABLISHING THAT SAID AGREED UPON AMOUNT OF IMPUTED INCOME SHOULD NO LONGER APPLY.

The Final Judgment of Dissolution of Marriage incorporated the parties' Marital Settlement Agreement ("MSA"), which based alimony and child support upon an agreed amount of $40,000 per year in imputed income to the Former Wife. Six years later, the Former Wife filed a petition for modification of alimony and child support and sought an award of temporary attorney's fees and costs. As grounds for the modification, she alleged that she had experienced an involuntary, permanent, and material change in her needs, and that the Former Husband's income was substantially higher than it had been when they entered into the MSA. At the hearing on the request for temporary attorney's fees, the Former Wife's attorney admitted that she had some passive income, but that it was modest. The Former Wife did not work and her only income was the alimony she received. The Former Wife testified that she had not paid any fees, had no ability to pay them, and had no income other than from alimony. She had received a $75,000 inheritance three years earlier, but had spent it all, except $9,000. Her accounts were worth a little over $12,000. The Former Wife withdrew $2,000 to $2,500 from her accounts as needed to make up the shortfall in her living expenses. Even so, she had $44,000 when she filed the modification petition, but had withdrawn $31,000 in the three months since. The Former Husband testified that his business was in a "deplorable" state due to the downturn in the construction industry. He had no new projects come in during the several months preceding the hearing, had laid off two employees, and had cut his employees' salaries by twenty percent. He was forced to borrow approximately $130,000 from his life insurance policies to support his business and family, and he is required to repay those funds. At the time of the hearing, he had $11,380 in his personal account, but was overdrawn by $12,812 in his business account. Ultimately, the trial court granted the Former Wife's request for temporary attorney's fees and costs, indicating in its order that the Former Wife's sole source of income was alimony and did not considering the agreed upon imputed income from the MSA. The District Court reversed:

1. "Here, the Former Wife agreed to an imputed annual income of $40,000 as part of the 2005 MSA. Six years later, she petitioned for modification . . . argu[ing] that her needs and those of her children had increased. In her petition, she acknowledged the imputed annual income from the MSA."

2. "There was no reason given as to why the $40,000 imputed income was not considered."

3. "We hold only that the $40,000 imputed income from the MSA must be taken into account in determining whether to award temporary fees."

4. "Because the Former Wife sought to modify the alimony and child support, she bore the burden of establishing that the $40,000 of imputed income should no longer apply."

Giorlando v. Giorlando, 103 So.3d 247 (Fla. 4th DCA 2013)

Fifth District

H. Miscellaneous

First District

ERROR TO AWARD WIFE ATTORNEY'S FEES WITHOUT CONDUCTING A HEARING AND GIVING THE HUSBAND AN OPPORTUNITY TO DISPUTE REASONABLENESS OF HOURLY RATE AND OF TIME CLAIMED.

The trial court awarded fees to the wife without a hearing. The District Court held: "Although we reject Appellant's argument that the trial court erred in determining that Appellee, the former wife, was entitled to attorney's fees, we agree that the trial court, which found that the hourly rate and number of hours claimed by Appellee's attorney were reasonable, erred in awarding fees and costs without conducting a hearing and giving Appellant the opportunity to dispute the reasonableness of the attorney's hourly rate and time claimed."
Newman v. Newman, 121 So.3d 661 (Fla. 1st DCA 2013)

Second District

Third District

Fourth District

AWARD OF ATTORNEY'S FEES REQUIRED RE-DETERMINATION WHERE PROVISION IN MSA, WHICH TIED THE OBLIGATION TO PAY ATTORNEY'S FEES TO CIRCUMSTANCES IN WHICH PARTY DEFAULTED ON DUTY OR OBLIGATION ARISING UNDER THE AGREEMENT, DID NOT APPLY AS NEITHER PARTY DEFAULTED ON AN OBLIGATION UNDER THE AGREEMENT, AND WHERE PROVISION APPLIED TO BOTH PARTIES EQUALLY AND THUS WAS NOT A UNILATERAL PROVISION NECESSITATING THE APPLICATION OF §57.105(7) FOR RECIPROCITY PURPOSES.

The final judgment of dissolution of marriage herein incorporated the parties' marital settlement agreement, which included the following provision regarding attorney's fees and costs: "Except as otherwise provided in this Agreement, should either party to this agreement default in his or her obligation hereunder, the party in default shall be liable to the other party for all reasonable expenses, including attorney's fees, incurred by the other party with regard to the enforcement of the obligations created in this Agreement, whether suit be brought or not."

The Former Wife filed an emergency motion for temporary sole custody and parental responsibility and for contempt against the Former Husband, and therein requested that the trial court order the Former Husband to pay attorney's fees and costs related to the filing. An evidentiary hearing was held on the emergency motion. Later, the trial court held a hearing on the issue of attorney's fees and costs, after which the trial court found: "Since the Former Husband prevailed on the Former Wife's Motion for Contempt, the Former Wife's request for fees and costs in reference to that motion is denied. Because the Former Wife's Motion for Contempt was in the nature of an enforcement of a provision in the Marital Settlement

Agreement, and because of the language contained in Florida Statute 57.105(7) making a provision for attorney's fees to enforce a contract provision bilateral, the Former Husband is entitled [to] an award of fees and costs in a successful defense of the Former Wife's Motion for Contempt."

The trial court also stated that the provision was not a prevailing party provision, and therefore, the Former Wife was entitled to temporary attorney's fees without regard to whether she prevailed on her request for permanent modification. The court found that $6,932 was a reasonable fee for the Former Husband's defense of the contempt motion and setoff this amount from the $20,000 it awarded to the Former Wife as temporary fees and costs in connection with her pending request for permanent modification. The Former Wife appealed. Reversing the trial court's order as to attorney's fees in part, the District Court held:

1. "In [an earlier case] we were faced with a similar provision in a marital settlement agreement…. Concerning this provision, we reasoned: 'We do not read this particular provision to base entitlement to fees on whether the party prevailed, although the party would have to successfully enforce performance against the defaulting party. Here the parties' agreement tied the contractual obligation to pay fees to whether one of them has "defaulted" on a duty or obligation arising under their settlement agreement.'"

2. "In the present case… the clause in the parties' marital settlement agreement tied the Former Wife's obligation to pay attorney's fees to a 'default' in one of the Former Wife's obligations under the marital settlement agreement. The Former Wife was unsuccessful in her attempt to obtain temporary sole custody and parental responsibility, and in her attempt to hold the Former Husband in contempt; thus, the trial court found that the Former Husband did not 'default' by failing to comply with the timesharing schedule. However, nor did the Former Wife 'default' in an obligation under the agreement simply because the Former Husband 'prevailed' in defending against her emergency motion."

3. "Accordingly, since there was no 'default,' and a 'default' was necessary to trigger application of the fees provision in the marital settlement agreement, we find that the attorney's fees provision in the marital settlement agreement was not applicable."

4. "The trial court, therefore, erred in finding a contractual basis to require the Former Wife to pay the Former Husband's attorney's fees under the circumstances of this case."

5. "Further, we note that section 57.105(7), Florida Statutes (2011), 'renders bilateral a unilateral contractual clause for prevailing party attorney's fees.' The attorney's fees provision in the marital settlement agreement applied to both parties equally, and was therefore not a unilateral provision necessitating the application of section 57.105(7) for reciprocity purposes, and as such, the trial court also erred in relying on section 57.105(7)."

6. "Therefore, we reverse the $6,932 in attorney's fees that was awarded to the Former Husband as a credit against the temporary fee of $20,000 awarded to the Former Wife in connection with her request for permanent modification."

7. "We direct the trial court to re-determine the Former Wife's entitlement to attorney's fees for the work performed on her emergency motion, using the standard for attorney's fees awards under section 61.16, Florida Statutes, for the entirety of the motion."

8. "If the trial court again determines that the Former Wife is entitled to attorney's fees, it should determine the reasonable amount of fees incurred in connection with the emergency motion, and set the manner in which the Former Husband will pay those fees."

Sacket v. Sacket, 115 So.3d 1069 (Fla. 4th DCA 2013)

AWARD OF TEMPORARY FEES REVERSED WHERE TRIAL COURT FAILED TO MAKE FACTUAL FINDINGS REGARDING HUSBAND'S MONTHLY INCOME, WHICH WAS DISPUTED BY PARTIES, THEREBY FRUSTRATING PROPER ABILITY TO PAY ANALYSIS.

The Wife filed a motion for temporary support, attorney's fees and costs for a forensic accountant. After a hearing on the motion, the trial court entered an order compelling the Husband to pay $50,000 in temporary attorney's fees and $10,000 in temporary accountant's fees within fifteen days. The trial court noted that the Wife had a monthly gross income of $6,844 (net of $5,555), and monthly expenses of $11,835. The court also noted that the Husband's forensic accountant testified that his monthly gross income was $13,598, while the Wife's forensic accountant testified that it was $14,899.26. However, no factual finding was made as to which figure was actually the Husband's income. The trial court held that the Wife had the need for, and the Husband had the ability to pay, both temporary support and attorney's fees. The Husband thereafter appealed. With regard to the lack of findings regarding the Husband's monthly income, the District Court reversed:

1. "Our analysis of the Husband's ability to pay is frustrated by the trial court's failure to make findings as to Husband's gross and net monthly income."

2. "Using the Husband's figures, the Husband is in a worse financial position than the Wife and lacks the ability to pay any significant amount of the Wife's fees…. However, using the Wife's figures, the Husband is in a better financial position than the Wife and could pay at least part, if not all, of the Wife's fees over time."

3. "Because we are unable to determine whether the Husband has the ability to pay the Wife's fees, we must reverse and remand for the trial court to determine the Husband's net monthly income."

Duncan v. Duncan, 124 So.3d 974 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN FINDING HUSBAND HAD ABILITY TO PAY ENTIRETY OF WIFE'S FEES WITHIN FIFTEEN DAYS, EVEN USING WIFE'S FIGURES SHOWING HIS MAXIMAL ABILITY TO PAY; ERROR TO ORDER A LUMP SUM PAYMENT ABSENT EVIDENCE OF ABILITY TO PAY.

The Wife filed a motion for temporary support, attorney's fees and costs for a forensic accountant. After a hearing on the motion, the trial court entered an order compelling the Husband to pay $50,000 in temporary attorney's fees and $10,000 in temporary accountant's fees within fifteen days. The trial court noted that the Wife had a monthly gross income of $6,844 (net of $5,555), and monthly expenses of $11,835. The court also noted that the Husband's forensic accountant testified that his monthly gross income was $13,598, while the Wife's forensic accountant testified that it was $14,899.26. However, no factual finding was made as to which figure was actually the Husband's income. The trial court held that the Wife had the need for, and the Husband had the ability to pay, both temporary support and attorney's fees. The Husband thereafter appealed. With regard to the fifteen-day time frame, the District Court reversed:

1. "Even using the Wife's figures for the Husband's income, the trial court erred in finding the Husband had the ability to pay the entirety of the Wife's fees within fifteen days. "

2. "It is reversible error for a trial court to order a large lump-sum payment when there is no evidence the payor has the ability to make the payment in the time frame ordered…. There is no record evidence that Husband could pay $60,000 in temporary fees in fifteen days."

3. "If, on remand, the trial court finds the Husband has the ability to pay all or part of the Wife's fees, it should determine a schedule in line with the Husband's ability to pay."

Duncan v. Duncan, 124 So.3d 974 (Fla. 4th DCA 2013)

Fifth District

IN DENYING FORMER WIFE'S REQUEST FOR ATTORNEY'S FEES, COURT ERRONEOUSLY BASED ITS DECISION ON FORMER WIFE'S ABILITY TO DRAW FROM HER NON-MARITAL BANK STOCKS AND ON SPECULATION THAT PARTIES WOULD BE ON NEAR-EQUAL FOOTING DUE TO FORMER HUSBAND'S EXPECTED RETIREMENT; REQUEST FOR FEES SHOULD HAVE BEEN EVALUATED BASED ON PARTIES' FINANCIAL RESOURCES AS OF THE TIME OF THE FINAL JUDGMENT.

During the dissolution of marriage proceedings, the Former Wife retained five attorneys. She sought $24,689.26 in attorney's fees—all related to the fifth attorney's representation of her in three months' time—because of the substantial disparity between the incomes of the parties. The trial court denied her request. In evaluating the request, the trial court appeared to have based its decision on Former Wife's ability to draw from her non-marital bank stocks and on speculation that the parties would be on near-equal footing, as Former Husband was expected to retire a few months after trial. The District Court reversed:

1. "[T]he lower court should have evaluated Former Wife's request for fees based on the parties' financial resources as of the time of the final judgment."

2. "While it can be an abuse of discretion to fail to award attorney's fees where there is a substantial disparity between the parties' income, the court must consider the 'overall relative financial positions and resources of the parties, and not just an isolated factor such as income or earning capacity.'"

3. "On remand, the trial court should reconsider Former Wife's request for attorney's fees in light of this Court's ruling and the applicable factors, articulate the basis for its conclusion, and, if awarded, make the requisite findings as to the reasonableness of the attorney's fees."

4. "The trial court can certainly consider the reasonableness of the fees in the context of Former Wife's repeated changes of counsel, which no doubt contributed to the accumulation of fees."

Davis v. Davis, 108 So.3d 660 (Fla. 5th DCA 2013)

TRIAL COURT ERRED IN INCLUDING IN FEES AND COSTS AWARD TO FORMER WIFE THE TRAVEL TIME FOR FORMER WIFE'S CPA AND VOCATIONAL EXPERT, AND A CANCELLATION FEES CAUSED BY FORMER WIFE'S ATTORNEY.

The Former Husband appealed from two orders—a final judgment of dissolution of marriage and a post-judgment award of fees and costs to the Former Wife. With respect to the requirement that the Former Husband reimburse the Former Wife's CPA and vocational expert's

travel costs and cancellation fees, the District Court reversed: "With respect to the fees and costs that the Former Husband was required to pay, we agree that the trial court erred by including nine hours of travel time for the Former Wife's CPA (at $285 per hour) and by including travel time for the Former Wife's vocational expert, as well as a $1,700 cancellation fee caused by the Former Wife's attorney. On remand, we direct the trial court to enter an amended fee and cost order that deletes these costs."
Sweeny v. Sweeny, 113 So.3d 987 (Fla. 5th DCA 2013)

V. CHILD SUPPORT

A. Support for Children Beyond 18 Years

First District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECIDING TO TERMINATE CHILD SUPPORT UPON CHILD REACHING AGE OF 18 RATHER THAN UPON GRADUATION FROM HIGH SCHOOL.

A final judgment modifying child support was entered that reduced the amount of child support payments owed to the Former Wife retroactive to the date of the original filing. The Former Wife appealed various aspects of the judgment. With regard to the trial court's decision to terminate child support upon the child reaching the age of 18, instead of upon high school graduation, the District Court held: "We find no abuse of discretion, however, in the trial court's termination of child support upon a child reaching the age of 18, instead of upon high school graduation."
Marlowe v. Marlowe, 123 So.3d 1194 (Fla. 1st DCA 2013)

Second District

WHERE SETTLEMENT AGREEMENT PROVIDED THAT THE PARTIES WOULD USE THEIR BEST EFFORTS TO PROVIDE FOR THE EXPENSES OF SENDING THEIR CHILDREN TO PRIVATE SCHOOLS AND COLLEGES, TRIAL COURT PROPERLY FOUND THAT FORMER HUSBAND HAD NOT USED HIS BEST EFFORTS; FORMER HUSBAND'S DEFENSE THAT WIFE FAILED TO EXERCISE HER BEST EFFORTS TO CONTRIBUTE FUNDS COULD NOT BE CONSIDERED ON APPEAL WHERE FORMER HUSBAND NEITHER PLED NOR ARGUED SAME AT TRIAL; "COSTS" OF COLLEGE NORMALLY INCLUDE ROOM AND BOARD.

The Former Wife and Former Husband herein entered into a Marital Settlement Agreement (MSA) on May 26, 1997. At that time, the parties had three minor children. By the terms of the agreement, the parties contracted to use their best efforts to provide for the expenses of sending their children to private school, college, and graduate school. The agreement also

provided that "[t]he contribution of each parent shall be calculated on the basis of the ratio between their gross annual incomes as reported In their most recent federal income tax return immediately preceding the academic year."

The parties' oldest child graduated from high school in December 2008 and enrolled in college the next month. The Former Husband began to contribute to the cost of the college expenses, however there came a time when he did not pay the full amount as expected by his now adult son and the Former Wife, and they sued the Former Husband for breach of contract. The trial court found that the Former Husband had not used his best efforts in supplying the costs of his son's college education and entered an order requiring him to pay a total of $41,603 to the son and the Former Wife as reimbursement for the costs of the college education.

The Former Husband appealed the trial court's award to the son and the Former Wife. He also argued that the trial court failed to take into account the Former Wife's failure to exercise her best efforts to contribute funds, as was also required by the agreement. Specifically, the Former Husband maintained that the Former Wife was willfully underemployed causing her annual income to range from $300 to $8,500. When compared to the Former Husband's income, the ratio described in the MSA required the Former Husband to pay the equivalent of 97.4% to 99.9% of the son's college expenses. The Former Husband argued that the trial court's failure to consider the Former Wife's willful underemployment in considering whether she was exercising her best efforts was error.

On appeal, the District Court affirmed the trial court's determination that the Former Husband be responsible for the college expenses:

1. "Although the agreement does suggest that each of the parties agreed to exercise his/her best efforts, the Former Husband did not plead the failure of the Former Wife to do so as an affirmative defense, nor did he argue this failure at trial."

2. "The only reference to 'best efforts' at trial was the Former Husband's argument that he indeed had exerted his best efforts by paying a portion of the costs even though he had not paid all of the costs. As such, the trial court determined the only issue that had been placed before it—whether the Former Husband exercised his best efforts in paying for the college expenses."

3. "Because the Former Husband did not plead the Former Wife's failure to employ her best efforts as an affirmative defense and did not argue the issue at trial, we cannot review this theory of defense for the first time on appeal."

4. "The Former Husband also argues on appeal that the trial court erred in calculating its award of total college costs by including room and board . . . Florida courts, however, have 'generally recognized that such expenses are factored into the cost of higher education.'"

Weaver v. Corey, 111 So.3d 947 (Fla. 2d DCA 2013)

Third District

Fourth District

Fifth District

B. Expenses Paid as Child Support

First District

WHERE SETTLEMENT AGREEMENT PROVIDED THAT THE PARTIES WOULD USE THEIR BEST EFFORTS TO PROVIDE FOR THE EXPENSES OF SENDING THEIR CHILDREN TO PRIVATE SCHOOLS AND COLLEGES, TRIAL COURT PROPERLY FOUND THAT FORMER HUSBAND HAD NOT USED HIS BEST EFFORTS; FORMER HUSBAND'S DEFENSE THAT WIFE FAILED TO EXERCISE HER BEST EFFORTS TO CONTRIBUTE FUNDS COULD NOT BE CONSIDERED ON APPEAL WHERE FORMER HUSBAND NEITHER PLED NOR ARGUED SAME AT TRIAL; "COSTS" OF COLLEGE NORMALLY INCLUDE ROOM AND BOARD.

The Former Wife and Former Husband herein entered into a Marital Settlement Agreement (MSA) on May 26, 1997. At that time, the parties had three minor children. By the terms of the agreement, the parties contracted to use their best efforts to provide for the expenses of sending their children to private school, college, and graduate school. The agreement also provided that "[t]he contribution of each parent shall be calculated on the basis of the ratio between their gross annual incomes as reported In their most recent federal income tax return immediately preceding the academic year."

The parties' oldest child graduated from high school in December 2008 and enrolled in college the next month. The Former Husband began to contribute to the cost of the college expenses, however there came a time when he did not pay the full amount as expected by his now adult son and the Former Wife, and they sued the Former Husband for breach of contract. The trial court found that the Former Husband had not used his best efforts in supplying the costs of his son's college education and entered an order requiring him to pay a total of $41,603 to the son and the Former Wife as reimbursement for the costs of the college education.

The Former Husband appealed the trial court's award to the son and the Former Wife. He also argued that the trial court failed to take into account the Former Wife's failure to exercise her best efforts to contribute funds, as was also required by the agreement. Specifically, the Former Husband maintained that the Former Wife was willfully underemployed causing her annual income to range from $300 to $8,500. When compared to the Former Husband's income, the ratio described in the MSA required the Former Husband to pay the equivalent of 97.4% to 99.9% of the son's college expenses. The Former Husband argued that the trial court's failure to consider the Former Wife's willful underemployment in considering whether she was exercising her best efforts was error.

On appeal, the District Court affirmed the trial court's determination that the Former Husband be responsible for the college expenses:

1. "Although the agreement does suggest that each of the parties agreed to exercise his/her best efforts, the Former Husband did not plead the failure of the Former Wife to do so as an affirmative defense, nor did he argue this failure at trial."

2. "The only reference to 'best efforts' at trial was the Former Husband's argument that he indeed had exerted his best efforts by paying a portion of the costs even though he had not paid all of the costs. As such, the trial court determined the only issue that had been placed before it—whether the Former Husband exercised his best efforts in paying for the college expenses."

3. "Because the Former Husband did not plead the Former Wife's failure to employ her best efforts as an affirmative defense and did not argue the issue at trial, we cannot review this theory of defense for the first time on appeal."

4. "The Former Husband also argues on appeal that the trial court erred in calculating its award of total college costs by including room and board . . . Florida courts, however, have 'generally recognized that such expenses are factored into the cost of higher education.'"
Weaver v. Corey, 111 So.3d 947 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN FAILING TO INCLUDE PROVISIONS IN FINAL JUDGMENT FOR HEALTH INSURANCE FOR MINOR CHILDREN AND ADDRESSING COST OF NON-COVERED MEDICAL, DENTAL, AND PRESCRIPTION EXPENSES.

The final judgment herein mentioned neither health insurance for the minor children nor their out-of-pocket medical expenses. The Wife appealed. In this regard, the District Court reversed:

1. "Although the child support guidelines worksheet notes what the Husband pays for the children's health insurance, there is no language in the final judgment mandating that he continue to pay for their insurance."

2. "The Husband acknowledges that the final judgment does not contain a provision for the children's health insurance but contends that any error is harmless because he does pay for their health insurance."

3. "We do not agree that the error is harmless because… '[e]ven if the husband is providing insurance, this does not abrogate the requirement of making it a legal obligation pursuant to the final judgment.'"

4. "We therefore remand the case for the trial court to include in the final judgment language stating that the Husband is required to pay for the health insurance for the minor children and to also apportion to the parties in the order for support the cost of any non-covered medical, dental, and prescription medication expenses of the children."
Harris v. Harris, 114 So.3d 1095 (Fla. 2d DCA 2013)

ORDER REQUIRING FORMER WIFE TO MAINTAIN LIFE INSURANCE POLICY WITH FORMER HUSBAND AND CHILDREN AS EQUAL BENEFICIARIES REQUIRED CLARIFICATION AS TO WHETHER POLICY WAS INTENDED TO SECURE ALIMONY OR CHILD SUPPORT; ABSENT SPECIAL CIRCUMSTANCES, ERROR FOR TRIAL COURT TO REQUIRE SPOUSE TO MAINTAIN LIFE INSURANCE FOR PURPOSE OF SECURING ALIMONY AWARD

During the parties' marriage, the Former Wife maintained a life insurance policy insuring her life in the face amount of $1 million. The final judgment entered herein mandated that she maintain this policy and that the Former Husband and their children continue as equal beneficiaries of the policy. The order was otherwise silent as to what purpose was to be served by maintaining this insurance. Both parties appealed various aspects of the amended final judgment. In this regard, the District Court reversed:

1. "The order is silent as to what purpose is served by maintaining this insurance: is it to secure the payment of alimony or child support or both?"

2. "In [an earlier case], this court stated that '[i]n the absence of special circumstances, a spouse cannot be required to maintain life insurance for the purpose of securing an alimony obligation.'"

3. "This court in [another case], concluded that 'sufficient findings [must be] contained in the final judgment to justify a requirement for life insurance as alimony security.'"

4. "The final judgment in [the earlier casse] was deficient in that it stated merely that 'the husband shall provide life insurance on his life in the amount of $93,000 as security for his alimony obligations….' [T]his court could not ascertain whether [the wife] would be paid the entire policy proceeds in the event of [the husband's] death or only so much as to compensate her for an alimony arrearage and noted that '[e]ither arrangement may be appropriate, but those terms must be certain.' The final judgment [herein] is even less specific…."

5. "[I]f the life insurance policy the trial court ordered [the Former Wife] to maintain is for alimony, the specific circumstances justifying it must be provided in the final judgment."

6. "We also encourage the trial court on remand to further specify whether upon [the Former Wife's] death [the Former Husband] shall receive only that portion of the proceeds required to compensate him for alimony payments due but not yet paid or otherwise."

Busciglio v. Busciglio, 116 So.3d 620 (Fla. 2d DCA 2013)

PROVISION OF FINAL JUDGMENT REQUIRING FORMER WIFE TO PAY "PRIVATE SCHOOL EXPENSES" FOR CHILDREN REQUIRED CORRECTION WHERE CHILDREN ATTENDED A CHARTER SCHOOL, WHICH IS CONSIDERED PUBLIC AND PAYMENTS MADE ARE VOLUNTARY.

Paragraph 12 of the amended final judgment ordered the Former Wife to "pay private school expenses for the minor children until graduation from high school, unless and until the parties agree otherwise." This ruling was based upon the trial court's finding that the children attended a private school before and during the pendency of these proceedings. However, the children were attending a charter school, which school suggests that parents make a *voluntary* yearly contribution and which the Former Wife had consistently made. Both parties appealed various aspects of the amended final judgment. In this regard, the District Court reversed:

1. "The parties agree and the record supports their agreement that this finding is factually incorrect."

2. "The children do not attend a private school; they attend a charter school that is considered a public school."

3. "On remand, the trial court shall correct the judgment to reflect that the children's school is a public one but may continue to require, if it sees fit, that [the Former Wife] pay all required expenses imposed by any school that the parents choose the children to attend."

4. "The voluntary nature of a parent's yearly contribution should remain voluntary."

Busciglio v. Busciglio, 116 So.3d 620 (Fla. 2d DCA 2013)

Third District

Fourth District

REQUIREMENT THAT FATHER OBTAIN TWO MILLION DOLLARS IN LIFE INSURANCE TO COVER MONETARY NEEDS OF CHILD IN EVENT FATHER BECAME PERMANENTLY DISABLED, RETIRED, OR PASSED AWAY WAS UNSUPPORTED BY EVIDENCE AS TO COST AND AVAILABILITY OF INSURANCE OR NEED FOR INSURANCE IN THAT AMOUNT; MOREOVER, THERE WAS NO AUTHORITY TO ORDER FATHER TO INCLUDE INSURANCE FOR DISABILITY AND RETIREMENT PROTECTION FOR CHILD.

The parties were married in 2003. They had a child in 2009. Shortly after the birth of the child, the marital difficulties intensified. The Wife commenced dissolution of marriage proceedings in June 2010. Following trial, a final judgment of dissolution of marriage was entered. Therein, the trial court ordered the Husband to obtain two million dollars of insurance on his life "to cover the monetary needs of the child in the event the Husband become (sic) *permanently disabled, retires* or passes away." (Emphasis added). However, no evidence was presented as to the cost of such insurance or how the court might have arrived at that amount. The Husband appealed, and the District Court reversed:

1. "Here, the trial court made no findings of availability and cost of such insurance, nor of the amount required to secure the child support obligation."

2. "On this record, two million dollars far exceeds the amount of child support awarded, or even the cost of additional 'needs' of the child."

3. "Finally, the trial court ordered the [Husband] to include insurance for disability and retirement protection for the child. There is no authority for such an award."

4. "Because voluntary retirement is not a ground for modification of child support, the child does not need protection from that event."

5. "Disability, on the other hand, may be a ground for downward modification."

6. "The parent has no obligation to secure the amount of child support regardless of all future circumstances that may befall the parent."

7. "We therefore reverse and remand for the trial court to conduct a hearing to determine the amount of life insurance required to secure the [Husband's] obligations and to further determine its availability and cost to assure that the [Husband] has the ability and means to secure it."

8. "The trial court shall also delete the requirement that insurance cover the events of disability and retirement."

Eckert v. Eckert, 107 So.3d 1235 (Fla. 4th DCA 2013)

ERROR TO REQUIRE FORMER HUSBAND, THE NONCUSTODIAL PARENT, TO PAY PRIVATE SCHOOL TUITION WITHOUT MAKING REQUIRED FINDINGS.

Reversing the trial court's decision to require the Former Husband to pay private school tuition, the District Court held:

1. "A trial court is permitted to require a noncustodial parent to pay for private school only if it finds: (1) the parent has the ability to pay for private school, (2) the expense is in accordance with the family's established standard of living, and (3) attendance is in the child's best interest."

2. "Where the trial court has failed to make each of the required factual findings, reversal is required."

3. "The trial court failed to make findings regarding whether Former Husband was able to pay the additional expense."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

ERROR TO REQUIRE FORMER HUSBAND TO OBTAIN LIFE INSURANCE TO SECURE ALIMONY AND CHILD SUPPORT WITHOUT REQUIRED FINDINGS

Reversing the trial court's decision to require the Former Husband to obtain life insurance to secure his alimony and child support obligation, the District Court held:

1. "'[I]f a trial court orders a spouse to obtain life insurance, then it must make specific findings as to the availability and cost of the policies and the impact of such cost on the husband.' *Galstyan v. Galstyan*, 85 So.3d 561, 565 (Fla. 4th DCA 2012)."

2. "The trial court failed to make any findings regarding the necessity or cost of the insurance."

3. "The trial court's only comment on availability of insurance required Former Husband to maintain the life insurance policy 'so long as it is reasonably available,' but it failed to detail the parameters of availability."

4. "As such the requirement of maintaining life insurance must be reversed for the trial court to make the required findings."

5. "We also remind the trial court that the amount of life insurance required must not exceed the support obligation."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

Fifth District

WHERE MARITAL SETTLEMENT AGREEMENT CONDITIONED FORMER HUSBAND'S CONTINUED CHILD SUPPORT OBLIGATION ON SON'S FULL-TIME COLLEGE ATTENDANCE, AND THERE WAS NO EVIDENCE TO SUPPORT FINDING THAT SON ATTENDED COLLEGE ON FULL-TIME BASIS DURING CERTAIN SEMESTER, FORMER WIFE WAS OBLIGATED TO REIMBURSE FORMER HUSBAND FOR CHILD SUPPORT PAID DURING THAT TIME FRAME.

The Former Husband appealed from the trial court's order approving and incorporating the general magistrate's report of findings and recommendations, which denied his supplemental petition to terminate child support. He argued that the general magistrate erred in interpreting the parties' marital settlement agreement, which conditioned the Former Husband's continued child support obligation on the parties' son's full-time college attendance. The District Court reversed that aspect of the final judgment:

1. "We find no competent substantial evidence to support the lower court's finding that the parties' son attended college on a full-time basis during the fall 2008 semester."

2. "Accordingly, [the] Former Wife shall reimburse [the] Former Husband for the child support paid during that time frame."

Price v. Price, 112 So.3d 652 (Fla. 5th DCA 2013)

WHERE TRIAL COURT IMPOSED FLAT-RATE OBLIGATION ON FATHER TO COVER UNREIMBURSED MEDICAL EXPENSES AND FACTORED THAT AMOUNT INTO HIS TOTAL CHILD SUPPORT OBLIGATION, ERROR TO THEN ORDER HIM TO ADDITIONALLY PAY PERCENTAGE OF UNREIMBURSED MEDICAL EXPENSES.

The first appearance of the underlying paternity action in the appellate court two years ago resulted in an opinion that specified five errors regarding the computation of child support that required correction on remand. One of the issues in the current appeal was the trial court's error in twice charging the Father for the child's unreimbursed medical expenses. Eschewing section 61.30(8)'s percentage basis approach (or so it appeared), the trial court imposed a flat-rate obligation of $230 per month on the Father to cover the unreimbursed medical expenses and factored that amount into his total child support obligation. The trial court then ordered the Father to pay a percentage of the unreimbursed medical expenses in addition to the flat rate. On appeal, the Father contends that the error of charging him twice for the child's unreimbursed medical expenses was not corrected on remand. The District Court agreed and reversed:

1. "As a prelude to our discussion of that error, we note the statutory requirements that '[e]ach order for [child] support shall contain a provision for health insurance for the minor child' and '[t]he court shall apportion the cost of health insurance, and any non-covered medical… expenses of the child, to both parties by adding the cost to the basic [child support] obligation."

2. "An option is therefore available that allows the trial court to simply add this medical expense to the child support obligation or order the obligation to be paid separately on a percentage basis."

3. "[The earlier case] held that this double charge was improper and ordered that the error be corrected on remand. Unfortunately, this same error was made again by the trial court, and now we must, for the second time, order that it be corrected."

Russell v. McQueen, 115 So.3d 1084 (Fla. 5th DCA 2013)

TRIAL COURT ERRED IN DETERMINING CHILD SUPPORT WITHOUT CONSIDERING THE COST OF MEDICAL INSURANCE IN COMPUTING THE AMOUNT OF THE HUSBAND'S OBLIGATION.

In the underlying action herein, the trial court went beyond the dictates of the appellate court's mandate on remand by delving into matters previously reviewed and affirmed by the District Court in an earlier appeal between the parties. In the original case, the trial court failed to use the Father's 2006 income tax return to calculate his support obligation for that year, and attributed his wife's income ($89,915) to him in calculating his 2007 income. On remand, while the trial court did use the Father's 2006 tax return to calculate his support obligation for that year, the court's reconsideration of his 2007 income went beyond the deletion of his wife's income and instead was completely recalculated by crediting him with business losses previously considered and rejected in the original proceedings.

With regard to the consideration of the Father's medical insurance costs in calculating his income, the record showed that he testified at the initial hearing, and on remand, regarding the amount he paid for his health insurance and yet, despite his repeated requests that this cost be included in the calculation, it was not deducted from his gross income. On appeal, the Father

noted the inherent unfairness in denying him that deduction while allowing the Mother to deduct the cost of hers from her gross income. On these two points, the District Court reversed:

1. "Because we examined the calculation of Father's 2007 income and affirmed that calculation (except for the improper inclusion of his wife's income) in the first appeal, the correction on remand only required the simple mathematical task of subtracting her income from Father's income for 2007."

2. "[W]e acknowledge, in fairness to the trial court, that [the earlier opinion] spoke in terms of failing 'to include the cost to Father of the health insurance that covered his child in calculating child support.' Therefore. [the earlier appeal] and the mandate that emanated from that appeal did not require inclusion of Father's health insurance in the calculation."

3. "We believe [the failure to allow the Father a deduction for his medical insurance costs] constitutes an error in need of correction based on notions of fairness and the statutory provisions that require the trial court 'to determine net income based upon section 61.30, Florida Statutes, by determining gross income as defined in subsection (2)(a) 1–14 and then subtracting from this figure allowable deductions as defined in subsection (3)(a)-(g).'"

4. "On remand, the trial court should allow the deduction to Father, just as it was allowed to Mother."

Russell v. McQueen, 115 So.3d 1084 (Fla. 5th DCA 2013)

TRIAL COURT ERRED IN ORDERING HUSBAND TO SECURE LIFE INSURANCE AS SECURITY FOR CHILD SUPPORT OBLIGATION IN AN AMOUNT EXCEEDING OBLIGATION, AND IN ORDERING HUSBAND TO LIST WIFE AS BENEFICIARY.

In an appeal from the underlying dissolution of marriage proceedings, the Husband challenged several aspects of the final judgment, including the trial court's requirement that he provide life insurance as security for his child support obligation. In this regard, the District Court reversed:

1. "We agree with [the Husband] that the trial court erred in ordering him to provide life insurance to secure his child support obligation."

2. "First, the requirement is not supported by sufficient factual findings."

3. "Second, the court erroneously ordered [the Husband] to procure insurance in an amount exceeding the obligation."

4. "Finally, the court erroneously ordered [the Husband] to list [the Wife] as the beneficiary."

Hodges v. Hodges, 128 So.3d 190 (Fla. 5th DCA 2013)

C. Modification

First District

UNDER PROVISIONS OF THE UNIFORM INTERSTATE FAMILY SUPPORT ACT, FLORIDA COURT DID NOT HAVE JURISDICTION TO MODIFY MICHIGAN CHILD SUPPORT ORDER REGISTERED IN FLORIDA UNDER UIFSA WHERE MICHIGAN NO LONGER HAS CONTINUING, EXCLUSIVE JURISDICTION, PARTY SEEKING MODIFICATION IS A FLORIDA RESIDENT, AND OPPOSING PARTY IS NON-RESIDENT WHO OBJECTS TO FLORIDA'S ASSUMPTION OF JURISDICTION; UIFSA NOT PREEMPTED BY FEDERAL FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT.

In 2007, a Michigan court dissolved the parties' marriage and ordered the Father to pay the Mother child support. In March 2010, after having moved to Florida with the parties' two minor children, the Mother petitioned the Florida circuit court to domesticate and modify the Michigan child support order. The Father, who now lives in California, requested that the order be registered in Florida under the UIFSA, but only for enforcement purposes. Concerned that the order could not be modified if it were registered under the UIFSA, the Mother argued that the order should instead be domesticated under the United States Constitution's Full Faith and Credit Clause and not with respect to any particular statute or constitutional provision. Ultimately, the court registered the order under the UIFSA, which is the applicable law.

Thereafter, the Mother filed an Amended Supplemental Petition to Modify Final Judgment. The Father moved to dismiss the modification proceeding for lack of subject matter jurisdiction, conceding that the court had personal jurisdiction over him. He relied on the UIFSA, which grants jurisdiction to modify a foreign child support order only when the moving party is not a Florida resident, with certain exceptions not at issue in this case. The Mother argued that modification in Florida is proper because the Full Faith and Credit for Child Support Orders Act ("FFCCSOA") removes the continuing, exclusive jurisdiction of a state that has issued a child support order when neither the child nor any of the parties continue to reside there. The circuit court agreed with the Mother, concluding that the FFCCSOA provides jurisdiction and preempts the UIFSA on this subject. The Father sought a writ of prohibition to prevent the exercise of jurisdiction over this modification action. The District Court granted the Father's petition:

1. "Here, neither the parents nor the children still live in Michigan, the trial court found that the father consented to personal jurisdiction, and the Father has not filed a written consent to the circuit court's jurisdiction to modify. Therefore, for the purposes of this case, the relevant distinction between the federal FFCCSOA and Florida's UIFSA is the nonresident requirement of section 88.6111(1)(a) 2."

2. "The Mother contends that Florida must exercise jurisdiction despite the UIFSA's nonresident requirement because Michigan has lost continuing, exclusive jurisdiction under the terms of the FFCCSOA. Michigan's loss of continuing, exclusive jurisdiction, however, does not automatically confer jurisdiction on a Florida court to modify Michigan's child support order . . .

Under the plain language of the FFCCSOA, modification may occur only 'in a State with jurisdiction over the nonmovant for the purpose of modification.'"

3. "Some courts have declined to apply the UIFSA's nonresident requirement because they view it as a hurdle to modification not contemplated by the FFCCSOA. Those courts interpret section 1738B(i)'s jurisdictional language as requiring only that the modification court have personal jurisdiction over the nonmovant . . . Other courts, which have found no conflict between the federal and state law, have interpreted this same language as conditioning modification upon finding both personal and subject matter jurisdiction . . . We are persuaded by the latter interpretation."

4. "Furthermore, we must acknowledge that if Congress had intended the language to characterize only personal jurisdiction, it could have used the words 'personal jurisdiction,' just as it did in section 1738B(c), when listing the requirements an order must fulfill to be 'made consistently with this section.'"

5. "Thus, to give full effect to the plain meaning of subsection (i), we hold that the text 'jurisdiction over the non-movant for the purpose of modification' properly refers to both personal jurisdiction and subject matter jurisdiction."

6. "Because the federal law allows modification only when a state has both personal and subject matter jurisdiction, the latter of which is defined in the uniform state law, compliance with both federal and state law is not only possible, but required."

7. "We also find nothing in a state's limitations on its own modification jurisdiction through the UIFSA that stands as 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' . . . In fact, a contrary holding would be difficult to justify because Congress essentially implemented both acts."

8. "Because Congress induced the states to adopt the UIFSA in an effort to create interstate consistency and simultaneously modified the FFCCSOA to comport with the UIFSA's substance, the two acts are generally considered 'complementary or duplicative and not contradictory.'"

9. "Before concluding, we pause to note that binding precedent recognizes a presumption against preemption, particularly in areas that have traditionally been regulated by the states… Family law is such an area…. Recent Supreme Court case law, however, suggests a shift away from the presumption…. Whatever the continuing vitality of the presumption doctrine may be, it does not affect our decision today, because we readily conclude from the language used in the two statutes that there is no conflict, express or implied. Consequently, we need not invoke the presumption to tip the scales."

10. "In conclusion, having thoroughly considered the text of the two acts, we hold that the FFCCSOA does not preempt section 88.6111(1) of the Florida UIFSA. Neither the language nor the purposes of either statute create any conflict that requires displacing state provisions. Therefore, the circuit court is required to give full effect to section 88.6111(1) and refrain from exercising modification jurisdiction in this matter."

Pulkkinen v. Pulkkinen, 127 So.3d 738 (Fla. 1st DCA 2013)

Second District

ABUSE OF DISCRETION TO FAIL TO MAKE CHILD SUPPORT MODIFICATION RETROACTIVE TO DATE OF FILING.

The trial court modified child support but failed to apply the modification retroactive to the date the petition for modification was filed. The District Court held:

1. "Retroactivity is the rule rather than the exception which guides the trial court's application of discretion when modification of alimony or child support is granted. Accordingly, there is a presumption of retroactivity which applies unless there is a basis for determining that the award should not be retroactive."

2. "The former husband's petition requested that the modification be applied retroactively to the date he filed the petition. The court's supplemental final judgment does not provide its rationale for denying retroactive application. And nothing in the record supports a denial."

3. "On remand, the trial court should grant the former husband's request that the modification in child support be retroactive to the date his petition for modification was filed."

Cash v. Cash, 122 So.3d 430 (Fla. 2d DCA 2013)

WHERE THE INTENT OF THE PARTIES' AGREEMENT RESULTED IN THE HUSBAND WAIVING A CHILD SUPPORT ADJUSTMENT BASED ON HIS TIMESHARING, IT WAS ERROR FOR COURT TO ADJUST CHILD SUPPORT BASED ON HUSBAND'S TIMESHARING ABSENT SOME SUBSTANTIAL CHANGE IN CIRCUMSTANCES THAT WOULD JUSTIFY OVERLOOKING HUSBAND'S WAIVER.

In 2005, the trial court entered a stipulated supplemental final judgment adopting another agreement by the parties, which increased the child support to $2,400 per month and reduced the alimony to $4,000 per month. The stipulated judgment specifically stated that 'the parties' visitation arrangements . . . will not be considered as the father's having 40% of time with the children." In 2007, the trial court entered a second supplemental final judgment reducing child support and alimony after a final hearing. This judgment found that the husband suffered a 22.32% reduction in his income and therefore reduced his alimony and child support to represent 48.86% of his income. The 2007 judgment specifically stated that all paragraphs Stipulated Supplemental Final Judgment other than those modified by the Order would remain in full force and effect.

In 2010, the husband sought to modify his child support based on one child reaching the age of majority [because the wife wouldn't agree to reduce his child support to $1,760.88 which represented the guideline amount for the remaining 3 children without credit for 20% overnights] and to reduce the wife's alimony. The Wife sought to increase her alimony. After a hearing, her alimony was increased and the court reserved on the child support issues. Due to the alimony increase, the husband filed a motion to determine child support, claiming he should pay $1,010 a month for three children, and filed to reduce his child support, this time including an adjustment in his proposed support obligation on the basis of substantial timesharing [42.47% of overnights]. The trial court reduced child support and ruled that the parties' 2005 agreement did not say that if the law changes, or if the father gets a certain amount of timesharing that he will

not receive any threshold timesharing in the child support calculation; that the agreement said he wouldn't get 40%. So the trial court gave him a 39% credit. The District Court held:

1. "At the time the parties entered into the stipulated agreement in 2005, section 61.30(11)(b) allowed an adjustment in the child support calculations when the parenting arrangement provides for the child or children to 'spend a substantial amount of time with each parent.' For purposes of this statutory adjustment, 'substantial amount of time' means that the noncustodial parent exercises visitation at least 40 percent of the overnights of the year.' Generally, the case law holds that this statutory adjustment is mandatory and that a party need not request it in order for a party to receive its benefit. But the issue in this case is whether the father expressly waived his right to this statutory reduction."

2. "The provision at issue in the 2005 agreement specifically states that '[t]he parties[']' visitation arrangements outlined herein will not be considered as the father having 40% of time with the children.' It is clear form the wording of the provision and the other provisions in the agreement relating to child support and visitation that the parties intended for the father's visitation schedule to have no effect on the father's child support obligation."

3. "Specifically, the parties intended that the father would pay a specific amount of child support, that the father would receive 40% of the overnights with the children, and that the father would not receive the adjustment in his child support."

4. "The goal to be accomplished by the agreement was that the father would provide a particular amount of support for his children without consideration of his substantial time-sharing. There is no other reasonable reading of this provision; there was no reason why the father's 40% visitation would need to be 'considered' other than for the purpose of child support."

5. "Because the provision in the 2005 agreement clearly indicates the parties' intention to not give the father a statutory adjustment in his child support based on his substantial time-sharing, the trial court erred in applying the adjustment in section 61.30(11)(b), absent some substantial change in circumstances that would justify overlooking the father's earlier waiver of his right to that statutory reduction."

6. "The father sought the instant reduction in child support based on the parties' oldest child's reaching majority age and no other factual change in circumstances. He did not seek the reduction in child support based on any reduction in his income; in fact, the father's income had increased since his child support had been reduced in 2007."

7. "The father contends that the trial court did not err because the statutory adjustment for child support based on substantial time-sharing is mandatory. But the cases holding that the adjustment is mandatory do not involve a parent who expressly agreed to waive the right to have his child support adjusted."

8. "We reverse the amended order setting amount of child support and remand for the trial court to recalculate the father's child support obligation in accordance with the parties' prior agreement and without the statutory adjustment for the father's substantial time-sharing."

Emmenegger v. Emmenegger, 38 FLW D1957 (Fla. 2d DCA 2013)

Third District

Fourth District

TRIAL COURT ERRED IN ORDERING HUSBAND TO MAINTAIN LIFE INSURANCE AS SECURITY FOR ALIMONY AND CHILD SUPPORT WITHOUT

FINDINGS REGARDING SPECIAL CIRCUMSTANCES THAT WARRANT THE REQUIREMENT, AVAILABILITY AND COST OF INSURANCE, AND HUSBAND'S ABILITY TO PAY FOR INSURANCE; WHERE INSURANCE IS SECURING CHILD SUPPORT, CHILDREN SHOULD HAVE BEEN NAMED BENEFICIARIES.

The parties were married in 1994, and a petition for dissolution of marriage was filed in 2009. Two children were born of the marriage in 1997 and 1999. The Wife was not employed and had not worked during the sixteen-year marriage. The Husband worked as a painting contractor for his own company. The parties' tax returns reflected adjusted gross income of $394,510 in 2006, $269,014 in 2007, $116,055 in 2008, and $71,467 in 2009. The final judgment of dissolution of marriage awarded the Wife durational alimony of $1,500 a month for fourteen years. The court ordered the Husband to maintain a life insurance policy in the amount of $50,000, naming the Wife as the beneficiary, in order to secure the payment of alimony. The trial court also ordered the Husband to pay $656 per month for child support, as well as $100 per month to pay for $1,300 in arrearages. He was further required to purchase at least $150,000 in life insurance to secure the payment of child support. The Husband appealed, raising several issues, including that the trial court erred in ordering him to maintain life insurance to secure alimony and child support. The District Court reversed:

1. "In the present case, the trial court did not make a specific finding of special circumstances."

2. "Additionally, the trial court did not make the required findings as to the availability and cost of insurance and the [H]usband's ability to pay."

3. "Further, the trial court erred by naming the [W]ife as the beneficiary of the life insurance policy securing the payment of child support."

4. "Accordingly, we reverse and remand for the trial court to make the requisite findings, including whether special circumstances are present, and if such special circumstances are present, for an evidentiary hearing on the availability, cost, and the [H]usband's ability to pay any insurance required by the trial court."

5. "If all the above are met, and the trial court orders life insurance to secure child support, then the trial court should require that the children be designated as the beneficiaries of the life insurance policy purchased to secure the child support payment."

Zvida v. Zvida, 103 So.3d 1052 (Fla. 4th DCA 2013)

Fifth District

PROVISION OF FINAL JUDGMENT REQUIRING HUSBAND TO REIMBURSE WIFE 75% OF COST OF MEDICAL EXPENSES INCURRED BY MINOR OR DEPENDENT CHILDREN MODIFIED TO APPLY ONLY TO NON-ELECTIVE REASONABLE AND NECESSARY EXPENSES.

In the dissolution of marriage proceedings, the final judgment required the Former Husband to reimburse the Former Wife 75% of the cost of any medical expenses incurred by the minor or dependent children. The Former Husband appealed. The District Court affirmed the final judgment, but modified this provision:

1. "We modify this provision to apply only to non-elective reasonable and necessary medical expenses."

2. "The Former Husband is not responsible for elective medical procedures, absent his express agreement or court order."
Oliver v. Oliver, 112 So.3d 538 (Fla. 5th DCA 2013)

D. Enforcement/Defenses

First District

TRIAL COURT ERRED IN LIMITING RETROACTIVE CHILD SUPPORT TO 24 MONTHS PRECEDING MAILING DATE OF NOTICE OF PROCEEDING TO ESTABLISH ADMINISTRATIVE SUPPORT ORDER, RATHER THAN EARLIER SERVICE DATE OF NOTICE OF PROCEEDINGS TO ESTABLISH PATERNITY, WHERE OPERATIVE DATE FOR DETERMINING RETROACTIVE CHILD SUPPORT PERIOD IN ADMINISTRATIVE PROCEEDINGS IN WHICH D.O.R. USES BIFURCATED PROCEDURE IN SECTION 409.256(4) TO ESTABLISH PATERNITY AND AN ADMINISTRATIVE CHILD SUPPORT ORDER IS THE DATE OF SERVICE OF NOTICE OF PROCEEDINGS TO ESTABLISH PATERNITY.

On July 12, 2011, the Department served Appellee with a notice of paternity proceeding. The notice advised Appellee that if genetic testing proved him to be the father of Karina Sorto's child, he would receive either a proposed order of paternity or a notice of support proceeding. Genetic testing established paternity in November 2011, and the Department subsequently sent Appellee a Notice of Support Proceeding. The Notice is dated, and was mailed on, January 23, 2012. The administrative hearing occurred on May 1, 2012. The presiding Administrative Law Judge ("ALJ") issued a "Final Administrative Paternity and Support Order" that named Appellee the legal and biological father of Ms. Sorto's child and established Appellee's child support obligation at $250.00 per month. The order further directed Appellee to "pay retroactive support from February 01, 2010 through May 31, 2012, a total of 28 months, based on the two years preceding the filing of the notice of proceeding for support." The Department, on behalf of Ms. Sorto, appealed the Order, arguing that the retroactive support period should have been calculated from the date the notice of paternity proceeding was served on Appellee. The District Court agreed and reversed:

1. "In cases in which paternity is unknown, section 409.256, Florida Statutes, gives the Department the option to either commence paternity and support proceedings at the same time, or commence a paternity proceeding first, and if paternity is established, follow up with a support proceeding . . . If the Department chooses the latter option, it must provide separate notices for the paternity proceeding and the support proceeding . . . The Department need not obtain separate orders, but may await a combined paternity and support order at the conclusion of the support proceeding."

2. "The Department asserts that where, as in this case, it chooses the two-step statutory process, the 24–month retroactive support period under section 61.30(17) should be calculated from the date on which the notice of paternity proceeding was served on the putative father. We agree."

3. "But while the Department reasons that the later notice of support proceeding essentially amends—and thus, relates back to—the notice of paternity proceeding, we conclude, instead, that section 409.256(4) creates a bifurcated administrative proceeding that begins with service of the notice of paternity proceeding."

4. "[U]nder the procedure set forth in section 409.256(4), service of a notice of paternity proceeding commences the administrative action. The issue of paternity is determined first, and if established, the father's support obligation is then determined. The support proceeding is thus part two of an ongoing overall administrative action, the goal of which is to ensure the child's biological father pays child support."

5. "Section 61.30(17), as well, supports using the service date of the notice of paternity proceeding to determine the retroactive period . . . If section 61.30(17) permits retroactive child support for a 24–month period preceding the date a paternity action was filed in circuit court, the service date of the notice of paternity proceeding likewise should be the operative date for administrative proceedings in which the Department uses the bifurcated procedure in section 409.256(4)."

6. "Accordingly, we reverse and remand for the ALJ to recalculate the Appellee's retroactive support obligation using the date the Department served Appellee with the notice of paternity proceeding—July 12, 2011—to determine the retroactive period."

Dept. of Revenue v. LaGree, 106 So.3d 534 (Fla. 1st DCA 2013)

ADMINISTRATIVE TRIBUNAL'S CALCULATION OF FATHER'S RETROACTIVE SUPPORT OBLIGATION ERRONEOUS IN THAT IT INCLUDED CREDIT FOR "IN KIND CONTRIBUTION" OF CHILD REARING RESPONSIBILITIES; TRIBUNAL HAD NO INHERENT AUTHORITY TO FASHION AN EQUITABLE REMEDY NOT SPECIFICALLY PROVIDED FOR IN APPLICABLE STATUTE.

On previous appeal, an administrative support order in this case was reversed based on the ruling that section 61.30(11), Florida Statutes, did not provide authority to deviate from the statutory child support guidelines for equitable reasons when no documented parental time-sharing plan was in place. On remand, the administrative law judge established the Father's current child support obligation in accordance with the child support guidelines in section 61.30. However, the calculation of his retroactive child support obligation included credit for his "in-kind contribution" of child-rearing responsibilities in an amount of $352.00. The Department of Revenue appealed. The District Court reversed:

1. "[T]here is no provision in the statute allowing credit for 'in-kind contribution of child-rearing responsibilities' to be applied to a retroactive child support obligation, as the administrative law judge ordered in this case."

2. "Because retroactive child support is a creature of statute, calculations, including credits, are governed solely by the provisions of the statute and the administrative tribunal has no inherent authority to fashion an equitable remedy not specifically provided for in the applicable legislative enactment."

3. "The concept of crediting one parent's retroactive child support obligation with a monetary value for days and nights spent with the child in a proportion indicating that the child 'visited' that parent is not consistent with the current public policy of this state, described in section 61.13(2)(c)1. & 2., Florida Statutes, 'that each minor child has frequent and continuing

contact with both parents' and that 'parental responsibility for a minor child shall be shared by both parents' unless detrimental to the child."

4. "A father's parenting time with his child is both his right and responsibility."

5. "Chapter 61 purposely does not relegate any parent to 'visitor' status and monetary credit for time spent on child-rearing prior to a court-ordered or court-approved parenting plan should not be presumed to be an extraordinary expenditure by that parent."

6. "In light of the foregoing, the portion of the final administrative support order after remand awarding [the Father] credit of $352.00 toward his retroactive child support obligation is hereby reversed."

Dept. of Revenue v. Ingram, 112 So.3d 169 (Fla. 1st DCA 2013)

RETROACTIVE CHILD SUPPORT CALCULATION ERRONEOUS WHERE COURT IGNORED FORMER HUSBAND'S FAILURE TO PAY ALIMONY, RESULTING IN ERRONEOUS REDUCTION IN FORMER HUSBAND'S INCOME AND INCREASE IN FORMER WIFE'S; TO THE EXTENT CHILD SUPPORT CALCULATIONS ARE RETROACTIVELY REDUCED ON REMAND, THEY CAN BE SET OFF BY ALIMONY ARREARAGE.

A final judgment modifying child support was entered that reduced the amount of child support payments owed to the Former Wife retroactive to the date of the original filing. With regard to the retroactive child support calculations, the child support worksheets in the record reflected that the Former Husband paid his alimony every month from November 2009 through May 2012 when, in actuality, he did not. An audit performed by the Escambia County Clerk reflected that the Former Husband's alimony payments were over $12,000 in arrearage. The Former Wife appealed various aspects of the judgment. The District Court held:

1. "Because the court ignored the unpaid alimony payments, there was an erroneous $600 reduction in the former husband's income and a $600 increase in the former wife's income."

2. "[S]et offs against support obligations are permitted 'in those limited circumstances where that party can show compelling equitable criteria and considerations justifying such set off.'"

3. "We find that equitable circumstances exist warranting the trial court's ruling because, if the alimony arrearage was not set off against the child support 'overpayment' by virtue of the retroactive reduction, the Former Wife would have an even greater financial burden owed to the Former Husband."

4. "Therefore, even though the trial court's calculation of retroactive child support is remanded for recalculation, to the extent the child support calculations are retroactively reduced, they can be set off by the alimony arrearage."

5. "On remand, the trial court should cap the amount to be deducted from the Former Husband's future child support obligations as offset for his retroactive child support overpayments. This is to ensure that the children's continuing support needs will be met, while simultaneously amortizing the sum of child support overpayments owed to the Former Husband."

Marlowe v. Marlowe, 123 So.3d 1194 (Fla. 1st DCA 2013)

Second District

Third District

Fourth District

REVERSAL REQUIRED WHERE TRIAL COURT FAILED TO DEMONSTRATE HOW SUPPORT ARREARAGE AMOUNT WAS CALCULATED; REMAND FOR MORE SPECIFIC FINDINGS.

In these post-judgment proceedings, it was determined that the Former Husband was behind on support payments in the amount of $18,506.19, according to the Support Enforcement Ledger. However, the Former Wife testified that the amount owed totaled $19,246. She indicated that her testimony was the product of calculations that she herself had prepared. She went through each payment that she received. However, there was no additional indication as to how this amount was established. Ultimately, the trial court established that the purge amount was $19,246. Reversing the calculation of the arrearage amount, the District Court held:

1. "'Absent competent, substantial evidence to show the basis for th[e] amount of support arrearages,' reversal and remand for more specific findings is appropriate."

2. "Because of the failure to demonstrate how the $19,246 in arrearages was calculated, we reverse on this issue and remand for more specific findings as to how the amount was calculated."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN DENYING HUSBAND'S MOTION TO CONTEST INTERCEPTION OF HIS FEDERAL TAX RETURN TO OFFSET RETROACTIVE CHILD SUPPORT ON THE BASIS THAT ARREARAGES ARE REQUIRED TO BE REPORTED TO DEPARTMENT OF TREASURY WHERE RETROACTIVE CHILD SUPPORT NOT OTHERWISE OVERDUE DOES NOT CONSTITUTE AN ARREARAGE/DELINQUENCY AND THUS CAN NOT SERVE AS THE BASIS FOR INTERCEPTING FATHER'S TAX RETURN

In the final judgment of dissolution of marriage herein, the Husband was ordered to pay $1,259.54 a month in child support and an additional $200 per month towards $20,536.20 in retroactive support. Although he remained current in his payments, he later received a letter from the Office of Child Support Enforcement ("OCSE") stating that his federal tax refund was subject to interception because of past-due support owed. The letter further stated: "You have a right to contest our determination that this amount of past due support is owed, and you may request an administrative review. To request an administrative review, you must contact us at the address or phone number listed above within 30 days of the date of this notice."

The Husband filed motions in the trial court challenging the letter and the subsequent interception of his federal income tax refund, alleging that he had called OCSE and was informed that his case would not be submitted to the Department of Treasury, only to find out later that it was. In contesting the interception on the merits, the Husband drew a distinction between retroactive support and past-due arrearages. Nonetheless, the trial court denied relief. It did not rule that he had failed to exhaust administrative remedies, rather that the arrearages were required to be reported to the Department of Treasury.

The Husband appealed the order denying his motion. For the first time on appeal, the Wife contended that the Husband had failed to exhaust his administrative remedies and was thus requesting an affirmance based upon a "right for the wrong reason" analysis. The District Court held that the Wife had waived the right to assert failure to exhaust administrative remedies; and, on the merits addressed by the trial court, reversed:

1. "Florida Administrative Code Rule 12E–1.014(4)(e) states, 'If the obligor does not ask for an informal review or administrative hearing within 30 days from the date of the notice, the obligor waives the right to contest the certification.'"

2. "'[I]f adequate administrative remedies are available, it is improper to seek relief in court before those remedies are exhausted….'"

3. "On this record, however, it appears that [the Husband] exhausted his remedies. He claims that he called the OCSE, as allowed by the letter [that] informed him of his right to review."

4. "The Department did not raise the exhaustion requirement at trial. The court ruled on the merits of the motion, not on exhaustion."

5. "Where the party asserts facts which would support exhaustion, and the Department does not challenge the exhaustion requirement in the trial court, the Department has waived any challenge on appeal."

6. "On the merits, we reverse, relying on [an earlier case] which explained that 'retroactive child support that is not otherwise overdue does not constitute a delinquency' and thus cannot serve as a basis for intercepting federal tax returns."

Fei Xu v. Dept. of Rev. ex rel. Ning Zhang, 128 So.3d 891 (Fla. 4th DCA 2013)

Fifth District

RELIEF FROM CHILD SUPPORT PAYMENTS GRANTED BY STATUTE TO DISESTABLISHED FATHER DOES NOT INCLUDE RELIEF FROM CHILD SUPPORT ARREARAGES.

The Father and Mother were never married to each other. The Mother gave birth to A.J.H. in 2001 and both parties executed his birth certificate, declaring themselves his natural parents. In May 2005, the Mother brought a paternity action against the Father resulting in a paternity judgment that found Father was the child's father. By separate order, the Father was ordered to pay $751 in monthly ongoing child support and $49 monthly toward the $20,277 in child support arrearages.

In early 2011, DNA test results revealed that Father was not the child's biological father. As a result, pursuant to section 742.18, Florida Statutes (2011), the Father filed a petition to disestablish paternity. Following a hearing, the trial court granted his petition and entered an order disestablishing his paternity and terminating his ongoing child support obligation, but continuing to hold him responsible for the previously determined support arrearage.

On appeal, the Father contended that the trial court erred by concluding that under section 742.18, Florida Statutes, he remained responsible for previously adjudicated child support arrearages. He argued that the plain meaning of "prospective child support payments" includes all future payments, regardless of whether such payments are for ongoing support or arrearages. Thus, he contended that the statute absolves a disestablished father of the obligation to pay previously established but unpaid child support arrearages. The Father also suggested that the

legislature specifically employed language relieving the disestablished father from prospective "payments" as opposed to prospective "obligations," evidencing the intent that successful application of the statute ceases all prospective payments, including those for arrearages. The District Court disagreed and affirmed:

1. "When a statute's language conveys a clear and definite meaning, the statute is given its plain and obvious meaning . . . However, when reasonable differences exist as to the meaning or application of a statute, the rules of statutory construction control its interpretation."

2. "When construing a statute, it must be considered in its entirety and all parts of a statute read together in order to achieve a consistent whole."

3. "Here, we conclude there is a reasonable question as to whether 'prospective child support payments' include arrearages."

4. "Section 742.18(5) specifically confirms all previous legal actions based on the father's status prior to disestablishment, and disallows its use to recover previously paid child support. By confirming past lawful actions, the statute, by its plain language, supports the continued efficacy of the previous arrearage order entered by the court."

5. "Courts generally hold that money judgments are final, and not prospective, even when they compel future payments of the judgment . . . Consequently, even when a money judgment is prospective in the sense that it remains unpaid, such a judgment is nevertheless a final order and not prospective for purposes of relief under section 742.18."

6. "Thus, we hold that the relief from prospective child support payments granted by section 742.18 to disestablished fathers does not include relief from arrearages."

7. "Still, [Father] suggests that the legislature specifically employed language relieving the disestablished father from prospective 'payments' as opposed to prospective 'obligations,' evidencing the intent that successful application of the statute ceases all prospective payments, including those for arrearages. We again disagree."

8. "Section 742.18 indicates the intent to relieve the disestablished father of future obligations, not previously established support, and, despite the statute's failure to employ that specific term, courts, in dicta, have suggested as much."

Hickman v. Milsap, 106 So.3d 513 (Fla. 5th DCA 2013)

E. Amount

First District

TRIAL COURT ERRED BY FAILING TO REDUCE FATHER'S CHILD SUPPORT BASED ON SUBSTANTIAL TIMESHARING; SUCH A REDUCTION IS MANDATORY WHEN A TIMESHARING SCHEDULE PROVIDES FOR CHILD TO BE WITH NON-RESIDENTIAL PARENT FOR A SUBSTANTIAL AMOUNT OF TIME.

Reversing the trial court's failure to reduce the Father's child support obligation based on substantial timesharing with the minor child, the District Court held:

1. "The Father argues, and we agree, that the trial court erred in failing to reduce the Father's child-support obligation under section 61.30(11)(b), Florida Statutes (2011), based on the time-sharing schedule the court ordered."

2. "As did the court in *Buhler v. Buhler*, . . . we note that this reduction is mandatory when the time-sharing schedule provides for the child to be with the non-residential parent for a substantial amount of time, as that concept is defined in the statute."

3. "If the Father does not regularly exercise a substantial amount of time-sharing with the child, the Mother may seek modification of the child-support order on that basis . . . At this time, however, we reverse and remand for application of the section 61.30(11)(b) variance."
Garren v. Oliver, 108 So.3d 1158 (Fla. 1st DCA 2013)

ADMINISTRATIVE LAW JUDGE ERRED IN FAILING TO INCLUDE DENTAL INSURANCE COSTS IN SUPPORT CALCULATION; HOWEVER, STATUTORY CALCULATION PROCEDURE REQUIRES THAT FULL COST OF CHILD CARE BE TAKEN INTO ACCOUNT ONLY AFTER BASIC SUPPORT OBLIGATION HAS BEEN CALCULATED.

The parties separated when their daughter was less than three months old, and the Father later remarried. His wife, a member of the armed forces, is required to relocate frequently, thus his employment changes frequently. After the Father's most recent relocation, his hourly wage decreased and he filed a petition for modification of his child support. During the pendency of the modification proceedings, which requested modification the Mother objected to, two intervening events occurred: the Father's wages rose close to their original level; and, the Father was able to obtain a court-ordered time-sharing plan through which his daughter would reside with him for thirty-eight percent of the year. As such, the Department of Revenue determined not to modify the child support order because of his increased earnings, and the Father properly sought an administrative remedy. Both parties attended a hearing at the Division of Administrative Hearings. There, it was determined that a modification was appropriate because of the intervening time-sharing order, and a final support modification order was issued. The Father appealed, arguing that the Administrative Law Judge ("ALJ") erred in failing to include dental insurance costs in the support calculation and contesting the Mother's claim of child care expenses of $100 per month despite the new time-sharing arrangement. The District Court affirmed in part and reversed in part:

1. "At the hearing, the ALJ accepted the testimony as to the cost of the insurance and indicated the amount would be included in the calculation; it appears the cost was inadvertently omitted from the order."

2. "On remand, the calculation of child support should include the expense for dental insurance and credit to [the Father] for prepaying the premium."

3. "[The Father] suggests the [M]other's cost—$100 per month—was falsified; this is a question of credibility on which we defer to the finder of fact…. As the record contains competent, substantial evidence to support the mother's claim, we will not disturb the factual finding."

4. "[T]he ALJ indicated the calculation of basic support included a reduction for the reduced time spent with the Mother's child care provider. However, the statutory calculation procedure requires that the full cost of child care be taken into account only after the basic support obligation has been calculated…. Thus, the reduction in basic support did not capture any change in child care costs."

5. "[The Mother] suggests we remand for a determination of what the new cost per month is—leaving it to the ALJ to determine whether the monthly cost has been reduced for the

time the child spends away from the Mother, or whether the cost is fixed regardless of days actually spent in day care. We agree."

6. "[T]he ALJ appears to have been laboring under the assumption that [child care expenses] w[ere] accounted for as part of the basic obligation. It was not. [The Mother] concedes error; on remand, the ALJ should determine the Father's monthly cost of child care using the same principles discussed above, and include the expense and a credit for prepayment in the calculation of support."

7. "[W]e direct the ALJ on remand to calculate retroactive child support using the Father's income for the periods between the date of the Proposed Administrative Order to Modify Administrative Support Order and the date of the order on appeal, and to apply the difference between this amount and the amount actually paid to the Father's retroactive support balance."

Hoover v. Dept. of Revenue, 114 So.3d 494 (Fla. 1st DCA 2013)

Second District

TRIAL COURT ABUSED ITS DISCRETION IN REQUIRING FORMER WIFE TO PAY FORMER HUSBAND THE PERCENTAGE OF THE TOTAL SUPPORT REFLECTED BY GUIDELINES AS ATTRIBUTABLE TO HER EVEN THOUGH SHE WAS TO HAVE CHILDREN 40% OF THE TIME, WHICH RESULTED IN FORMER HUSBAND HAVING THE BENEFIT OF 100% OF THE CHILD SUPPORT TO PROVIDE FOR THE CHILDREN ONLY 60% OF THE TIME, WHILE FORMER WIFE WOULD HAVE NO SUPPORT TO PROVIDE FOR THE CHILDREN DURING HER 40% OF THE TIME; TRIAL COURT'S FINDING OF AMOUNT OF HUSBAND'S INCOME NOT SUPPORTED BY THE RECORD

The Former Wife petitioned for the dissolution of the parties' fifteen-year marriage in June 2009. During the litigation, the trial court awarded the Former Wife $750 per month in temporary alimony. In the final judgment, the trial court awarded the Former Wife $1,300 per month in durational alimony. The trial court also found that the Former Wife had a monthly income of $300. Combining the durational alimony award and her monthly income, the court used the figure of $1,600 a month as the Former Wife's income for purposes of calculating child support. The trial court further determined that the Former Husband had a net monthly income of $3,500 a month, after deducting the $1,300 awarded as durational support. Both parties submitted to the trial court child support guidelines worksheets, and neither party used the $4,800 income figure for the Former Husband.

At trial, the Former Husband testified to the accuracy of the information contained in his amended financial affidavit, which showed the Former Husband's monthly income to be $4,753 after deducting the $750 in temporary alimony ordered by the court, or $5,503. When this amount is reduced by the $1,300 monthly durational alimony payment, the Former Husband's income for child support purposes is $4,203.

Additionally, per the terms of the final judgment, the Former Husband was to have the benefit of 100% of the child support to provide for the children only 60% of the time, while the Former Wife would have no support in providing for the children while she had them 40% of the time. Meanwhile, the Former Wife's monthly income was only $1,600 prior to paying child

support, while the Former Husband's was $4,203. The Former Wife appealed. The District Court reversed:

1. "The trial court… determined that the Former Husband had a net monthly income of $3,500 a month, after deducting the $1,300 awarded as durational support. This would suggest that the trial court found the Former Husband's monthly income to be $4,800 prior to the deduction of the court ordered support. However, such figure is not supported by the record."

2. "When this amount [($5,503)] is reduced by the $1,300 monthly durational alimony payment, the Former Husband's income for child support purposes is $4,203. Accordingly, the trial court abused its discretion in establishing the incomes of the parties for the purpose of calculating child support."

3. "Additionally, the trial court abused its discretion in requiring the Former Wife to pay the Former Husband the percentage of the total support reflected by the guidelines as attributable to her even though she was to have the children 40% of the time."

4. "This error is exacerbated by the fact that the Former Wife's monthly income was only $1600 prior to paying child support, while the Former Husband's monthly income prior to any child support consideration was $4203."

5. "Although the Former Husband attempts on appeal to explain factors the trial court may have considered in deciding to order the Former Wife to pay child support to the Former Husband, the factors suggested are not properly considered in determining child support."

Bazzel v. Bazzel, 109 So.3d 1250 (Fla. 2d DCA 2013)

IN CALCULATING CHILD SUPPORT OBLIGATION, TRIAL COURT ERRED IN DEDUCTING AN AMOUNT FROM FATHER'S GROSS INCOME BASED ON A COURT-ORDERED SUPPORT OBLIGATION TO ANOTHER CHILD WHERE EVIDENCE ESTABLISHED THAT FATHER HAD NOT BEEN PAYING SAME.

The final judgment ordered the Father to pay child support in the amount of $23.37 per month. In arriving at this figure, the court subtracted the amount of a prior court-ordered child support obligation from the Father's imputed gross income. This left a monthly net income of $563.20. The court also ordered retroactive child support based on the $23.37 per month figure. Attached to the final judgment was a child support worksheet indicating that $541.67 was deducted from the Father's gross income of $1256.67 for "legally ordered child support." At the final hearing, the Father testified that he was current on the child support ordered in the other case, and as a result, the trial court deducted that child support figure from his imputed income. At the time of the final hearing, the Father was unemployed and the court imputed income to him.

In its motion for rehearing, the Department of Revenue alleged that a review of the Father's payment records revealed that he was delinquent in the amount of $81,720 and in arrears in the amount of $6,820 with regard to the payment of his prior child support obligation. At the hearing on the Department's motion, the Father's first wife testified that he was current on his child support payments to her and that he paid her directly. However, on cross-examination she testified that she had not received any child support payments from the Father since December 2010. In lieu of payments, he had been working around her house. She also testified that prior to December 2010, the Father's child support payments varied in amount.

Following rehearing, the court entered an order finding that "as long as [the first wife] is willing to bring an action [to] zero out the account balance as reflected in the domestic relations

[case] number [2001–DR–006310] the [father] should be given credit for that child support obligation in the current case in accordance with Florida Statute 61.30(3)(f)." The court then deferred ruling on the Department's motion for rehearing for several days to give the first wife time to take action to reduce the account balance to zero. The court did not order the Father to pay the arrearages or delinquent amount.

Although nothing in the record indicates whether or how the trial court received notice of a zero balance in case 2001–DR–006310, on June 13, 2011, the court entered the final judgment deducting the child support ordered in case 2001–DR–006310 from the Father's income. The Department appealed. The District Court reversed:

1. "One of the listed deductions [of Section 61.30, Florida Statutes (2011)] is 'court-ordered support for other children which is actually paid.' Here, it is uncontested that the Father was under court order to pay child support in case 2001–DR–006310. The issue is whether he actually paid that support."

2. "The intent and meaning of section 61.30(3)(f) require no explanation…. The phrase 'actually paid' is not ambiguous; it has only one reasonable interpretation…. Thus, we give the statute 'its plain and obvious meaning' and do not 'extend, modify, or limit [ ] its express terms or its reasonable and obvious implications.'"

3. "Just as '[t]he obligation to support children not subject to any prior support action is not listed as an allowable deduction'… neither is court-ordered support which is not paid, is in arrears, or is delinquent."

4. "Because the record conclusively established that the Father had not actually paid his court-ordered child support obligation in case 2001–DR–006310 at the time of the rehearing, and the court did not order him to pay the arrearages and delinquent amounts, our conclusion is that the Father did not actually pay the court-ordered child support."

5. "As a result, the trial court reversibly erred in deducting $541.67 from the Father's income to determine his child support obligation in the current case."

Dept. of Revenue v. S.J.W., 113 So.3d 85 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN FAILING TO INCLUDE PROVISIONS IN FINAL JUDGMENT FOR HEALTH INSURANCE FOR MINOR CHILDREN AND ADDRESSING COST OF NON-COVERED MEDICAL, DENTAL, AND PRESCRIPTION EXPENSES.

The final judgment herein mentioned neither health insurance for the minor children nor their out-of-pocket medical expenses. The Wife appealed. In this regard, the District Court reversed:

1. "Although the child support guidelines worksheet notes what the Husband pays for the children's health insurance, there is no language in the final judgment mandating that he continue to pay for their insurance."

2. "The Husband acknowledges that the final judgment does not contain a provision for the children's health insurance but contends that any error is harmless because he does pay for their health insurance."

3. "We do not agree that the error is harmless because… '[e]ven if the husband is providing insurance, this does not abrogate the requirement of making it a legal obligation pursuant to the final judgment.'"

4. "We therefore remand the case for the trial court to include in the final judgment language stating that the Husband is required to pay for the health insurance for the minor children and to also apportion to the parties in the order for support the cost of any non-covered medical, dental, and prescription medication expenses of the children."
Harris v. Harris, 114 So.3d 1095 (Fla. 2d DCA 2013)

ABUSE OF DISCRETION TO INCREASE CHILD SUPPORT BY FIVE PERCENT DEVIATION ABSENT EVIDENCE THAT THE COURT CONSIDERED ANY STATUTORY FACTORS.

In its supplemental final judgment, the trial court included two upward deviations from the guidelines' figure, stating that "the court shall deviate from the child support guidelines by the [five percent] permitted without extraordinary circumstances required and shall further deviate by requiring an additional [five percent] as a result of the Husband's limited timesharing with children." The order on appeal includes the finding that "child support based on [the former husband's monthly] income of $23,000 will dramatically decrease the former wife's child support income and make it difficult for the former wife to meet her financial obligations." The trial court made no oral findings on the record at the hearing on the former husband's petition for modification. The District Court held:

1. "Although not entirely clear, it appears the court may have deviated from the presumptive child support figure based upon the former wife's purported monthly deficit in the event the child support significantly decreased."

2. "While we recognize that specific findings are not required for a five percent deviation… neither the record nor the order in this case indicates that the court considered any of the statutory factors in increasing the presumptive child support obligation by five percent. Therefore, the trial court abused its discretion in ordering the deviation."
Cash v. Cash, 122 So.3d 430 (Fla. 2d DCA 2013)

ABUSE OF DISCRETION TO INCREASE CHILD SUPPORT BY AN ADDITIONAL FIVE PERCENT DEVIATION BASED ON FORMER HUSBAND'S LIMITED TIMESHARING WITH CHILDREN.

In its supplemental final judgment, the trial court included two upward deviations from the guidelines' figure, stating that "the court shall deviate from the child support guidelines by the [five percent] permitted without extraordinary circumstances required and shall further deviate by requiring an additional [five percent] as a result of the Husband's limited timesharing with children." The order on appeal includes the finding that "child support based on [the former husband's monthly] income of $23,000 will dramatically decrease the former wife's child support income and make it difficult for the former wife to meet her financial obligations." The trial court made no oral findings on the record at the hearing on the former husband's petition for modification. The District Court held:

1. "The trial court also abused its discretion in ordering a second five percent deviation."

2. "The supplemental final judgment states only that the court is deviating from the guidelines by and 'additional [five percent] as a result of the [former] husband's limited time sharing with the children.' Section 61.30(1) mandates that a deviation in excess of five percent

must be supported by 'a written finding explaining why ordering payment of such guideline amount would be unjust or inappropriate.' Here, the court's finding is insufficient."
Cash v. Cash, 122 So.3d 430 (Fla. 2d DCA 2013)

ABUSE OF DISCRETION TO DETERMINE HUSBAND'S MONTHLY INCOME BY ADDING EXISTING CHILD SUPPORT OBLIGATION; IF RELYING ON NON-RECURRING INCOME TO DETERMINE MONTHLY INCOME, COURT MUST FIRST DETERMINE THAT RECURRING INCOME IS INSUFFICIENT TO MEET HIS CHILDREN'S NEEDS.

Trial court found the former husband's gross monthly income to be $23,000, although his financial affidavit introduced into evidence at the hearing indicated a monthly income of $17,677.50. The court found his purported income to be speculative but did not rely on the 2010 income to establish his net monthly income; instead, the court determined the income by adding the existing child support obligation of $5,000 to his monthly expenses of $18,000. The District Court held:

1. "Neither monthly expenses nor existing child support obligations are listed as figures to be used in income determination. And while the statutory language list is not inclusive, none of the statutory factors are payments, liabilities, or expenditures."

2. "The uncontradicted evidence at the hearing established that a significant portion of the former husband's 2010 income was nonrecurring, the result of a business sale garnering $73,500 for the former husband. To the extent the court did, or may on remand, rely on the former husband's nonrecurring income to determine his monthly income, the court must first determine that the recurring income is insufficient to meet the children's needs."
Cash v. Cash, 122 So.3d 430 (Fla. 2d DCA 2013)

REMAND REQUIRED FOR CORRECTION OF MATHEMATICAL ERROR IN CHILD SUPPORT RESULTING IN EXCESS AWARD; NO MERIT TO MOTHER'S CLAIM THAT FATHER FAILED TO PRESERVE THIS ERROR BY NOT FILING A MOTION FOR REHEARING.

Shortly after the child's birth, the Father filed a petition to establish paternity. Following mediation, both parties sought an award of child support in the trial court. In the final judgment of paternity, the trial court found that the Mother was entitled to child support and awarded her an arrearage based on its determination and the Father's previous support payments. However, the trial court made a mathematical error when it calculated the amount of the child support arrearage at $4,050, instead of $3,050. The Father appealed. In this regard, the District Court reversed:

1. "[The Mother] argues that [the Father] failed to preserve this error for appellate review by electing not to file a motion for rehearing. While other district courts have required parties complaining on appeal about inadequate findings in dissolution cases to bring the alleged defect to the trial court's attention in a motion for rehearing in order to preserve the issue for appeal, this court has not yet decided the preservation issue in the broader context…. However, we previously declined to extend this line of reasoning to claims of mathematical error appearing on the face of a final judgment."

2. "Here, it is clear from the final judgment that the circuit court intended to calculate the arrearage based on a finite monthly award of $410 for child support, and that according to the court's determination of [the Fahter's] historical support payments the arrearage should have totaled $3050, not $4050."

3. "Because the imposition of the extra $1000 is not supported by competent, substantial evidence, we reverse and remand for the court to correct its mathematical error."

B.K. v. S.D.C., 122 So.3d 980 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN FAILING TO INCLUDE CHILD SUPPORT GUIDELINES WORKSHEET IN CHILD SUPPORT ORDER.

Following the final hearing in this action by the Department of Revenue for the establishment of paternity, child support, and other relief, the trial court entered its final judgment, which listed the father's net monthly income as $3,322.88, imputed to the Mother a net monthly income of $1,051.20, denied retroactive support, and ordered the Father to pay $600 monthly by income deduction order. The trial court decided to deviate from the child support guidelines, and provided the following observation: "Respondent requests deviation due to the fact that he has chosen not to pursue parenting time which [sic] this child does not know him [and] that he was unaware the child was not adopted, which is plausible, as adoption records are sealed. There is no showing of need for this child who was to be adopted [and] the potential retroactive period has been extended by Petitioner's delay at compliance with discovery." A child support guidelines worksheet, however, was not attached to the final judgment. The Father appealed, and the District Court reversed on this and other grounds:

1. "The trial court erred in failing to include in its order a child support guidelines worksheet."

2. "The only guidelines worksheet in the record is that of the Department, which shows a higher amount for the father's net monthly income. Consequently, the final judgment fails to show how the trial court calculated the child support amount."

3. "Moreover, our record does not detail how the trial court arrived at its $600 monthly support obligation, an amount more than 12% less than the Department requested."

Dept. of Revenue v. B.J.M., 127 So.3d 859 (Fla. 2d DCA 2013)

FACTORS RELIED UPON BY TRIAL COURT (SPECIFICALLY, THAT FATHER AND CHILD DID NOT KNOW EACH OTHER) DID NOT SUPPORT DOWNWARD DEVIATION FROM GUIDELINES.

In November 2010, the Department of Revenue filed a petition to establish paternity, child support, and other relief. The petition sought current and retroactive child support from the Father. The Mother and child lived in North Carolina. She was unemployed, with income coming from support and supplemental security income payments for her other children. She earned $400 a month in her last job, which she lost and had been unable to find another. The Father, on the other hand, was employed, earned $39,327.79 in 2010, and was currently earning a net monthly income of $2,587.76.

The child, L.W.M., was born on January 31, 2000. The Father agreed to an adoption that did not happen. The Mother then married another man soon after the child's birth, and the Father again consented to adoption by the new husband. The mother and then-husband later divorced,

however, and that adoption never went through. At the final hearing herein, the Father argued that the Mother was not entitled to retroactive support because, believing that the child would be adopted, he never sought a relationship with the child. At the time of the final hearing, the child was twelve years old.

At the final hearing, in February 2012, the Department filed a proposed child support guidelines worksheet that listed the Mother's net monthly income as $1,051.20, imputing North Carolina minimum wage, and the Father's at $3,527.42. The Department computed the Father's child support obligation at $675.64 per month. The Father did not submit a separate child support guidelines worksheet, but asked the trial court to deviate downward from the guidelines, arguing that even though he could seek visitation, which would lower his child support obligation, he was not doing so in the child's best interests because the child did not know him. In the end, he believed that the support amount was too large and that support should be handled privately. The trial court took the matter under advisement. Ultimately, The trial court deviated from the child support guidelines with the following observation: "Respondent requests deviation due to the fact that he has chosen not to pursue parenting time which [sic] this child does not know him [and] that he was unaware the child was not adopted, which is plausible, as adoption records are sealed. There is no showing of need for this child who was to be adopted [and] the potential retroactive period has been extended by Petitioner's delay at compliance with discovery." The final judgment listed the Father's net monthly income as $3,322.88, imputed a net monthly income of $1,051.20 to the Mother, denied retroactive support, and ordered the father to pay $600 a month by income deduction order.

The Department appealed, and the District Court reversed: "We do not agree with the father that section 61.30 authorizes a reduction based on the facts relied on by the father.' *Krufal v. Jorgensen*, 830 So.2d 228, 229 (Fla. 4th DCA 2002)."
Dept. of Revenue v. B.J.M., 127 So.3d 859 (Fla. 2d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ORDER SUPPORT RETROACTIVE TO AT LEAST DATE OF CHILD SUPPORT PETITION; NEITHER FACT THAT MOTHER REPRESENTED THAT CHILD WOULD BE ADOPTED NOR HER DELAY IN DISCOVERY COMPLIANCE JUSTIFIED THE DENIAL.

In November 2010, the Department of Revenue filed a petition to establish paternity, child support, and other relief. The petition sought current and retroactive child support from the Father. The Mother and child lived in North Carolina. She was unemployed, with income coming from support and supplemental security income payments for her other children. She earned $400 a month in her last job, which she lost and had been unable to find another. The Father, on the other hand, was employed, earned $39,327.79 in 2010, and was currently earning a net monthly income of $2,587.76.

The child, L.W.M., was born on January 31, 2000. The Father agreed to an adoption that did not happen. The Mother then married another man soon after the child's birth, and the Father again consented to adoption by the new husband. The mother and then-husband later divorced, however, and that adoption never went through. At the final hearing herein, the Father argued that the Mother was not entitled to retroactive support because, believing that the child would be adopted, he never sought a relationship with the child. At the time of the final hearing, the child was twelve years old.

In November 2010, the Department of Revenue filed a petition to establish paternity, child support, and other relief. The petition sought current and retroactive child support from the Father. The Mother and child lived in North Carolina. She was unemployed, with income coming from support and supplemental security income payments for her other children. She earned $400 a month in her last job, which she lost and had been unable to find another. The Father, on the other hand, was employed, earned $39,327.79 in 2010, and was currently earning a net monthly income of $2,587.76.

At the final hearing, in February 2012, the Department filed a proposed child support guidelines worksheet that listed the Mother's net monthly income as $1,051.20, imputing North Carolina minimum wage, and the Father's at $3,527.42. The Department computed the Father's child support obligation at $675.64 per month. The Father did not submit a separate child support guidelines worksheet, but asked the trial court to deviate downward from the guidelines, arguing that even though he could seek visitation, which would lower his child support obligation, he was not doing so in the child's best interests because the child did not know him. In the end, he believed that the support amount was too large and that support should be handled privately. The trial court took the matter under advisement. Ultimately, The trial court deviated from the child support guidelines with the following observation: "Respondent requests deviation due to the fact that he has chosen not to pursue parenting time which [sic] this child does not know him [and] that he was unaware the child was not adopted, which is plausible, as adoption records are sealed. There is no showing of need for this child who was to be adopted [and] the potential retroactive period has been extended by Petitioner's delay at compliance with discovery." The final judgment listed the Father's net monthly income as $3,322.88, imputed a net monthly income of $1,051.20 to the Mother, denied retroactive support, and ordered the father to pay $600 a month by income deduction order.

The final judgment denied retroactive support. The Department appealed, and the District Court reversed:

1. "Finally, the trial court abused its discretion in failing to order support retroactive to at least the date of the petition."

2. "The adoption defense ceased with the filing of the petition because the Father was on notice that no adoption occurred."

3. "Because retroactive support is based on the child's need and the parent's ability to pay at the time of filing… the [Mother's] delay in discovery compliance is irrelevant. "

4. "Moreover, if the [Mother] had produced the discovery when due, the support order would have issued sooner and support for the time between the discovery due date and the production date would have been prospective instead of retroactive."

5. "It is evident from the record that the child was in need and the father had the ability to pay; the father was earning more than $39,000 per year, the mother was unemployed, and the child was receiving Medicaid benefits from North Carolina."

Dept. of Revenue v. B.J.M., 127 So.3d 859 (Fla. 2d DCA 2013)

ERROR FOR TRIAL COURT TO DEVIATE FROM CHILD SUPPORT GUIDELINES WITHOUT SPECIFIC WRITTEN FINDINGS.

The Wife appealed from a final judgment in which the child support deviated more than 5% without written findings. The District Court held:

1. "Because the trial court failed to support its deviation from the child support guidelines with specific written findings, we reverse and remand for further proceedings addressing the child support award."

2. "Although the trial court has discretion to deviate from the child support guidelines, where the deviation is grater than five percent of the guideline amount the court must provide written findings supporting the deviation."

3. "There may be reasons to support the trial court's deviation from the guideline amount. However, the trial court did not explain why ordering payment of the guideline amount would be unjust or inappropriate as required under section 61.30(1)(a), and therefore we are compelled to reverse. On remand, if the trial court again elects to deviate from the guidelines by more than five percent, it must make the requisite findings pursuant to the statute."

Caudil-Rosa v. Rosa, 38 FLW D1969 (Fla. 2d DCA 2013)

Third District

Fourth District

TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER ECONOMIC EFFECTS OF FATHER'S OTHER CHILDREN AND ANTICIPATED COSTS OF TRAVEL ASSOCIATED WITH CHILD LIVING IN FLORIDA WITH MOTHER AND FATHER LIVING IN NEW JERSEY IN ITS CHILD SUPPORT AWARD.

In this paternity action, the Father lived in New Jersey, had a wife and two other children, and had a gross monthly income of $2,240.50 per month. The Mother, who lived in Florida, earned $11 per hour and had weekly day care costs of $20. The trial court entered a final judgment granting primary physical custody to the Mother and allowing the Father more liberal visitation, as well as granting the Mother child support. However, the trial court failed to take into consideration the economic effects of the Father's other two children and anticipated travel costs. In this regard, the District Court reversed:

1. "First, we reverse the child support award and remand to the circuit court to take into consideration the economic effects of the Father's other two children and anticipated travel costs under subsections 61.30(1)(a) & (11)(a)11, Florida Statutes (2010)."

2. "Subsection 61.30(1)(a) allows a court to vary a guideline amount of child support by 'plus or minus 5 percent, from the guideline amount, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent.'"

3. "Subsection 61.30(11)(a)11 allows a judge to 'adjust the total minimum child support award' based upon 'a reasonable and necessary existing expense or debt' or any other 'adjustment that is needed to achieve an equitable result.'"

Pope v. Langowski, 115 So.3d 1076 (Fla. 4th DCA 2013)

REMAND FOR RECALCULATION OF CHILD SUPPORT REQUIRED WHERE WIFE'S NET INCOME WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND WIFE ADMITTED AT TRIAL THAT FINANCIAL AFFIDAVIT UNDERSTATED HER TRUE INCOME

When making its calculation of child support herein, the trial court relied upon the Wife's Fifth Financial Affidavit to determine a net income of $24,407 per month. The Wife admitted at trial, however, that this affidavit understated her true income. The Wife's expert testified that her net income was actually about $67,000 per month. Although, the Wife also testified that she was facing an imminent decline in income. The Husband appealed the final judgment dissolving his marriage. As to child support, the District Court reversed:

1. "Child support awards must be supported by competent substantial evidence."

2. "In making an award of child support under section 61.30, Florida Statutes (2011), the trial court is required to determine the net income of each parent and to include adequate findings in the final judgment."

3. "Here, the trial court's determination of the Wife's net income was not supported by competent substantial evidence."

4. "The trial court relied upon the Wife's Fifth Financial Affidavit in determining that her net income was $24,407 per month. However, the Wife admitted at trial that this affidavit understated her true income."

5. "Further, the Wife's expert testified that [her] net income was actually about $67,000 per month. Even if the trial court believed the Wife's testimony that she was facing an imminent decline in income of about $20,000 a month due to increased expenses for her business, her net income would still be substantially higher than the figure the trial court used to calculate child support."

6. "We therefore reverse and remand for the trial court to make a determination of the Wife's income that is supported by the record and then to recalculate the child support award accordingly."

Addie v. Coale, 120 So.3d 44 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT ERRED IN DETERMINING CHILD SUPPORT WITHOUT CONSIDERING THE COST OF MEDICAL INSURANCE IN COMPUTING THE AMOUNT OF THE HUSBAND'S OBLIGATION.

In the underlying action herein, the trial court went beyond the dictates of the appellate court's mandate on remand by delving into matters previously reviewed and affirmed by the District Court in an earlier appeal between the parties. In the original case, the trial court failed to use the Father's 2006 income tax return to calculate his support obligation for that year, and attributed his wife's income ($89,915) to him in calculating his 2007 income. On remand, while the trial court did use the Father's 2006 tax return to calculate his support obligation for that year, the court's reconsideration of his 2007 income went beyond the deletion of his wife's income and instead was completely recalculated by crediting him with business losses previously considered and rejected in the original proceedings.

With regard to the consideration of the Father's medical insurance costs in calculating his income, the record showed that he testified at the initial hearing, and on remand, regarding the amount he paid for his health insurance and yet, despite his repeated requests that this cost be included in the calculation, it was not deducted from his gross income. On appeal, the Father noted the inherent unfairness in denying him that deduction while allowing the Mother to deduct the cost of hers from her gross income. On these two points, the District Court reversed:

1. "Because we examined the calculation of Father's 2007 income and affirmed that calculation (except for the improper inclusion of his wife's income) in the first appeal, the correction on remand only required the simple mathematical task of subtracting her income from Father's income for 2007."

2. "[W]e acknowledge, in fairness to the trial court, that [the earlier opinion] spoke in terms of failing 'to include the cost to Father of the health insurance that covered his child in calculating child support.' Therefore. [the earlier appeal] and the mandate that emanated from that appeal did not require inclusion of Father's health insurance in the calculation."

3. "We believe [the failure to allow the Father a deduction for his medical insurance costs] constitutes an error in need of correction based on notions of fairness and the statutory provisions that require the trial court 'to determine net income based upon section 61.30, Florida Statutes, by determining gross income as defined in subsection (2)(a) 1–14 and then subtracting from this figure allowable deductions as defined in subsection (3)(a)-(g).'"

4. "On remand, the trial court should allow the deduction to Father, just as it was allowed to Mother."

Russell v. McQueen, 115 So.3d 1084 (Fla. 5th DCA 2013)

TRIAL COURT ERRED IN BASING CHILD SUPPORT CALCULATION ON GROSS INCOME AMOUNTS.

In an appeal from the underlying dissolution of marriage proceedings, the Husband challenged several aspects of the final judgment, including the trial court's decision to base child support on the parties' gross income amounts. In this regard, the District Court reversed:

1. "The parties agree that the trial court erred in calculating child support by basing the calculation on gross income amounts."

2. "Based on the child support guidelines worksheet attached to the final judgment, the correct amount of child support is $140.65 per month."

Hodges v. Hodges, 128 So.3d 190 (Fla. 5th DCA 2013)

F. Imputed Income

First District

IN REDUCING AMOUNT OF CHILD SUPPORT OWED TO FORMER WIFE, TRIAL COURT IMPROPERLY IMPUTED MINIMUM WAGE INCOME TO HER WHERE THERE WAS NO FACTUAL BASIS FOR CONCLUSION THAT SHE WAS VOLUNTARILY UNDEREMPLOYED AND NO SUPPORT FOR DETERMINATION THAT SHE SHOULD BE WORKING 40 HOURS PER WEEK.

A final judgment modifying child support was entered that reduced the amount of child support payments owed to the Former Wife retroactive to the date of the original filing. In reducing the amount of child support owed, the trial court imputed minimum wage income to the Former Wife based on the conclusion that she was voluntarily under-employed and should have been working 40 hours per week. The Former Wife appealed various aspects of the judgment. With regard to the trial court's imputation of income to the Former Wife, the District Court held:

1. "Florida courts have consistently held that the imputation of income must be supported by factual findings as to the 'probable and potential earnings level, source of imputed and actual income, and adjustments to income.'"
2. "Particularized findings relating to the current job market, the party's most recent work history, occupational qualifications, and the prevailing earnings level in the local community are all required to support an imputation of income."
3. "Here, the trial court does not provide any factual basis for its conclusion that the Former Wife was voluntarily underemployed."
4. "Nor does the trial court provide any support for its determination that the Former Wife should be working 40 hours a week."
5. "The record is undisputed that the Former Wife is a homemaker with limited work experience, no marketable skills, and no resume."
6. "In fact, evidence shows that [she] was forced to leave her minimum wage job as a teacher's assistant because of child care issues with her youngest of seven children of this marriage."
7. "Without any factual findings, the imputation of income must be reversed and remanded."

Marlowe v. Marlowe, 123 So.3d 1194 (Fla. 1st DCA 2013)

Second District

ABUSE OF DISCRETION TO FAIL TO IMPUTE INCOME TO FORMER WIFE WHERE FORMER HUSBAND PRESENTED COMPETENT, SUBSTANTIAL EVIDENCE THAT FORMER WIFE WAS VOLUNTARILY UNDEREMPLOYED.

The parties were married in 2001 and their triplets were born in 2004. From 2000 until just after the triplets were born, the former wife worked for the former husband. At the time of the hearing, the former wife testified that she had recently started an internet store; that she had

looked for work in Charlotte County where available jobs would pay approximately eleven dollars an hour, but she had not been formally offered a job. She had a degree and had previously worked for the Fla. Dept. of Environmental Protection earning $26,000 annually. She had completed a night class in the legal assisting area and had previously worked as a legal assistant and thought she could go back to that. She believed the care for the children before and after school would cost $200 a week, making it disadvantageous to work. The trial court did not impute income to the former wife, finding that the evidence was insufficient to do so. The District Court held:

1. "Monthly income 'shall be imputed to an unemployed or underemployed parent when such [un]employment or underemployment is found by the court to be voluntary on that parent's part, absent circumstances over which the parent has not control….' Imputing income is a two-step analysis: (1) the determination of whether the parent's underemployment was voluntary, and (2) if so, the calculation of imputed income….' The decision to impute income and the determination of the amount of income to be imputed must be based on competent, substantial evidence presented at an evidentiary hearing.'"

2. "Although it did not expressly state whether the former wife was voluntarily or involuntarily unemployed, the trial court found that the evidence presented was insufficient to impute income to her. Given the mandatory language of the statute, the court's statement implicitly encompasses a finding that the former wife was involuntarily unemployed. However, none of the evidence presented at the hearing supports a finding of involuntary unemployment. The former husband presented competent, substantial evidence that the former wife is voluntarily unemployed."

3. "In addition, there was no evidence that the former wife has a physical or mental incapacity which would limit her ability to work."

4. "Thus, the court should have considered 'the employment potential and probable earnings level' of the former wife based upon 'her recent work history, occupational qualifications, and prevailing earnings level in the community.'"

5. "Further, '[a] court may impute income to a party who has no income or is earning less than is available to her based upon a showing that the party has the capability to earn more by the use of h[er] best efforts.'"

Cash v. Cash, 122 So.3d 430 (Fla. 2d DCA 2013)

Third District

Fourth District

TRIAL COURT WAS NOT REQUIRED TO IMPUTE INCOME TO MOTHER WHERE EVIDENCE SUPPORTED CONCLUSION THAT SHE WAS NOT VOLUNTARILY UNEMPLOYED; HOWEVER, FINDING THAT MOTHER WAS UNEMPLOYED BECAUSE OF AN AGREEMENT BETWEEN THE PARTIES THAT SHE WOULD NOT WORK UNTIL CHILD WAS OLD ENOUGH TO GO TO SCHOOL FULL-TIME WAS NOT SUPPORTED BY EVIDENCE.

The parties were married in 2003. They had a child in 2009. Shortly after the birth of the child, the marital difficulties intensified. The Wife commenced dissolution of marriage proceedings in June 2010. Following trial, a final judgment of dissolution of marriage was

entered. Therein, the court determined that it would not impute income to the Wife in its child support determination. The court found: "The Wife worked as a Deputy City Clerk prior to the marriage, earning approximately $40,000.00 per year. She has not worked since the birth of the minor child. Although she has the ability to go back to work, the Court believes that the parties agreed she would not do so, at least until the child is old enough to go to school (kindergarten) full time."

During trial, the Wife testified that she made $75,000 as a city clerk prior to the marriage. She maintained that the Husband asked her to quit her job and work for his medical practice, which she did even though she was paid less. Contrary to the trial court's findings, she worked after the child was born, returning to work a week after the birth. A few months later, the Husband fired her, and she has collected unemployment compensation ever since. The Wife has since gone on several interviews for positions in Broward and Palm Beach Counties without any results, and has also interviewed for two positions in Indian River County. The Husband appealed the trial court's decision not to impute income to the Wife based upon a finding that the parties had agreed she would not work during the child's early years. The District Court reversed:

1. "We could find no reference at all in the transcript to any such agreement, and it is contradicted by [the Wife] working immediately after the birth of the child and her continuing to search for work."

2. "Based upon the evidence presented, the court could have concluded that the [Wife] was not voluntarily unemployed, because no proof was offered that she refused to accept an available job."

3. "However, the court erred in determining that she was not employed based upon the agreement of the parties."

4. "The [Wife] is looking for, and indeed must find, gainful employment to support herself and the child. When she finds employment, the [Husband] may be entitled to seek modification, and the trial court's finding of a non-existent agreement that she not work until the child is school age would preclude his ability to do so."

5. ""We thus reverse that finding because it is not supported by competent substantial evidence."

Eckert v. Eckert, 107 So.3d 1235 (Fla. 4th DCA 2013)

IMPUTATION OF INCOME TO FORMER WIFE REVERSED AS NOT SUPPORTED BY FINDINGS OR EVIDENCE.

Reversing the trial court's imputation of income to the Former Wife, the District Court held:

1. "When imputing income at an amount other than the median income, a trial court is required to make specific findings, which are supported by competent substantial evidence."

2. "The trial court failed to make a finding as to whether Wife's unemployment was either voluntary or involuntary' it did not find whether she was able to obtain employment, only that she was able to seek employment."

3. "Former Wife explained that $36,000 is the starting salary for an entry level member of her profession. Her expert explained that a starting level employee in her position could make at minimum $25,000. Given this testimony, an imputation of income at a rate of $15,000 a year is unsupported by the evidence."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

Fifth District

G. Miscellaneous

First District

Second District

Third District

TRIAL COURT ABUSED ITS DISCRETION IN DENYING MOTHER LEAVE TO AMEND PETITION FOR MODIFICATION OF CHILD SUPPORT TO SEEK CHILD SUPPORT ON A PERMANENT BASIS FOR SEVERELY MENTALLY INCAPACITATED CHILDREN WHERE RECORD CONTAINED COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT AWARD ON A PERMANENT BASIS, BUT MAGISTRATE FOUND MOTHER WAS LIMITED BY RELIEF REQUESTED IN HER PETITION.

The Mother herein is a single mother of two severely handicapped children. She filed a pro se petition for upward modification of child support and sought to extend the Father's support responsibility until the children reached age twenty-five due to a substantial change in circumstances. The Mother, later represented by counsel, filed a motion for leave to amend her petition and attached a proposed amended petition wherein she requested that the trial court establish child support on a permanent basis due to a substantial change in circumstances. She also alleged that the request was in the best interests of the children because the children required constant care and supervision due to their severe disabilities. The trial court denied the motion without prejudice, but provided no reasons for its ruling. Thereafter, the Mother moved for reconsideration of the court's denial, which motion the trial court also denied.

At the hearing on the Mother's pro se petition, she and a school teacher testified. The children, one of whom was then seventeen and the other who was fifteen, have the intelligence and ability of an infant and a toddler. One of the children must take antipsychotic medication to control his behavior. The children cannot speak, understand when spoken to, feed themselves, dress, bathe, or use the restroom alone. The children must wear diapers, and they both need assistance and supervision twenty-four hours a day. The children attend a school for profoundly mentally handicapped individuals whose IQs range between 0 and 20.

The magistrate found that there was substantial, competent evidence that the children required support and were dependent, and that they were going to be dependent beyond the age of eighteen. The magistrate further found that the testimony regarding the handicap of the children was unrebutted. As such, the father's child support obligation was extended until the children reached the age of twenty-five. The magistrate noted that she would have extended the modification of child support on a permanent basis, but she was limited to the relief requested in the pending petition. The Mother appealed the trial court's order adopting the findings and recommendations of the magistrate. The District Court reversed:

1. "It cannot be said that the Mother abused the privilege to amend. Her motion for leave to amend was the first instance where she requested such relief."

2. "There is no issue of futility either. The Mother clearly stated a claim for relief because the children undeniably have a mental incapacity that requires permanent support."

3. "Nor does the record reflect that the motion for leave to amend would have caused any prejudice to the Father, the opposing party. Any prejudice would have certainly been remedied with a continuance, which the Father did not request."

4. "The interests of justice would have been served under these circumstances where the Mother mistakenly did not request child support on a permanent basis, to which she was entitled under these circumstances."

5. "Accordingly, we hold that the trial court abused its discretion when it denied the Mother leave to amend her petition for modification of child support."

6. "Given that the record contains competent, substantial evidence to support the magistrate's determination that the award should be on a permanent basis, it would be a waste of judicial resources to remand for another hearing on the amended petition."

7. "We therefore reverse the order under review with directions to grant the Mother's motion for leave to amend her petition for modification of child support consistent with the evidence introduced at the hearing before the magistrate."

8. "We further direct the court to enter judgment in the Mother's favor and award her child support on a permanent basis due to the mental incapacity of the children."

Santos v. Flores, 116 So.3d 518 (Fla. 3d DCA 2013)

Fourth District

Fifth District

VI. PARENTING PLANS AND TIME-SHARING

A. Factors

Supreme Court

SUPREME COURT RECOGNIZES THE FUNDAMENTAL RIGHT TO PARENT ONE'S CHILD REGARDLESS OF A PARENT'S SEXUAL ORIENTATION OR THE MANNER IN WHICH THE CHILD WAS CONCEIVED.

D.M.T. and T.M.H. are two women who were involved in a long-term committed relationship during which they agreed to jointly conceive and raise a child together as equal parental partners. Their child was conceived through the couple's use of assisted reproductive technology, with T.M.H. providing the egg and D.M.T. giving birth to the child. After the child was born, the couple gave her a hyphenation of their last names, and both T.M.H. and D.M.T. participated in raising their child until their relationship soured and D.M.T. absconded with the child. Until that time, the child did not distinguish between the parties as the biological or the

birth parent; each party was simply a parent up until and including the point at which D.M.T. absconded to an undisclosed location.

T.M.H. sought to establish her parental rights to the child and also to reassume parental responsibilities. D.M.T., conversely, sought to prevent T.M.H. from doing either. D.M.T. asserted that she, and she alone, should have the fundamental right to be the parent of the child. No other individual has asserted parental rights to the child, and no party or amicus curiae in this case other than D.M.T. takes the position that T.M.H. should be denied her rights.

After finally locating D.M.T. in Australia, T.M.H., the biological mother of the child who donated the egg to D.M.T., filed a petition to establish parental rights and for declaratory relief, including an adjudication of parentage and a declaration of constitutional invalidity with respect to Florida's assisted reproductive technology statute—section 742.14, Florida Statutes (2008). In response, D.M.T. filed a motion for summary judgment, alleging that T.M.H. lacked parental rights as a matter of law regardless of the couple's original intent with respect to raising the child. The trial court held a hearing and granted the motion for summary judgment, explaining that it felt constrained by the current state of the law and expressing hope that an appellate court would reverse its ruling: "First, let me say, I find that [the birth mother's] actions to be—this is my phraseology—morally reprehensible. I do not agree with her actions relevant to the best interest of the child. However, that is not the standard. There is no distinction in law or recognition of rights of the biological mother verses a birth mother…. [S]ame-sex partners do not meet the definition [in section 742.13(2)] of commissioning couple. There really is no protection for [the biological mother] under Florida law because she could not have adopted this child to prevent this current set of circumstances. I do not agree with the current state of the law, but I must uphold it…." Thus, the trial court found that the birth mother and the biological mother, as a same-sex couple, could not meet the definition of a "commissioning couple," as the term is defined in section 742.13(2) and used in section 742.14, to be exempt from the relinquishment of parental rights, and that Florida law does not recognize the rights of a biological mother versus a birth mother.

On appeal, the Fifth District Court of Appeal reversed, holding that Florida's assisted reproductive technology statute—section 742.14, Florida Statutes (2008)—did not apply to T.M.H., and that the trial court's application of the statute was unconstitutional because it prevented T.M.H., who provided the egg for the couple, from asserting her parental rights to the child. Recognizing the rich body of federal and state constitutional law that would unquestionably give constitutionally protected rights to a biological father in the exact situation presented by the facts of this case, the Fifth District concluded that the biological mother was "entitled to constitutionally protected parental rights to the child and that the statutory relinquishment of those rights under section 742.14 is prohibited by the Federal and Florida Constitutions." The Court certified a question of great public importance. The Supreme Court of Florida held:

1. "'The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.'"

2. "Because the Fifth District declared section 742.14 unconstitutional as applied to T.M.H., we have mandatory jurisdiction under article V, section 3(b)(1), of the Florida Constitution to review this case…. In addition, the Fifth District certified a question of great

public importance regarding whether the statute was unconstitutional, and we also have jurisdiction on that basis. See art. V, § 3(b)(4), Fla. Const."

4. "We conclude that the statute is unconstitutional (1) as a violation of the Due Process Clause of the United States Constitution and separately as a violation of the Due Process Clause and privacy provision of the Florida Constitution; and (2) as a violation of the federal Equal Protection Clause and separately as a violation of the Florida Equal Protection Clause."

5. "In reaching our conclusion, we rely on long-standing constitutional law that an unwed biological father has an inchoate interest that develops into a fundamental right to be a parent protected by the Florida and United States Constitutions when he demonstrates a commitment to raising the child by assuming parental responsibilities. It is not the biological relationship per se, but rather 'the assumption of the parental responsibilities which is of constitutional significance.'"

6. "Because the application of section 742.14 operated to automatically deprive T.M.H. of her ability to assert her fundamental right to be a parent, we conclude, based on the circumstances of this case, that the statute is unconstitutional as applied under the Due Process Clauses of the Florida and United States Constitutions and under the privacy provision of the Florida Constitution." 7. "Further, we hold that section 742.14, in combination with the restrictive definition of the term 'commissioning couple' in section 742.13(2), also violates state and federal equal protection by denying same-sex couples the statutory protection against the automatic relinquishment of parental rights that it affords to heterosexual unmarried couples seeking to utilize the identical assistance of reproductive technology."

7. "Accordingly, we affirm the Fifth District's determination of statutory unconstitutionality and also answer the certified question in the affirmative, but we disapprove the Fifth District's holding that the statute does not apply in this situation."

8. "Our holding that T.M.H. has rights deserving of constitutional protection does not mean that D.M.T.'s parental rights are not deserving of constitutional protection—quite the opposite. Our decision does not deny D.M.T. the right to be a parent to her child, but requires only that T.M.H.'s right to be a parent of the child be constitutionally recognized. D.M.T.'s preference that she parent the child alone is sadly similar to the views of all too many parents who, after separating, prefer to exclude the other parent from the child's life."

9. "We remain ever mindful that although our resolution of the constitutional issues revolves around the rights of T.M.H., the biological mother, we cannot and should not lose sight of the fact that there is a child at the center of this dispute whose best interests will ultimately determine the extent to which each parent will play a role in her life through legal rights and legal responsibilities."

10. "We therefore remand this case to the trial court to determine, based on the best interests of the child, issues such as parental time-sharing and child support, and we emphasize, as did the Fifth District, that an all-or-nothing choice between the two parents is not necessary."

11. "In the decision below, the Fifth District determined that section 742.14, the assisted reproductive technology statute, did not apply to T.M.H., the biological mother, in this situation because she is not a 'donor' as that term is used in the statute. We disagree with the Fifth District as to the statutory construction analysis because we conclude that the statute does, on its face, apply to T.M.H. as the provider of the egg for the couple."

12. "The plain language of section 742.14 does not provide for the subjective intentions of someone in T.M.H.'s position to be taken into consideration in determining whether he or she is a 'donor' under the terms of the statute. Rather, the statute identifies only two categories of

individuals who do not relinquish parental rights as to their provision of biological material during the course of assisted reproductive technology—(1) members of a 'commissioning couple'; and (2) fathers who have executed a preplanned adoption agreement. Indeed, the structure of section 742.14 designates these groups as fitting within the term 'donor,' and then provides that they are specifically exempted from the statutory relinquishment of parental rights . . . If the statute did not apply to these groups, then they would not need to be exempted from its requirements."

13. "In providing for these two exceptions, the Legislature expressed its intent not to allow the subjective intentions of all other individuals who provide eggs, sperm, or preembryos during the course of assisted reproductive technology to become an issue in need of litigation…. Instead, the Legislature articulated a policy of treating all individuals who provide eggs, sperm, or preembryos as part of assisted reproductive technology as 'donor[s]' bound by the terms of the statute, and then exempting two specific groups in accordance with the purpose behind the statutory enactment."

14. "To hold that section 742.14 does not apply to T.M.H. in this case because of her subjective intention not to give her egg away would essentially create a third exception in the statute. This Court, however, is 'not at liberty to add words to the statute that were not placed there by the Legislature.'"

15. "It is clear that the primary purpose behind the Legislature's enactment of the assisted reproductive technology statute was to ensure that couples taking advantage of medical advances in reproductive science to conceive a child are protected from a claim to parental rights by a third-party provider of the genetic material used for assisted reproductive technology. In this regard, we emphasize that our resolution of the constitutional issues presented in this case does not undermine the statutory protections or certainty provided to commissioning couples in any way."

16. "It is a basic tenet of our society and our law that individuals have the fundamental constitutionally protected rights to procreate and to be a parent to their children. These constitutional rights are recognized by both the Florida Constitution and the United States Constitution."

17. "This Court has interpreted the Florida Constitution's privacy provision to provide greater protection than is afforded by the federal constitution and to include specific protection against State interference in parents fundamental right to raise their children except in cases where the child is threatened with harm…. Indeed, we have previously stated that, in Florida, an individual's fundamental liberty interest in parenting… is specifically protected by our state constitutional privacy provision."

18. "Moreover, we recognize the sanctity of the biological connection between parents and children, and thus, we look carefully at anything that would sever the biological parent-child link."

19. "With respect to the link between a biological father and his child, we have previously explained that constitutional protection of the individual's right to be a parent applies when an unwed biological father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in raising his child. The approach this Court has taken regarding the rights of biological but unwed fathers echoes the United States Supreme Court's recognition that a biological father's constitutional rights are inchoate and develop into a fundamental right to be a parent when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child

because his interest in personal contact with his child acquires substantial protection under the due process clause."

20. "The legal parameters and definitions of parents, marriage, and family have undergone major changes in the past several decades, from holding a state's ban on interracial marriage unconstitutional… to recognizing the fundamental right to be a parent even for unmarried couples…. In fact, although not impacting our ultimate analysis, as the United States Supreme Court has recently declared in acknowledging that many states have extended the definition of family to permit the legal marriage of same-sex couples, federal law may not infringe upon the rights of those couples to enhance their own liberty and to enjoy protection in personhood and dignity."

21. "In this case, the biological mother asserts that she has a protected constitutional interest to be a parent to her child, which is a fundamental right unquestionably protected by the Florida and federal Due Process Clauses and specifically by Florida's state constitutional privacy provision. While acknowledging that a mere biological link between parent and child is insufficient to merit substantial constitutional protection, the biological mother argues that we should analogize the nature of her interest to the interest possessed by unwed biological fathers, whose parental rights are inchoate but develop into a fundamental right to be a parent when the biological father demonstrates a full commitment to the responsibilities of parenthood…. We agree."

22. "As explained by the Fifth District in this case, it is difficult to understand how rigid legal rules 'established during a time so far removed in history when the science of in vitro fertilization was a remote thought in the minds of the scientists of the times [have] much currency today.' Although the right to procreate has long been described as one of the basic civil rights individuals hold… advances in science and technology now provide innumerable ways for traditional and non-traditional couples alike to conceive a child and, we conclude, in so doing to exercise their inalienable rights . . . to enjoy and defend life and liberty, and to pursue happiness."

23. "It would indeed be anomalous if, under Florida law, an unwed biological father would have more constitutionally protected rights to parent a child after a one night stand than an unwed biological mother who, with a committed partner and as part of a loving relationship, planned for the birth of a child and remains committed to supporting and raising her own daughter. As the Fifth District stated, 'it would pose a substantial equal protection problem to deny an unwed genetic mother the ability to assert parental rights after she established a parental relationship with her child while allowing an unwed genetic father to do so.'"

24. "Although the biological mother in this case is seeking vindication of her right to be a parent to her child, this right comes with critical legal and financial responsibilities, including possible child support payments…. Unquestionably, these responsibilities are part and parcel of the fundamental right to be a parent…. Because T.M.H. accepted responsibility for raising her child from the beginning and did in fact parent and support the child until D.M.T. prevented her from doing so, we hold that T.M.H.'s inchoate interest has developed into a protected fundamental right to be a parent to her child."

25. "Quite simply, based on the factual situation before us, we do not discern even a legitimate State interest in applying section 742.14 to deny T.M.H. her right to be a parent to her daughter."

26. "This is significant to our as-applied constitutional analysis of the statutory scheme, which is intended to provide statutory protection to a 'commissioning couple' from a parental

rights claim by a third-party provider of biological material used in assisted reproductive technology. We therefore reject the dissent's assertion that our analysis has no "logical end point" or "obvious stopping point," . . . as our conclusion is based on the specific facts presented in this case, as set forth in the Fifth District's certified question, which establish that T.M.H. was an intended parent and assumed full parental responsibilities until her contact with the child was cut off."

27. "In recently addressing a comparable claim brought by a parent who provided biological material for use in conceiving a child through assisted reproductive technology and thereafter demonstrated a commitment to raising that child, the Virginia Supreme Court explained that 'there is no compelling reason why a responsible, involved, unmarried, biological parent should never be allowed to establish legal parentage of her or his child born as a result of assisted conception.' While the Virginia assisted conception statute is different from our own, we embrace the Virginia Supreme Court's conclusion regarding whether a compelling interest exists."

28. "We conclude that the State does not have a compelling interest in depriving T.M.H. of her right to be a parent in this situation. Accordingly, we hold that section 742.14 is unconstitutional as applied to abridge T.M.H.'s fundamental right to be a parent."

29. "Sexual orientation has not been determined to constitute a protected class and therefore sexual orientation does not provide an independent basis for using heightened scrutiny to review State action that results in unequal treatment to homosexuals."

30. "Further, even though our state constitution recognizes gender as a specific class… it does not separately recognize sexual orientation as a protected class, and thus we do not rely on our state's Equal Protection Clause to apply a heightened scrutiny examination to statutes discriminating on the basis of sexual orientation. Accordingly, we apply a rational basis analysis to our review of this claim."

31. "The specific question we confront is whether the classification between heterosexual and same-sex couples drawn by the assisted reproductive technology statute bears some rational relationship to a legitimate state purpose."

32. "D.M.T. argues that defining the term 'commissioning couple' in section 742.13(2), as applied in section 742.14, to include only one male and one female is related to the State's legitimate interest in not extending rights to same-sex couples. Specifically, she cites to Florida law that declines to recognize same-sex marriages and prohibits homosexuals from adopting children. We reject this argument as unavailing for several reasons."

33. "First, section 742.14 does not operate to grant parental rights to biological parents, but only to provide for the relinquishment of those rights in the case of the typical egg or sperm donor…. Therefore, because section 742.14 does not operate to grant rights, but only to eliminate rights that are already held or that may develop, any State interest that could potentially exist in not extending rights to same-sex couples is not implicated."

34. "Second, there is no indication that the exception provided in section 742.14 for a 'commissioning couple' extends only to married couples, so the state constitutional provision against same-sex marriage is also not implicated…. By contrast, in the next statutory provisions, sections 742.15–16, Florida Statutes, which relate to gestational surrogacy, the Legislature has specifically provided that the 'commissioning couple' must be 'legally married' in order to claim protection under the statutes…. In the assisted reproductive technology statute, however, the Legislature did not include an additional marriage requirement regarding an exemption from the relinquishment of parental rights with respect to the donation of eggs, sperm, or preembryos."

35. "Third, we reject D.M.T.'s contention that recognizing T.M.H.'s parental rights in this case would undermine the State interest in providing certainty to couples using assisted reproductive technology to become parents because it would increase litigation regarding the intentions of individuals providing genetic material for use in assisted reproductive technology."

36. "No one disputes that the State has an interest in ensuring that the parental rights of children conceived through the use of assisted reproductive technology are defined by law, in making sure children have parents to care for them, and in preventing litigation that disrupts families . . . In reality, however, the issue of an unmarried mother and father's intent under the statute, including whether they qualify as a 'commissioning couple,' has been the subject of prior litigation in the courts of this state."

37. "Since intent… is the determinative element regarding whether two individuals seeking the assistance of reproductive technology to conceive qualify as a 'commissioning couple,' it is of course relevant to the inquiry. We conclude, though, that the State does not have a legitimate interest in precluding same-sex couples from being given the same opportunity as heterosexual couples to demonstrate that intent. Consistent with equal protection, a same-sex couple must be afforded the equivalent chance as a heterosexual couple to establish their intentions in using assisted reproductive technology to conceive a child."

38. "Finally, we note that the Third District has held Florida law prohibiting same-sex couples from adopting as unconstitutional… as a denial of equal protection lacking a rational basis… 'gay people and heterosexuals make equally good parents,' and no party offered a justification for the prohibition on homosexual adoption based 'on any theory that homosexual persons are unfit to be parents.'"

39. "Likewise, in this case, no party and no amicus curiae has advanced the argument that either T.M.H. or, for that matter, D.M.T., is unfit to be a parent. Further, no party or amicus curiae has advanced the argument that the child's best interests would be better served by having only one loving parent rather than two. To the contrary, the very statute that bars T.M.H. from being considered part of a 'commissioning couple' fully contemplates that D.M.T., as the birth mother, would be recognized as the mother of the child born from the couple's use of assisted reproductive technology, even though D.M.T. has no genetic connection to the child."

40. "We conclude that the State would be hard pressed to find a reason why a child would not be better off having two loving parents in her life, regardless of whether those parents are of the same sex, than she would by having only one parent."

41. "This, once again, is particularly true given that in this statute the Legislature did not limit the definition of 'commissioning couple' to married individuals. Thus, as we have observed, an unmarried heterosexual couple would have the same rights to parent the resulting child, under this statute, as a married couple. Critically, the only excluded category is for individuals of the same sex."

42. "We further conclude that this distinction is unconstitutional as applied because it lacks a rational basis. Regardless of whether the individual's parental rights have developed into a fundamental right, as T.M.H.'s have, the distinction is unconstitutional as applied to same-sex couples because the statute does not permit same-sex couples—and only same-sex couples—to qualify as a 'commissioning couple.'"

43. "Accordingly, based on the reasons we have set forth, we conclude that section 742.14, in conjunction with the restrictive definition of 'commissioning couple' in section 742.13(2), violates the Equal Protection Clauses of the Florida and United States Constitutions as

applied in this case because it prohibited T.M.H., as part of a same-sex couple, from qualifying as a 'commissioning couple.'"

44. "The undisputed facts of this case clearly refute the argument [that the biological mother waived any parental rights to this child by signing a standard informed consent form during the couple's process of seeking medical assistance to conceive] and demonstrate that the biological mother did not expressly waive her parental rights. Instead, it is clear that the very purpose of the biological mother's provision of the egg to her partner was to enable each party to become parents of the child they wished to conceive. This conclusion is supported by several facts, including a careful review of the informed consent form this Court has in its record, as well as the affidavit of the doctor who operated the reproductive center the couple attended."

45. "While it is uncontroverted that the biological mother signed a standard [consent] form… with the birth mother listed as the recipient, the biological mother signed this form as the birth mother's partner and not as the individual providing the egg for the couple. Clearly, then, this informed consent does not on its face apply to waive the biological mother's rights to the child, even though this is the document that the birth mother relied on in her initial motion to dismiss and motion for judgment on the pleadings."

46. "[C]ourts that have considered similar standard informed consents used in reproductive technology have held that waiver provisions like the one referenced by the Fifth District are inapplicable in circumstances like those in this case. This is because it is uncontested that the biological mother was not an anonymous donor, but rather, that the parties were in a committed relationship where reproductive technology was used—with one woman providing her egg and the other partner bearing the child—so that both women became the child's parents."

47. "For the foregoing reasons, we hold that application of section 742.14 as a bar to T.M.H.'s assertion of parental rights is unconstitutional. The due process guarantees in the Florida and United States Constitutions and the privacy provision of the Florida Constitution do not permit the State to deprive this biological mother of parental rights where she was an intended parent and actually established a parental relationship with the child."

48. "We further hold that sections 742.13(2) and 742.14, in providing an exception to the statutory relinquishment of parental rights for egg and sperm donors who are part of a heterosexual 'commissioning couple,' but not those who are part of a same-sex couple, violate the Florida and federal Equal Protection Clauses."

49. "We therefore hold that T.M.H.'s parental rights have not been terminated by law."

50. "Accordingly, we affirm the Fifth District's determination of statutory unconstitutionality, answer the certified question in the affirmative, and determine that T.M.H. has a constitutionally protected interest to parent the child under the United States Constitution and separately under the Florida Constitution."

D.M.T. v. T.M.H., 129 So.3d 320 (Fla. 2013)

First District

TRIAL COURT ERRED IN ORDERING ROTATING CUSTODY WHERE NEITHER PARTY REQUESTED SUCH AN AWARD.

S.L.W., the minor child herein, was born to the parties in 2008. The Mother has never denied that the Father is the child's biological father, but the parties are not now and never have been married. In January 2012, the Father filed a petition to establish paternity and other relief,

seeking sole physical custody of the child and only supervised visitation for the Mother. The Father alleged that the Mother had engaged in criminal activity, was financially unable to support the child as she rarely worked, and had a transient lifestyle. At the subsequent hearing on the petition, the trial court ordered rotating custody on a weekly basis. The Father appealed. Finding that the trial court erred in ordering rotating custody when neither party requested it, the District Court reversed:

1. "In the order under review, there are no findings to support the weekly rotating custody schedule set by the trial court."

2. "Further, neither party requested rotating custody."

Waybright v. Johnson-Smith, 115 So.3d 445 (Fla. 1st DCA 2013)

Second District

TRIAL COURT ABUSED ITS DISCRETION BY GIVING WIFE FINAL DECISION-MAKING AUTHORITY OVER MATTERS INVOLVING PARTIES' CHILD SHOULD PARTIES BE UNABLE TO AGREE AND BY INCLUDING IN PARENTING PLAN PROVISIONS ASSIGNING TO WIFE ULTIMATE RESPONSIBILITY FOR CHILD'S EDUCATION AND NON-EMERGENCY HEALTH CARE.

The parties were married in 1999, and had one minor child. The evidence at trial primarily focused on the Wife's request to relocate to Texas with the minor child. There was extensive evidence about the Husband's many changes in employment, the family's frequent moves, and the parties' financial issues. Pertinent to the child's education, the evidence showed that both parents read to the child and helped with her homework. Because the Wife did not work outside the home, she was able to volunteer at the child's school; but according to the child's former teacher, both parents were involved with the school. While this teacher also said that the child had no difficulty learning, the Husband was concerned about the child's reading level; he was interested in learning aids that would help the child improve.

In the final judgment, the trial court found that it was in the child's best interests for the parties to exercise shared parental responsibility, and the court ordered them to do so. But, the final judgment further provided that the Wife "shall have final decision-making authority should the parties be unable to reach an agreement on matters pertaining to the minor child." Time-sharing was ordered in accordance with an attached parenting plan, which also provided for shared parental responsibility. But, like the final judgment, it granted sole authority to the Wife in the event the parents are unable to agree, although it limited her ultimate authority to the areas of "Education/Academic decisions" and "Non-emergency health care." The Husband appealed. The District Court reversed:

1. "The court here made no oral or written findings on the factors governing parental responsibility. And our review of the record reveals no logic or justification for the final judgment's provision granting one party ultimate responsibility over all decisions affecting the child should the parties be unable to agree."

2. "As was noted by a sister court, 'the effect of this order gives one parent complete control over all the decision-making, which undermines the intent of the child custody statute regarding shared parental responsibility….' We likewise find no logic or justification for the provisions in the parenting plan that granted [the Wife] ultimate authority over the child's education and nonemergency health care."

3. "The scant evidence did not support assigning [the Wife] ultimate responsibility for decisions affecting the child's education."

4. "Nor was there any evidence on the issue of nonemergency health care. In fact, the only possibly relevant evidence pertained to an emergency situation in which the child broke her arm when [the Husband] was out of town."

5. "We reject [the Wife's] assertion that the award of ultimate responsibility was supported by the level of hostility between the parties . . . Here, there was evidence that [the Husband] had insulted [the Wife], and we do not condone his remarks. But nothing showed a continuing pattern of hostility that reasonably would lead one to conclude that the parties will be unable to effectively work together for their child's best interests."

Fazzaro v. Fazzaro, 110 So.3d 49 (Fla. 2d DCA 2013)

TRIAL COURT'S DECISION TO EXCLUDE FORMER HUSBAND FROM DECISIONS INVOLVING CHILDREN'S MENTAL HEALTH CARE WAS UNSUPPORTED BY THE RECORD; ALTHOUGH ORDER WAS INTENDED TO BE TEMPORARY, IT PROVIDED NO GUIDANCE AS TO WHEN RESTRICTIONS ON FORMER HUSBAND'S PARENTAL RIGHTS WOULD END OR WHAT HE NEEDED TO DO FOR RESTRICTIONS TO BE REMOVED.

The Former Husband has a relationship with another woman who has apparently created significant parenting issues for this divorced couple. While a petition and counter-petition for modification of the final judgment were pending, the trial court entered several temporary orders restricting his participation in many parental decisions and limiting his contact with the children. The trial court entered an order granting the Former Wife "temporary sole parental responsibility over the parties' three minor children's health care, including mental health care." The order recited that it was to remain in place "until further order of the court." The Former Husband sought certiorari review. Granting the petition for certiorari in part, the District Court held:

1. "Although the order challenged in this proceeding is a procedurally uncommon order, we decline to hold that the trial court departed from the essential requirements of the law in entering it."

2. "Two aspects of the order, however, concern us…. In light of the psychologists' reports and the discussion in the earlier opinion, we understand the trial court's decision to exclude the former husband from decisions involving the children's mental health care. On the other hand, the former husband is a fully trained, licensed physician. If one of his children needed medical care other than mental health care, we see nothing in this record that would justify barring the former husband from participating in such medical decisions."

3. "Second, the order is intended to be temporary, but it provides no guidance as to when these significant restrictions on parental rights will end or what the former husband needs to do for these restrictions to be removed. The order simply recites that it will remain in place 'until further order of the court.'"

4. "It may be that the trial court anticipates that it will resolve these issues in an order addressing the pending petitions for modification at a hearing in the near future. If so, that is not explained in this order. On the face of this order, it could continue "temporarily" until the children reach majority."

5. "In this procedural context, these errors are not matters that can be adequately addressed in any subsequent direct appeal."

6. "Moreover, the first error impacts his fundamental liberty interest in parenting a child by restricting his participation in medical decisions. The second error raises additional serious due process concerns."

7. "We conclude that these errors are proper matters to address by certiorari."

Weissman v. Weissman, 112 So.3d 735 (Fla. 2d DCA 2013)

Third District

Fourth District

AMENDED FINAL JUDGMENT WAS NOT FUNDAMENTALLY DEFECTIVE BECAUSE IT FAILED TO INCLUDE EXPLICIT FINDINGS CONCERNING THE BEST INTERESTS OF THE CHILD IN DETERMINING TIME-SHARING.

The parties are the parents of a minor child ("the Child"). In 2010, the trial court entered an Agreed Order on Child Support, which did not address the issue of time-sharing. According to the Father, he enjoyed time-sharing with the Child every weekend during this period. According to the Mother, the Father only had time-sharing every other weekend. In February 2012, the Mother moved to hold the Father in contempt for failure to pay child support. The Father, who was not represented by counsel at the time, failed to appear for the hearing on the motion. Finding that he had been duly noticed, the court proceeded and later issued a Final Judgment of Paternity that in addition to addressing child support related issues, stated the Father was to have time-sharing every other weekend, in addition to specified holidays and special days. The order did not explicitly address the best interests of the child.

The Father, at that point represented by counsel, timely filed a motion for rehearing, or in the alternative, to vacate the final judgment pursuant to Florida Rules of Civil Procedure 1.530 and 1.540. With regard to time-sharing, the Father stated that before the entry of the Final Judgment of Paternity, he enjoyed time-sharing with the Child every weekend. The trial court did not hold a hearing on the Father's post-judgment motions and denied them. The Father subsequently appealed, arguing in part that the trial court's order was deficient because it failed to explicitly address the best interest of the Child. In that regard, the District Court affirmed:

1. "The Father is correct that 'a trial court must make a finding that the time-sharing schedule is in the child's best interests.'"

2. "The case law is clear, however, that the written order is not fundamentally deficient for failing to address the best interest of the child."

3. "The court may properly make a finding that a time-sharing schedule is in the best interest of the child at trial, and the written order is not deficient solely because it fails to address the best interest determination."

4. "Here, the parties have not provided a transcript of the hearing, and this court will not assume that the trial court failed to consider the best interest of the child unless it is clear from the record."

5. "We note, however, that '[t]he better practice is for the trial court to thoroughly address the relevant considerations in its written order.'"

Jeffers v. Mcleary, 118 So.3d 287 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN ENTERING AMENDED FINAL JUDGMENT OF PATERNITY SETTING TIMESHARING SCHEDULE FOLLOWING HEARING AT WHICH FATHER FAILED TO APPEAR WITHOUT FIRST HOLDING EVIDENTIARY HEARING ON FATHER'S MOTION FOR REHEARING OR, IN THE ALTERNATIVE, RELIEF FROM JUDGMENT AT WHICH FATHER COULD PRESENT HIS EVIDENCE REGARDING THE BEST INTERESTS OF THE CHILD.

The parties herein are the parents of a minor child ("the Child"). In 2010, the trial court entered an Agreed Order on Child Support, which did not address the issue of time-sharing. According to the Father, he enjoyed time-sharing with the Child every weekend during this period. According to the Mother, he only had time-sharing every other weekend. In February 2012, the Mother moved to hold the Father in contempt for failure to pay child support. The Father, who was not represented by counsel at the time, failed to appear for the hearing. Finding that he had been duly noticed, the court proceeded and later issued a Final Judgment of Paternity that in addition to addressing child support-related issues, stated that the Father was to have time-sharing every other weekend, in addition to specified holidays and special days. The order did not explicitly address the best interests of the child.

The Father, at that point represented by counsel, timely filed a motion for rehearing, or in the alternative, to vacate the final judgment pursuant to Florida Rules of Civil Procedure 1.530 and 1.540. He admitted receiving notice of the hearing in the mail, but waited to open the mail until he had obtained counsel, which occurred shortly after the hearing. With regard to time-sharing, the Father stated that before the entry of the Final Judgment of Paternity, he enjoyed time-sharing with the Child every weekend. The trial court did not hold a hearing on the Father's post-judgment motions and denied them. The Father subsequently appealed. With regard to the manner in which the timesharing schedule was set, the District Court reversed:

1. "Generally, the standard of review for the denial of a motion for rehearing or motion for relief from judgment is whether there has been an abuse of the trial court's discretion . . . However, when the trial court makes a ruling affecting time-sharing, the trial court must have information from both parents to ensure that the court's ultimate decision will truly be in the best interest of the child."

2. "Because orders affecting time-sharing implicate the best interest of the child, 'both parents should have the opportunity to put on evidence . . . regardless of how they conduct themselves.' "

3. "Even when a parent willfully fails to attend a hearing, the trial court should still give the parent the opportunity to be heard and to present evidence before reaching a decision affecting time-sharing."

4. "The rule requiring testimony from both parents in decisions affecting the best interest of the child does not give parties license to abuse the judicial system. As this court cautioned [Iin an earlier case]: 'Our holding… should not be interpreted as compelling an automatic reversal of a final judgment where one party to a custody battle willfully fails to appear at a hearing. To hold that a final judgment is defective simply because a parent failed to appear at a final hearing would lead to all kinds of strategic game-playing and cause delay in the resolution of custody cases. This would be contrary to the best interest of the child.'"

5. "[Quoting an earlier case]: 'A parent should have the right to move to vacate a final custody judgment on the grounds allowed by Rule 1.540(b). At the hearing on the Rule 1.540(b) motion, the court may consider the absent party's grounds for failing to appear and hear any

evidence that the party may have that would involve the party's 'meritorious defense' to the proceedings…. Unless the [parent who failed to appear] takes the step of seeking to vacate the final judgment, the final judgment is not reversible.'"

6. "Here, the Father moved for rehearing or, in the alternative, to vacate the final judgment pursuant to Rules 1.530 and 1.540. The trial court denied the Father's motion without a hearing, and without giving the Father the opportunity to present evidence to show whether he had a 'meritorious defense to the proceedings.' Case law suggests that the trial court hold a hearing on the Father's post-judgment motions during which the Father may present his evidence, at which point the trial court should determine whether to vacate the judgment."

7. "We stress that this opinion should not be extended beyond cases affecting the best interest of the child. Our cases discussing these issues emphasize that these rulings are exceptional due to the importance of the rights of the child."

8. "We also wish to emphasize… that parties should not misconstrue our holdings as permission to engage in 'strategic game-playing' to delay the resolution of judicial proceedings affecting the rights of children."

Jeffers v. Mcleary, 118 So.3d 287 (Fla. 4th DCA 2013)

Fifth District

COMPETENT SUBSTANTIAL EVIDENCE SUPPORTED FINAL JUDGMENT AWARDING FATHER MAJORITY TIMESHARING IN FOREIGN STATE AFTER FINDING THAT MOTHER ENGAGED IN DECEPTIVE AND CONTINUOUS COURSE OF CONDUCT INTENDED TO THWART ANY RELATIONSHIP BETWEEN FATHER AND CHILD, THAT FATHER PROVIDED MORE STABLE AND SATISFACTORY ENVIRONMENT FOR CHILD, AND THAT MOTHER HAD DEMONSTRATED DISREGARD FOR BOTH PHYSICAL AND EMOTIONAL HEALTH OF CHILD.

Although they were no longer a couple, the Father allowed the Mother to continue living in his home during the pregnancy, while he was out of state performing cleanup services following Hurricane Katrina. On three occasions, the Mother changed the locks, effectively excluding the Father from his own residence. Additionally, the Mother filed criminal charges and a domestic violence injunction against Father, both of which were ultimately dismissed. As a result of Mother's ex parte application for the domestic violence injunction, however, the Father was unable to attend the birth of his child. Worse still were the Mother's efforts to conceal P.N.'s paternity. The Mother did not acknowledge the Father as the child's father on the birth certificate and for the first eighteen months of the child's life, refused him any contact with P.N.

The Father filed a paternity action in September 2007. The Mother delayed DNA testing, but finally complied when the court so ordered. However, instead of taking P.N. to be tested, she took a different child—apparently her sister's—who was born close in time to P.N. Upon receiving the negative test results, the Father, still convinced he was the child's father, conducted his own investigation. Through social media, he viewed photographs of P.N. and discovered the photographs were not those of the child Mother had presented for DNA testing. The Father filed a motion for a second DNA test, which the trial court granted. For this test, the Mother brought two children whose faces were obscured by hoods. At first, she tried to prevent the Father from seeing the children in order to further confuse the testing process, but ultimately, the staff, with

Father's assistance, determined the correct child for testing. That test confirmed the Father as P.N.'s father.

At trial, the Mother testified that she knew the Father was P.N.'s father from the time of the child's birth and nevertheless, failed to denote him as the father on the birth certificate, filed numerous pleadings denying he was the father, and fraudulently procured false DNA test results, all with the intent to deceive both Father and the court.

The evidence adduced at trial also reflected Mother's poor parenting skills. P.N. has respiratory issues that necessitate the use of a breathing machine. Although the trial court ordered time-sharing with Father on a temporary basis, the Mother refused to provide him with any medical information relating to P.N. Father hired a private investigator whose videotaped surveillance revealed that, despite P.N.'s respiratory issues, Mother smoked cigarettes in an automobile with P.N. present and lived in a small trailer with five dogs and a cat. Also, during the surveillance, P.N. and his older half-brother were observed wandering alone in a large store, searching for their mother.

The trial court considered and weighed the factors set forth in section 61.13(3), Florida Statutes (2011). The majority of factors considered by the trial court in determining a proper time-sharing schedule weighed in favor of Father. In pertinent part, the trial court found that Mother engaged in a deceptive and continuous course of conduct intended to thwart any relationship between Father and the child; that Father provided a more stable and satisfactory environment for the child; and that Mother demonstrated a disregard for both the physical and emotional health of P.N. The trial court ultimately concluded that P.N. would reside the majority of the time with his father in Mississippi. The Mother appealed, raising a number of challenges to the final judgment. She argued that Father's paternity petition did not request a designation of the "primary residential parent," and that the final judgment does not articulate "how it is in the best interest of the child to designate a Primary Residential Parent." She also challenged several of the trial court's factual findings. The District Court affirmed:

1. "While the final judgment does not specifically designate a 'primary residential parent,' the time-sharing schedule placed P.N. with the father in the role of what traditionally would have been considered the primary residential parent. The trial court's decision was based on the statutory factors and in consideration of the fact that the parties live in different states. We find no abuse of discretion in that decision."

2. "The [Mother] also challenges several of the trial court's factual findings. She, however, misconstrues the role of this Court in reviewing the evidence. Our review is limited to determining whether there is competent substantial evidence to support the findings of the court below . . . In doing so, we view the evidence in the light most favorable to the appellee, [Father]."

3. "The fact that [Mother] presented evidence disputing the trial court's findings is not sufficient to warrant reversal."

Neuman v. Harper, 106 So.3d 974 (Fla. 5th DCA 2013)

B. Third Parties

First District

Second District

Third District

Fourth District

Fifth District

C. UCCJEA

First District

Second District

Third District

Fourth District

TRIAL COURT DID NOT ERR IN DETERMINING THAT IT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER DISSOLUTION OF MARRIAGE PETITION BECAUSE WIFE, WHO WAS IN THE U.S. ON NON-IMMIGRANT TOURIST VISA, HAD NOT ESTABLISHED ACTUAL RESIDENCY WITH AN INTENT TO REMAIN PERMANENTLY IN STATE; CLAIM THAT UNDER UCCJEA, TRIAL COURT HAD JURISDICTION INSOFAR AS SHE SOUGHT CHILD CUSTODY COULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL, AND EVEN IF COURT HAD JURISDICTION, TRIAL COURT PROPERLY DISMISSED ACTION ON GROUNDS THAT FLORIDA WAS INCONVENIENT FORUM WHERE PARTIES AND CHILD WERE GERMAN CITIZENS AND HUSBAND'S SUIT FOR DIVORCE WAS PENDING THERE.

The parties and their child are all German citizens. Although the parties married in Florida in 2002 while on vacation, they executed a prenuptial agreement under German law and continued to live in Germany. The Husband owns an interest in a company in Germany, and all of the parties' income and property is located in Germany. In July 2009, the Wife and the daughter moved to Boca Raton for the daughter to study here and to distance themselves from the Husband, who the Wife accused of domestic violence. They entered the United States on a non-immigrant tourist visa. To maintain her status in this country, the Wife filed required certificates of eligibility with the immigration authorities every several months, including forms filed both before and after she filed the petition for dissolution of marriage. In renewing her tourist visa, she swore on each affidavit that she sought to remain in the United States temporarily and "solely for the purpose of pursuing a full course of study." To comply with the tourist visa, she would also leave the United States periodically and return to Germany. She returned to Germany in December 2009 and stayed until the end of January 2010.

When asked in her deposition whether she had filed any document with the United States indicating that she intended to stay permanently in this country, she testified that she had not. When asked whether she intended to do so, she answered "Maybe, yes." She also admitted that she had not notified the German government of her removal from her home district in Germany, something she is required to do under German law when she moves out of a district. She also testified that she had not taken all of her personal effects when she left Germany.

The Husband had agreed to allow the child to come to Florida to attend school. He paid the lease on their rental and otherwise supported the Wife and his daughter. Originally, the agreement was for six months, but he later agreed to support the wife and child until the end of the school year. He testified that they had return airfare tickets home for the end of summer in 2010. The Husband visited the girls in Florida in October 2009 and March 2010; and the couple tried to reconcile, but after the March 2010 visit, the Wife determined that the marriage could not be saved.

In July 2010, the Husband filed a petition for dissolution of marriage in Germany. That suit remained active at the time of the appeal, although there were issues regarding proper service on the Wife. However, several emails between the parties indicated the Wife's desire to settle the dissolution proceeding filed in Germany without litigation. On August 6, 2010, the wife received an email from the Husband that he was flying into Miami International Airport on August 11, 2010, to pick up the child for a vacation to the Bahamas. She did not respond until August 10, telling him that they would meet him at the airport, although she had no intention of allowing the child to accompany the Father. On that same day, she filed a petition for protection from domestic violence, and the trial court granted an ex parte temporary injunction prohibiting the Husband from contact with the Wife or child. The next day, the Wife filed a petition for dissolution of marriage, and the Husband was served with the domestic violence petition, the temporary injunction, and the petition for dissolution of marriage upon arrival at the Miami airport on August 11th. The Husband then returned to Germany immediately.

The Husband moved to dismiss the Wife's petition for dissolution because of lack of subject matter jurisdiction, as the wife was not a domiciliary of the state, for lack of personal service on him, and for forum non conveniens. He also moved to abate the action because of his pending petition for dissolution in Germany. The trial court conducted an evidentiary hearing on the issues of subject matter and personal jurisdiction, and, over objection on grounds of lack of notice, on the issue of the domestic violence injunction. The Husband did not testify in order to preserve his objection to personal jurisdiction on which the trial court had not ruled. The court heard from experts on German law with respect to the forum non conveniens claim, as well as the testimony of the Wife and her friend as to her intention to stay in this country and her fear of her Husband. The court also heard testimony from the child's psychologist.

Based upon the facts, the court granted the motion to quash service of process and the motion to dismiss for lack of subject matter jurisdiction and personal jurisdiction over the Husband. It found that it did not have jurisdiction because the Wife had not proved her permanent residence or intention to remain in Florida when she filed repeated affidavits to renew her passport certifying that she was in the country temporarily. In addition, the court considered that her failure to notify the German government, as required by law, that she was no longer a resident. The court determined that it did not have jurisdiction over the Husband because service was obtained through the Wife's deceptive conduct in luring him to the jurisdiction. It also made findings that the German courts had jurisdiction over the marriage, the child, and the property of

the parties, and the court declined to exercise jurisdiction under these circumstances. The wife appealed. With regard to the jurisdictional issues, the District Court affirmed:

1. "The [W]ife argues that the court made an implicit finding that she could not have an intention to reside in Florida as a matter of law because of the various immigration forms she signed indicating that she was only in the U.S. on a 'temporary' basis. The Wife argues that this is contrary to the holding of *Weber v. Weber*…."

2. "*Weber* looked to [earlier cases] as authority for its ruling…. [Those cases] stand for the proposition that a trial court does not lack subject matter jurisdiction as a matter of law based upon the non-permanent status of the petitioning party, but that status may be taken into consideration in the factual determination of domiciliary intent."

3. "We conclude that the trial court in this case did not determine that the Wife could not establish residency as a matter of law but determined based upon the facts presented that the Wife had not established actual residency with an intent to remain permanently."

4. "It emphasized, as powerful evidence of her lack of intent, the affidavits that the Wife signed as late as May 2010, in which she swore that she did not intend to remain permanently in the United States. The trial court is not compelled to disregard her sworn statements in determining her intent."

5. "Moreover, there was other evidence at the hearing which would support the trial court's conclusion."

6. "She had never notified the German government that she had moved from her home district, something she knew she was required to do. In her deposition, [she] was equivocal as to her intent to apply for permanent residency status in the United States. At the hearing as well as in her deposition, she testified that she and her daughter first came to Florida so her daughter could go to school and to put some distance between her and her husband. She did not state that she was intending at the time to move to Florida permanently, and she left personal possessions in Germany. She spent the month of January in Germany. When she returned, the Husband came for a visit in March at which time they were still trying to reconcile the marriage. Obviously, if they were attempting reconciliation, that would entail her moving back to Germany, the parties' home and workplace. Thus, the court could conclude that the Wife had not determined to stay in Florida until she filed for dissolution of marriage, and the intent and the act of residency had not concurred for the prescribed period."

7. "Because the trial court did not rule as a matter of law that the Wife's tourist visa prevented the court from acquiring subject matter jurisdiction but ruled, based upon the facts, that she had not established the intent to remain, we affirm the trial court's ruling dismissing the dissolution petition for lack of subject matter jurisdiction as it is supported by competent substantial evidence."

8. "With respect to the Wife's argument the trial court had jurisdiction that under the UCCJEA]… even if the trial court did have jurisdiction pursuant to section 61.514, Florida Statutes, it is apparent that the court dismissed the action on the grounds that Florida was an inconvenient forum…. At the hearing on the Husband's motions, the court heard evidence on the factors in section 61.520(2) that a court should consider in determining whether Florida is an inconvenient forum. Again, in ruling, the court found: 'There is no rational basis for this Court to assume jurisdiction over the German court in a case involving German citizens, a minor child who is a German citizen, and all marital real and personal property interests in Germany.' Therefore, we hold that the court did not err in dismissing the petition even as to child custody."

Rudel v Rudel, 111 So.3d 285 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN FINDING HOME STATE OF MINOR CHILDREN TO BE COLORADO WHERE CHILDREN HAD RESIDED IN FLORIDA WITHIN SIX-MONTH PERIOD PRIOR TO FATHER'S FILING OF PETITION, THUS MAKING FLORIDA THEIR HOME STATE UNDER THE UCCJEA.

The Mother and Father moved with their two minor children from Colorado to Florida in October 2010. In August 2011, the Mother moved back to Colorado with the children, and a third child was born in 2012. In December 2011, the Father filed a verified petition for establishment of parenting plan, child support, and determination of parental responsibility and timesharing. The Mother's answer asserted that she had filed a petition for divorce in Colorado, but failed to contest the alleged duration of time the minor children lived in Florida.

In May 2012, a hearing was held on the Father's second urgent motion for a child pick-up order and temporary parenting plan, at which time the Mother testified that she and the children had been Florida residents for ten months. The trial court denied the Father's motion for a pick-up order, and found Colorado to be "the home state under the UCCJ[E]A for jurisdiction purposes." The trial also stated as follows on the record: "In terms of factual findings, the Court finds that there is no court order determining the rights of custody that has been entered by any Court of competent jurisdiction. The Court finds that the mother had relocated to the State of Colorado on August 24th or August 25, 2011. The Court finds that the children had maintained continuous residency in the State of Colorado since that time." Following a denial of the Father's subsequent motion for rehearing, his appeal followed. Finding that the trial court erred by incorrectly applying the UCCJEA to the facts, the District Court reversed:

1. "'Under the UCCJEA, jurisdictional priority lies in the child's home state.'"

2. "The Florida circuit court has jurisdiction to make an initial child custody determination only if Florida is the child's home state on the date of the commencement of the custody proceeding or was the child's home state within six months before commencement of the proceeding and a parent or person acting as a parent continues to live in the state . . . ."

3. "This court has concluded that 'section 61.514(1)(a) permits the exercise of home state jurisdiction if, at any time during the six months preceding the filing of the custody proceeding, Florida qualified as the child's home state.'"

4. "[An earlier] case of is instructive . . . On appeal from the trial court's ruling that Florida was not the home state of the child, the appellate court found: 'Here, the trial court failed to look back to June 9, 2010, six months prior to the filing of the father's petition, to determine if Florida qualified as the home state at any time between June 9, 2010, and December 9, 2010, the date he filed his petition…. Based on the parties' agreement on these dates, the mother lived in Florida with [the child] from January 3, 2010, until September 7, 2010, a total of eight consecutive months. September 7, 2010, is within the six-month period prior to the father's filing of his petition. Thus, Florida qualifies as the home state under the UCCJEA and the South County court had jurisdiction to make the initial time-sharing determination.'"

5. "In the present case…we look back to six months prior to the date of the Father's petition, or June 8, 2011, and determine whether Florida qualified as the home state of the minor children at any time between then and December 8, 2011. On June 8, 2011 the parties' two minor children had been living in Florida with both parents for approximately eight months. The Mother left Florida after living here with the two children for approximately ten months and

within the six-month period prior to the Father's filing of the petition, thereby making Florida the home state of the two minor children at the time of the petition.'"

6. "Thus, the trial court erred in declining to exercise jurisdiction on the grounds that the home state of the minor children was Colorado under the UCCJEA."

Barnes v. Barnes, 124 So.3d 994 (Fla. 4th DCA 2013)

Fifth District

D. Geographical Limitations/Relocation

First District

TRIAL COURT ERRED BY PERMITTING FORMER WIFE TO KEEP CHILD IN NEW YORK WHERE FORMER WIFE RELOCATED CHILD WITHOUT FIRST COMPLYING WITH THE REQUIREMENTS OF SECTION 61.13001, FLORIDA STATUTES.

The Former Husband appealed. Among his several issues, he argued that the trial court erred in allowing the Former Wife to remain in New York with the parties' minor child where she had not complied with the requirements of section 61.13001, Florida Statutes. The District Court agreed and reversed in this regard:

1. "Section 61.13001(3)(a) unambiguously requires that, absent agreement of both parents, a parent wishing to relocate file a petition and the petition be served on the other parent…. Only where the relocating parent files a proper petition may the court order temporary relocation pending final determination."

2. "This Court has previously made clear that these requirements are unambiguous and are 'a clear statutory mandate.'"

3. "Here, there was no such agreement or petition. And, [the Former Wife] does not contest that she and the child relocated to New York. Accordingly, she is subject 'to contempt and other proceedings to compel the return of the child;' additionally, the court may grant other relief, including restraining relocation or ordering the child's return."

4. "Therefore, the trial court erred in permitting the minor child's temporary relocation pending final determination."

5. "That said, the parties were not prepared to have a full hearing on the best interests of the child—a necessary consideration to the relocation question, which takes into account certain statutorily specified factors."

6. "Like in [an earlier case, the Former Husband] limited his argument at the hearing to the permissibility of [the Former Wife's] relocation without following the statutory requirements. It is clear she did not follow the requirements and [the Former Husband] was thus entitled to some relief—what relief, exactly, is not mandated by statute and is a matter of the trial court's discretion."

7. "We do not pass on what the exact specifications of the trial court's order on remand should be."

8. "'[W]e recognize the difficulty faced by the trial court in crafting a remedy that provides meaningful makeup time-sharing for an out-of-state father where the record reflects that

the mother has refused to comply with court orders and has shown little to no interest in the child having a relationship with his father.'"

9. "Nevertheless, 'before ordering a temporary change of custody or any other type of makeup time-sharing, the trial court was required to consider the best interests of the child.'"

10. "Accordingly, the case is remanded to accomplish what the trial court had already begun before this appeal."

11. "After taking evidence on the best interests of the child, the trial court may appropriately order relief for [the Former Wife's] unauthorized relocation and on [the Former Husband's] specific entitlement to make-up time."

12. "This will also be necessary before creation of a final time-sharing agreement and the ultimate dissolution of the parties marriage."

Milton v. Milton, 113 So.3d 1040 (Fla. 1st DCA 2013)

Second District

Third District

Fourth District

TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING MOTHER TO RELOCATE WITH CHILD TO A DIFFERENT COUNTY WITHOUT MAKING ORAL OR WRITTEN FINDINGS BASED ON STATUTORY FACTORS INVOLVED IN RELOCATION DECISIONS; THE FACT THAT A PARENT HAS A HOME ELSEWHERE, WITHOUT MORE, IS AN INSUFFICIENT BASIS TO SUPPORT RELOCATION.

The parties were married in 2003. They entered into a pre-marital agreement in which the Wife agreed to waive any claim for alimony and accept payment of $50,000 for each child born of the marriage, should the marriage last at least five years. They had a child in 2009. Shortly after the birth of the child, the marital difficulties intensified. The Wife commenced dissolution of marriage proceedings in June 2010.

Shortly after filing her initial petition for dissolution, the Wife amended the petition, requesting to relocate with the child to Vero Beach, Florida. In her petition, she claimed that she was unemployed and had no financial prospects in the Broward County area, and that the Husband was not providing for her support. Her adult son, who is in the military, owned a home in Vero where she could move. The petition alleged that relocation would improve the general quality of life for her and the child because of its financial benefits.

Within three months of the filing of the petition, the parties entered into a mediated settlement of temporary support and child matters. The Husband agreed to purchase a townhome in Broward County for the Wife and the child, and pay for all of its expenses pending a final judgment of dissolution. The Wife and child lived in the home until the final hearing.

Between the filing of the dissolution through the trial, the parties argued over the child and his care, involving many hearings and orders from the court. The Wife claimed that the Husband was overbearing and harassing, and the Husband claimed that the Wife was trying to prevent him from developing a relationship with the child and was not attending to the child's developmental issues.

The court conducted a trial of the matter over several days. As to relocation, the Wife testified that she had purchased the home in Vero Beach during the marriage as a kind of safe haven for her from the Husband's harassment. She then transferred the home to her adult son. Presently, with the mortgage, the home was "underwater." She paid over half of each mortgage payment. At the time of trial, she did not have funds to pay the mortgage. Instead, she was paying the mortgage from her unemployment compensation funds, but these funds had terminated. She had no choice but to move to Vero Beach, because the Husband was "kicking [her] out" of the townhome in Broward County, and she did not have a job. The Husband's attorney asked her about her reasons for relocation, "[O]ther than the house, there's no other reason that you desire to go to Vero Beach, right?" She responded affirmatively, "That's right." In fact, despite her conflicts with the Husband, she did not mind living in Broward County. The Wife has friends and family in Broward County. She does not have any family or friends in Vero Beach.

After the testimony in the trial, the court took the matter under advisement. It made no findings at the trial. It did enter a temporary order in which it granted the Wife the right to relocate to Vero Beach and provided for a 50/50 time-sharing arrangement with each parent having the child for a week at a time. The order merely granted the relocation without making any findings, even that it was in the best interests of the child. The court determined that it could revisit the matter in the final judgment. Nevertheless, in the final judgment, the court merely referred to the fact that it had already granted relocation without elucidating any further its reasons for doing so. The Former Husband appealed. The District Court reversed:

1. "This court's review is hampered, because the trial court made no findings of fact, either oral or written, on any of the relevant factors involved in a decision to grant or deny relocation of a parent."

2. "Here, nothing in the record shows that the trial court evaluated any of the factors, as no evidence was presented at all on most of them."

3. "We are left with the mother's statement that her sole reason for moving was the availability of the house in Vero Beach. Even that reason does not withstand scrutiny."

4. "At the time of the final hearing, the home in Vero Beach was owned by her son, not her, and was rented to tenants. In order for her to occupy the house, the tenants were required to move, and thus end their rental payments. The mortgage payment and expense of maintaining the home would fall on her and her son."

5. "She testified that she paid half of the rent from her unemployment check, but by the time of trial she had exhausted unemployment benefits. Therefore, at the time the court permitted relocation, she did not have the money to make her share of the mortgage payments. There is no evidence that she could make the payments on the mortgage."

6. "On this record, the home in Vero Beach did not provide any stable housing for her and the child."

7. "That a parent has a home in another location cannot be the sole basis for permitting relocation under the statutory provisions. Any parent could simply purchase a home in a distant location and claim that because of economic circumstances, he or she must move there. The statute requires a far more thorough analysis of the situation and the impact on both the child and both parents."

8. "The trial court may have thought that because the child was so young, and the court was ordering 50/50 time-sharing, relocation would not impact the father/son relationship."

9. "At the very least, however, when the child becomes of school age, the time-sharing arrangements will have to change because of the school schedule. That may place the father with a significant loss of contact because of the distance between them."

10. "On this record, permitting relocation is an abuse of discretion, because there is no competent substantial evidence to support it."

Eckert v. Eckert, 107 So.3d 1235 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN AUTHORIZING FORMER WIFE TO TEMPORARILY RELOCATE WITH CHILD TO FOREIGN STATE WITHOUT EVIDENTIARY HEARING; FORMER HUSBAND'S VERIFIED ANSWER TO PETITION FOR RELOCATION RELATED BACK TO ORIGINAL UNVERIFIED ANSWER AND WAS THUS TIMELY FILED

The trial court entered a non-final order authorizing the Former Wife to relocate to North Carolina with the parties' minor child on a temporary basis. However, the trial court failed to hold an evidentiary hearing before allowing the temporary relocation. The trial court also found that the Former Husband's verified answer to the petition for relocation was untimely. The Former Husband appealed. The District Court reversed:

1. "We reverse because the trial court failed to hold an evidentiary hearing before allowing the temporary relocation, contrary to the requirements of section 61.13001(6)(b), Florida Statutes."

2. "Furthermore, contrary to the trial court's ruling, we conclude that the [Former Husband's] verified answer to the [Former Wife's] petition for relocation related back to his original unverified answer, which was timely filed."

3. "The failure to verify a pleading which, by statute, is required to be verified does not constitute a jurisdictional defect; verification may be supplied by an amendment and relate back to the time the original unverified pleading was filed."

4. "We therefore reverse and remand the cause for an evidentiary hearing from which the court can determine the necessary findings required by section 61.13001."

Rivero v. Rivero, 111 So.3d 233 (Fla. 4th DCA 2013)

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ENTERING ORDERS REQUIRING RETURN OF PARTIES' CHILD TO FLORIDA FROM FOREIGN STATE AND ESTABLISHING TEMPORARY TIMESHARING SCHEDULE PENDING FINAL DISPOSITIONS OF PATERNITY AND CUSTODY PETITIONS FILED BY FATHER WHERE TRIAL COURT CONDUCTED ADEQUATE HEARING AND AFFORDED BOTH PARTIES OPPORTUNITY TO BE HEARD.

The parties were never married. Their child was born in 2009 and they all lived in Florida until January 19, 2012, when the Mother moved out of the parties' home while the Father was out of town, not having advised him prior to leaving. The Mother moved to Illinois and immediately filed a petition for emergency order of protection, alleging abuse of both her and the child by the Father. The Illinois court granted the ex parte request.

Several days later, the Father filed a petition for establishment of paternity in Florida, including a request for custody and/or time-sharing with the child. He also moved for an order requiring the child's return. Multiple jurisdiction hearings occurred and the Illinois court

ultimately dismissed the proceedings in favor of Florida, the child's home state. Because of the delays that resulted from the competing proceedings, the hearing on the Father's requests did not commence until nearly eleven months after the child's removal from the state. Because of limited time, the hearing was not concluded; and the continuation was set for March, giving the parties five months notice.

Although she had notice of the March hearing, the Mother did not attempt to secure the testimony of Illinois witnesses until the end of February. She then moved to continue the March proceedings, but the Father vehemently objected. The court denied the Mother's motion and the matter proceeded. The parties stipulated that the successor judge could review the transcript of the first hearing and consider the previous testimony of the Father and the maternal grandmother. At the second hearing, the Mother and Father testified, as well as the child's Florida pediatrician. The evidence presented revolved around three main themes: 1) the Mother's removal of the child from the state, and the Father's good relationship with and ability to provide for the child in Florida; 2) the Mother's claim of extreme abuse by the Father towards both her and the child, supported by her and her mother's testimony, but denied by the Father; and 3) the child's diagnosis and treatment in Illinois for several medical problems, testified to only by the Mother while the Florida physician testified to not having observed any disorders or evidence of abuse.

At the close of the evidence, the judge specifically noted that he had considered the factors contained in section 61.13, as well as the relocation statute. The trial court determined that its ruling was in the best interests of the child, stating "I'm not concerned about [the mother's and father's] feelings, and what's in their best interest. I'm just not." The trial court ultimately ordered the immediate return of the child to Florida and set a temporary timesharing schedule, which required a 50/50 split if the mother remained in Florida; if she did not, she would be entitled to a weekend visitation every month. The Mother appealed. The District Court affirmed:

1. "The reason that [the Illinois] witnesses did not testify…was due to the Mother's failure to secure their testimony in a timely fashion. The trial court denied [her] request for a continuance, which was not an abuse of discretion, given the length of time the Mother had to prepare for the hearing as well as the prejudice to the Father by continuing to be deprived of access to his child."

2. "Furthermore, both the mother and the maternal grandmother testified as to the child's situation in Illinois and his medical disorders and treatment. Therefore, the court did have evidence regarding the care and treatment of the child in Illinois."

3. "Given the fact that the hearing was for the purposes of return of the child to Florida pending final determination in the paternity and custody litigation, the trial court did not abuse its discretion in limiting the Mother's testimony. We noted in [an earlier case], 'Contested temporary relief hearings are not and should not be as lengthy as contested final hearings. The parties need to obtain temporary relief expeditiously. Shorter hearings are required to accomplish that goal.'"

4. "The Mother had the opportunity to be heard on the issue of abuse and presented substantial testimony regarding her relationship with the Father. For the purposes of the temporary hearing, the trial court did not abuse its discretion in sustaining the objection to the cumulative nature of the [M]other's testimony."

5. "For the purposes of these interim orders regarding return of the child and time-sharing, the trial court conducted an adequate hearing and afforded both parties the opportunity to be heard on the important issues."

6. "The [M]other further argues that because the relocation statute does not apply to these circumstances, the trial court had no authority under section 61.13 to order the return of the

child. Irrespective of the fact that [she] did not object to the trial court's authority to order the return of the child under section 61.13, we find this point without merit."

7. "In [an earlier case] the court concluded that even though the case was not strictly a relocation, the relocation factors should be considered in determining the best interests of the child under section 61.13."

Shiba v. Gabay, 120 So.3d 80 (Fla. 4th DCA 2013)

ORIGINAL TIMESHARING ARRANGEMENT, WHICH HAD BEEN MODIFIED TO ACCOMMODATE MOTHER'S RELOCATION OUT OF STATE, WAS NOT REINSTATED WHEN MOTHER MOVED BACK TO STATE AS STATUTE RELIED UPON BY FATHER APPLIED TO SITUATIONS ARISING "DUE TO MILITARY SERVICE" AND NEITHER PARTY HEREIN WAS IN MILITARY DURING RELEVANT PERIOD

Following the parties 2007 divorce, the Mother herein relocated out of state. In 2009, the trial court entered an agreed order that changed the parties' timesharing schedule to accommodate the move. The Mother later moved back to Florida, in 2011. The Father filed a motion for contempt against the mother, which the trial court denied. The Father appealed. He contended that section 61.13002, Florida Statutes (2012), applied to reinstate the timesharing arrangement in the original final judgment. The District Court affirmed:

1. "The plain language of the statute indicates that it applies to situations arising 'due to military service,' where a parent is 'activated, deployed, or temporarily assigned to military service.' § 61.13002(1) & (2), Fla. Stat. (2012)."

2. "Neither party was in the military during the relevant period of time. Therefore, the statute does not apply to this case."

Canino v. Canino, 125 So.3d 990 (Fla. 4th DCA 2013)

Fifth District

FINAL JUDGMENT DENYING FORMER WIFE'S PETITION FOR RELOCATION WELL-SUPPORTED BY THE EVIDENCE; TRIAL COURT DID NOT ERR IN APPLYING FACTORS ENUMERATED IN SECTION 61.13001(7) TO FIND THAT FORMER WIFE FAILED TO PROVE THAT RELOCATION WAS IN BEST INTERESTS OF CHILD; FORMER HUSBAND WAS MERELY SEEKING ENFORCEMENT OF TIMESHARING SCHEDULE, NOT A MODIFICATION, AND THUS WAS NOT REQUIRED TO PROVE A SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

The parties were married for nearly three years, lived in California, and had one child. They divorced in 2008, and the California court entered a final judgment, which included a time-sharing schedule within the incorporated Marital Settlement Agreement ("MSA"). At the time, both resided in California, but the Former Wife anticipated moving to Florida. Accordingly, the MSA provided that in the event she moved within twelve months, the parties would share custody of the child, with Former Wife having primary physical custody. The agreement further provided that in the event Former Husband also relocated to Florida, the parties would resume equal timesharing.

The Former Wife moved to Florida in April 2008. In an effort to be closer to his child, the Former Husband followed in August 2010. Several months later, however, Former Wife relocated with the child to Indiana without prior court approval or the Former Husband's consent. The Former Husband filed a petition to domesticate the California judgment and a verified motion for a temporary injunction to prevent the removal of the child. The motion was denied, but the matter was set for hearing in January 2011. On February 2, 2011, the trial court entered an order domesticating the California judgment and subsequently accept full jurisdiction upon receipt of the California order declining same.

In the meantime, the Former Husband filed a motion for contempt and for the return of child and in September 2011, the trial court entered an order requiring the Former Wife to return the child on or before 11:59 p.m. on October 16, 2011. A hearing was set for October 17, to which the child was to be brought but, the Former Wife did not return the child as required, and instead attended the hearing telephonically. The trial court then entered an order denying her motion to dismiss and directing the parties to attend mediation, which was unsuccessful. The next day, Former Wife filed a petition to relocate the child pursuant to section 61.13001.

In April 2012, trial on Former Wife's petition to relocate was held. The following facts were established: Before the Former Wife moved to Florida, the parties had equal time-sharing. When the Former Husband agreed to move, there was a "good chance" that he would be transferred to an Air Force base in Florida. From the time the child moved until the time he moved, he spent all of his leave time visiting the child. When the Former Husband later learned that he would be unable to transfer to Florida, he decided to end his career in the Air Force to be closer to his daughter. He had no other reason for moving and took a considerable pay cut by leaving. From the time he moved to Orlando in August 2010 until Former Wife and the child moved to Indiana in November 2010, he had time-sharing with the child almost every week from Thursday to Monday. Prior to moving to Florida, Former Husband informed Former Wife of his plan to relocate and at no time did she advise him that she planned to move to Indiana. About 2 ½ months after moving to Florida, he received an e-mail from her stating that she was relocating to Indiana within one week because her current husband received a job offer. She further stated that they could freely change their custody agreement between them, otherwise the process could take "up to a year." She provided him with a sample relocation agreement. Even after meeting with Former Husband and learning his objections to her relocation, the Former Wife moved to Indiana that very week without advising him and later provided him with a post office box address.

The trial court entered a final judgment denying Former Wife's petition to relocate. Applying the factors enumerated in section 61.13001(7), the trial court found that Former Wife failed to prove by a preponderance of the evidence that relocation was in the best interest of the child: "[Former Wife] has shown by her actions a complete disregard to previous Court Orders…. The Court finds [Former Wife] comes into this proceeding with unclean hands and has attempted to interfere with the relationship of her daughter and [Former Husband]. If the Court were to grant [Former Wife's] Motion to Relocate, it is extremely unlikely [Former Wife] would comply with further Court Orders and would impede contact between the child and [Former Husband]." The trial court ordered Former Wife to return the child by June 4, 2011 and the resumption of equal time-sharing if she returned to Florida. When the Former Wife did not comply, the Former Husband filed a motion to enforce the final judgment, to which she responded with a motion for rehearing or reconsideration, arguing that the trial court did not have jurisdiction and the trial court's findings were not supported by the evidence. That motion was

denied. The Former Wife then appealed the judgment denying her petition to relocate. With regard to her argument that the trial court erred in applying section 61.13001 to this case instead of requiring Former Husband to prove that there had been a substantial change in circumstances since the entry of the initial judgment determining time-sharing pursuant to section 61.13, the District Court affirmed:

1. "We first note that Former Wife did not raise this issue below. In fact, she specifically sought relief pursuant to section 61.13001 in her petition to relocate."

2. "Moreover, her argument lacks merit. Former Husband was not required to prove a substantial change in circumstances because he was not seeking a modification of the time-sharing schedule…. Instead, he merely sought to enforce the time-sharing schedule set forth in the California judgment, which provided for equal time-sharing once he moved to Florida."

3. "We cite this issue as an example of the nature of the arguments Former Wife raises on appeal, all of which are devoid of merit."

4. "We conclude that the trial court's judgment is well-supported by the evidence. Accordingly, we affirm."

Fetzer v. Evans, 123 So.3d 124 (Fla. 5th DCA 2013)

E. Modification/Enforcement

First District

TRIAL COURT ERRED IN MODIFYING JUDGMENT IN ABSENCE OF SHOWING OF SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES; MAGISTRATE'S FINDING, ADOPTED BY TRIAL COURT, THAT FORMER WIFE CONSENTED TO MODIFICATION NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE OF RECORD, AND PARENT'S CONSENT TO EXTRA VISITATION IS NOT PROPER BASIS FOR MODIFICATION.

The parties' agreement as to child custody and support, among other things, was adopted by the trial court in its final judgment of dissolution of marriage herein. Thereafter, the Former Husband moved to modify that part of the judgment. The matter was heard before a general magistrate, who stated as follows in his recommendation: "The court cannot say that the testimony and evidence presented by the Former Husband, alone, amounts to a substantial and material change in circumstances. However, when the testimony and evidence presented by the Former Husband is combined with the Former Wife's lack of objection to the Former Husband receiving additional time with the child, the Court finds that this amounts to a substantial and material change in circumstances. Former Wife's attorney did argue that the Court should not memorialize this extra timesharing into a separate order when the existing provisions of the parties' Consent Judgment provides that the parties can allow each other extra time when requested. The Court does not agree with the Former Wife's attorney's argument." The trial court adopted this provision verbatim in its judgment granting modification of child custody and support. Finding that there was no showing of a substantial and material change in circumstances, the District Court reversed:

1. "To the extent the magistrate's report finds that the Former Wife consented to modification, such a finding is not supported by competent, substantial evidence of record."

2. "The Former Wife did testify that she tried to be accommodating when the Former Husband asked for additional time, as she wanted the children to have a good relationship with their father. She did not consent to modification, however, as evidenced by her response opposing the motion to modify. The matter was sent to mediation, and no agreement could be reached. She continued to contest a modification at the hearing."

3. "Further, as argued to the magistrate below, a parent's consent to extra visitation is not a basis for a modification."

4. "Section 61.13(3), Florida Statutes, requires proof that modification of a parenting plan and time-sharing schedule is in the best interests of the child and is based upon a substantial, material, and unanticipated change in circumstances."

Brown v. Brown, 124 So.3d 424 (Fla. 1st DCA 2013)

Second District

ORDER MODIFYING PARENTING PLAN REVERSED WHERE IT FAILED TO REFLECT THAT THE REMEDIAL CUSTODY ARRANGEMENT WAS TEMPORARY AS THE ORAL PRONOUNCEMENT HELD.

On August 19, 2011, the parties herein filed a parenting plan and settlement agreement which provided that during the Father's time-sharing week, the Mother was allowed to select three school-day afternoons to pick up the child from school and return the child to the Father by 6:30 p.m. A hearing was later held on the Mother's supplemental petition for the modification of child support and the Father's motion seeking additional time-sharing, attorney's fees, and enforcement of a previous court order. At that time, the trial court found that the Mother had refused to comply with the parties' time-sharing agreement and had wrongfully kept the child from the Father from December 16, 2011, through the date of the order, January 26, 2012. To allow the Father to recover this time, the trial court announced that during his week with the child, the Mother's right to pick up the child from school and keep the child with her until 6:30 p.m. would be suspended until the Father's missed time was recovered. However, the order reflected that this change was permanent, stating that "the Parenting Plan is hereby modified to dispense with the Mother's selection of three (3) afternoons on the Father's week. The Mother shall no longer pick the child up from school on three (3) days during the Father's week, and will not otherwise be entitled to time-sharing during the Father's week." The Mother appealed. The District Court reversed:

1. "Because this portion of the written order is materially different from the trial court's oral pronouncement, this part of the order must be reversed."

2. "Accordingly, that part of the order modifying the parenting plan to dispense with the Mother's opportunity to see the child after school three afternoons during the Father's week is reversed and remanded for the trial court to note that this change is temporary."

Fernandez v. Wright, 111 So.3d 229 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN ENTERING ORDER MODIFYING TIMESHARING AGREEMENT THAT EXCEEDED SCOPE OF RELIEF REQUESTED, AND WITHOUT NOTICE THAT MODIFICATION ISSUE WAS SET FOR HEARING.

After the parties' marriage was dissolved, the Former Husband filed a motion seeking modification of the timesharing agreement, followed by motions for contempt and for clarification, the latter of which were noticed for hearing. Following a hearing, the trial court entered an order modifying timesharing. The order provided for six hours of visitation with the Former Husband every Monday and Friday, as well as weekend visitation every other weekend. It additionally scheduled holiday visitation for 2011–12. The Former Wife subsequently filed a motion for rehearing, which was denied. On appeal, the Former Wife challenged the order modifying the parties' final judgment of dissolution, as well as the order denying her motion for rehearing. The Former Wife claimed that the trial court procedurally erred by granting relief beyond that requested in the Former Husband's motions, and also noted that the notice of hearing did not indicate that any modification issue was set for that day. Reversing the portion of the order modifying the timesharing arrangement, the District Court held:

1. "'In modification proceedings, as in other civil matters, courts are not authorized to award relief not requested in the pleadings. To grant unrequested relief is an abuse of discretion and reversible error.'"

2. "Additionally, a court should not grant such relief absent proper notice to the parties."

3. "Although we are without the benefit of a transcript of the hearing, it is clear from the record that the modified visitation times are not part of the relief requested in the Former Husband's motions for clarification and contempt."

4. "And the Former Husband's modification petition that was not noticed for the hearing also fails to seek the specific timesharing modifications that were entered by the trial court in the order on appeal."

5. "Because it is clear from the face of the record that the trial court abused its discretion by granting relief that was not requested, we reverse that portion of the order modifying the timesharing arrangement and remand for further proceedings consistent with this opinion."

6. "We affirm the remaining portions of the order, including the portion relating to the holiday visitation schedule, without further comment. That portion of the order is a part of the relief requested in the motion for clarification that was noticed for hearing. Additionally, the 2011–12 holiday season has passed, and no future holiday times are addressed in the order, mooting any related arguments on appeal."

7. "We recognize that in addition to the substantive arguments the parties may raise before the trial court on remand, both parties had other motions related to contempt, requests for modification, relocation, paternity, and mediation pending in the trial court at the time of this appeal. The status of those proceedings is impossible to ascertain from the limited record before this court, and we leave any determinations regarding their impact on the scope of the proceedings on remand to the trial court."

Worthington v. Worthington, 123 So.3d 1189 (Fla. 2d DCA 2013)

Third District

Fourth District

ALTHOUGH § 61.13, FLORIDA STATUTES DIRECTS TRIAL COURT TO CONSIDER BEST INTERESTS OF CHILD IN ORDERING MAKE-UP TIMESHARING, NOTHING IN STATUTE COMPELS TRIAL COURT TO EXPLICITLY INCLUDE THIS WITHIN THE WRITTEN ORDER.

The parties were married and had a child. In June 2010, the trial court entered a final judgment of dissolution of marriage incorporating a Marital Settlement Agreement (MSA), which provided that the Mother could relocate outside Florida, and that if she did "the [Father's] time sharing shall consist of Spring Break ... and four consecutive weeks each summer." The Mother relocated to Texas with the child. Subsequently, on July 10, 2012, the Father filed a motion for contempt, alleging that the Mother failed to make the child available for summer timesharing. He requested that the Mother be found in willful contempt and that he be awarded "makeup time-sharing" and attorneys' fees. A contempt hearing was held on September 12th. The Father was present with his attorney, but the Mother was not. Thereafter, on September 21st, the court entered an order finding the Mother in civil contempt of court. The order set forth the provision of the MSA that required her to make the child available for summer time-sharing, and stated that she "willfully failed to comply" with the final judgment "through the Mother's own fault and neglect." The order also stated the Mother "is in willful contempt of court for deliberate failure and refusal to comply with the order of the court." The contempt order made provisions for makeup time-sharing during the child's break periods from school and ordered her to pay the Father's attorneys' fees. On appeal, the Mother argued that the trial court erred in ordering makeup time-sharing without considering the best interests of the child. The District Court affirmed:

1. "The Mother argues that the order adjudicating her in contempt must be reversed because the written order did not include any findings relating to the best interests of the child."

2. "While we agree with the Mother and the First District that 'the best interests of the child are always the paramount concern in child custody and time-sharing matters,' we disagree with the Mother's conclusion that the written contempt order is deficient on its face because it does not use the words 'best interests of the child.'"

3. "We hold that while the statute directs the trial court to consider the best interests of the child in ordering makeup time-sharing, nothing in the statute compels the trial court to explicitly include this in the written order."

4. "Our decision does not conflict with [the First District decision] because we do not think that [it] requires the trial court to include its finding that the makeup time-sharing is in the best interests of the child within the written order. Instead, we believe [the earlier decision] and section 61.13(4)(c) only require that the court consider the best interests of the child in reaching its makeup time-sharing decision."

5. "We note that a First District case decided after [the case relied upon by the Mother] found that, at least under some circumstances, 'the failure to make specific factual findings [regarding the best interests of the child in ordering makeup time-sharing], while not helpful for meaningful appellate review, is not fatal and does not compel reversal.'"

6. "In the absence of a transcript of the hearing, we cannot find that the trial court failed to consider the best interests of the child."

7. "The better practice is for the trial court to thoroughly address the relevant considerations in its written order, but the failure to include and discuss these issues in the written order does not, in and of itself, compel reversal."
Nunes v. Nunes, 112 So.3d 696 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT ERRED IN REFUSING TO DISSOLVE EX PARTE INJUNCTIVE ORDER AWARDING TEMPORARY CUSTODY TO FATHER WHERE FATHER'S VERIFIED PETITION ALLEGING MOTHER WAS DANGEROUS TO THE CHILD ARGUABLY ESTABLISHED AN EMERGENCY SUFFICIENT TO SUPPORT THE INITIAL EX PARTE ORDER, BUT AT THE HEARING ON MOTHER'S MOTION TO DISSOLVE THE EX PARTE ORDER, FATHER FAILED TO PRESENT COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER.

On February 15, 2005, the trial court entered a final judgment, which adjudicated Father as the natural father of the child, awarded Mother sole custody, and awarded Father supervised visitation. The final judgment also set forth Father's child support obligations. Father was not present at the trial.

Three years later, the Father moved to set aside the final judgment for fraud upon the court. On November 5, 2010, the trial court entered a written order setting aside the final judgment and suspending child support until it could be recalculated at a subsequent trial. The Mother was found in contempt and the Father was given temporary custody until November 12, 2010. The parties were ordered to return to court on November 12th for a review hearing, at which time the case would be set for another trial to resolve the issues in the original petition and counter-petition.

The Mother was not present at the November 12th review hearing because she was still in custody. At that time, Father indicated he had information from the child's maternal uncle that Mother had previously threatened to commit suicide and kill the child. Later that day, the Father filed a verified motion to transfer temporary custody of the child to him until the Mother underwent a psychological evaluation. On November 15, 2010, the trial court entered an order awarding the Father temporary custody of the child during the pendency of the proceedings and gave Mother supervised contact with the child. Father was allowed to remove the child from Florida to his home in Virginia. Mother had not seen the child since November 15, 2010.

On March 8, 2011, the Mother filed a motion to dissolve the ex parte temporary order transferring custody of the minor child to the Father. A hearing was held on April 4, 2011, at which time Mother, Father, and the child's maternal grandmother testified. The Mother denied having suicidal ideations and filed a psychological report indicating same with the trial court. She also explained that she was living and working in Orlando and capable of taking care of the child. The maternal grandmother testified that the child was happy, healthy and cheerful with the Mother. She also testified that Mother never indicated to her that she wanted to commit suicide or otherwise harm the child. The Father testified regarding positive changes in the child's health and academics and provided a transcript of the November 5, 2010 hearing as evidence of proof of Mother's erratic behavior. At the conclusion of the hearing, the trial court indicated it would not disturb the status quo because it appeared the child was thriving with Father. No written order was entered.

A second hearing was held on September 20, 2011. Father offered no testimony at the hearing. At that time, Mother asked the trial court to determine whether or not Father proved the verified motion he filed on November 12, 2010. On September 22, 2011, the trial court entered an order denying Mother's motion to dissolve the ex parte temporary order without further comment. Mother appealed. The District Court reversed:

1. "Father's verified petition alleging Mother was a flight risk and had threatened to kill herself and the child, arguably, established an emergency sufficient to support the trial court's issuance of the initial ex parte order."

2. "The issue we must now resolve is whether the trial court erred when it refused to dissolve the ex parte order after the April and September hearings on Mother's motions. We find that it did."

3. "Where a party 'challenges the entry of an ex parte order or injunction by a motion to dissolve, at the hearing on the motion the burden is on the party who obtained such a ruling to show that the complaint and supporting affidavits are sufficient to support the injunction…. [The party] who has obtained ex parte relief based simply on allegations in its complaint cannot shift the burden to the [opposing party] until it has established an evidentiary basis to support such relief.'"

4. "Here, Father failed to meet his burden when the only evidence he presented was his own testimony and a transcript of the November 5, 2010 hearing where Mother was held in contempt."

5. "Because Father presented insufficient evidence to keep the emergency ex parte order in place at the hearing on Mother's motion to dissolve, we reverse."

6. "However, because the minor child has been living with Father for an extended period of time, the child shall remain with Father until the trial court can conduct a full and proper hearing on the issues of custody and visitation."

Ashby v. Murray, 113 So.3d 951 (Fla. 5th DCA 2013)

F. Miscellaneous

First District

Second District

Third District

Fourth District

FATHER LACKED STANDING TO ASSERT CHILD'S PSYCHOTHERAPIST-PATIENT PRIVILEGE AS BASIS FOR STRIKING SOCIAL INVESTIGATION REPORT WHERE FATHER SOUGHT TO STRIKE REPORT DUE TO HIS PERCEPTION THAT CONFIDENTIAL INFORMATION THEREIN WOULD BE TO HIS DISADVANTAGE IN ONGOING CUSTODY ASPECTS OF DISSOLUTION PROCEEDINGS.

The Father petitioned the District Court to issue a writ of certiorari quashing a trial court order that denied his amended motion to strike a social investigation report prepared in the dissolution of marriage proceedings below. He alleged that in preparation of this report, confidential communications between his children and their psychotherapist were improperly disclosed by the psychotherapist to the report's author without the consent of the minor children, for whom no guardian ad litem was appointed by the trial court, in violation of section 90.503, Florida Statutes (2010). The Father claimed irreparable harm in the trial court's future consideration of the report's contents, including the privileged information that would disadvantage him in the proceedings. The District Court denied the petition for writ of certiorari:

1. "We deny the petition based on *Hughes v. Schatzberg*, . . . where we held that a parent lacked standing to assert the statutory privilege found in section 90.503 on behalf of his or her minor child, where the parent is involved in litigation seeking to pursue his or her own interests, and the child is not a party to the underlying action."

2. "As [the Father] seeks to strike the social investigation report due to his perception that the confidential information placed in the report by its author is to his disadvantage in the ongoing custody aspect of this dissolution proceeding, he falls squarely within the rationale for the holding in *Hughes*."

Carrillo-Jimenez v. Carrillo, 110 So.3d 490 (Fla. 4th DCA 2013)

ORDER ESTABLISHING SUMMER VISITATION AFFIRMED WHERE ARGUMENTS WERE NOT PRESERVED BY PROPER OBJECTION AND ISSUES WERE MOOT AS TO PREVIOUS SUMMER VISITATION; HOWEVER, RESTRICTIONS REGARDING POSSESSION OF GUNS BY CHILD OR BY FATHER IN CHILD'S PRESENCE OVERLY BROAD BECAUSE NO EVIDENCE SHOWED CHILD SHOULD BE DISALLOWED TO PLAY WITH TOY GUNS.

On appeal by the Father herein, the District Court affirmed, but held as follows:

1. "We affirm the order establishing summer visitation, as none of the arguments made by the appellant on appeal were preserved by proper objection in the trial court."

2. "In addition, the issues are moot for the previous summer's visitation."

3. "Nevertheless, we take this opportunity to observe that the restrictions regarding the possession of guns by the child or by the father in the presence of the child are overly broad."

4. "Even though the guardian ad litem and mother sought a prohibition against the child handling a real gun, BB gun, or paintball gun because of the child's tender years and his unfortunate experience with a BB gun on a visit with the father, the trial court additionally

included in the prohibition toy guns. No evidence showed that the child should be disallowed to possess or play with a pop gun, water pistol or some similar childhood toy."
Ingram v. Ingram, 110 So.3d 987 (Fla. 4th DCA 2013)

Fifth District

IN DETERMINING TO AWARD FORMER HUSBAND MAJORITY TIMESHARING WITH MINOR CHILD, TRIAL COURT ERRONEOUSLY ADMITTED INVESTIGATIVE SUMMARIES OF DEPARTMENT OF CHILDREN AND FAMILIES WHERE AUTHORS OF REPORTS WERE NOT CALLED TO TESTIFY; ERROR WAS HARMLESS, HOWEVER, WHERE SUMMARIES WERE MERELY CUMULATIVE

Due to Former Husband's military career, the family moved frequently before settling in Florida in 2008. In Florida, DCF investigated the family nine times over a period of three years. At trial, the court admitted into evidence thirty pages of DCF investigative summaries during Former Husband's testimony. The documents were comprised of numerous hearsay statements of various DCF investigators based on their observations and interpretations of statements given by the parties, the child, and third parties. Former Wife timely objected on hearsay, authentication and foundation grounds, but was overruled. In the final judgment, the trial court referenced the DCF summaries to explain that it was struck by the continuing theme that Former Wife's allegations underlying the investigations were not supported by the evidence. The trial court further noted that a DCF investigator had observed in a report that Former Wife was hindering Former Husband's attempts to rebuild a relationship with the child. Based on these and other findings, the trial court awarded Former Husband majority time-sharing, after considering the factors set forth in section 61.13(3), Florida Statutes (2010). Former Wife appealed. Regarding the erroneous admission of the DCF investigative summaries, the District Court affirmed:

1. "[W]e agree the trial court erred in admitting the investigative summaries. Former Husband failed to call the authors of the reports to testify, or to otherwise establish any predicate for their admission."

2. "Nevertheless, the trial court's error does not require reversal…. There was ample evidence to support the trial court's findings, including Former Husband's testimony. Accordingly, the investigative summaries were merely cumulative, and any error in their admission was harmless."

Davis v. Davis, 108 So.3d 660 (Fla. 5th DCA 2013)

TRIAL COURT ERRED IN REFUSING TO DISSOLVE EX PARTE INJUNCTIVE ORDER AWARDING TEMPORARY CUSTODY TO FATHER WHERE FATHER'S VERIFIED PETITION ALLEGING MOTHER WAS DANGEROUS TO THE CHILD ARGUABLY ESTABLISHED AN EMERGENCY SUFFICIENT TO SUPPORT THE INITIAL EX PARTE ORDER, BUT AT THE HEARING ON MOTHER'S MOTION TO DISSOLVE THE EX PARTE ORDER, FATHER FAILED TO PRESENT COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER.

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visitation. The final judgment also set forth Father's child support obligations. Father was not present at the trial.

Three years later, the Father moved to set aside the final judgment for fraud upon the court. On November 5, 2010, the trial court entered a written order setting aside the final judgment and suspending child support until it could be recalculated at a subsequent trial. The Mother was found in contempt and the Father was given temporary custody until November 12, 2010. The parties were ordered to return to court on November 12th for a review hearing, at which time the case would be set for another trial to resolve the issues in the original petition and counter-petition.

The Mother was not present at the November 12th review hearing because she was still in custody. At that time, Father indicated he had information from the child's maternal uncle that Mother had previously threatened to commit suicide and kill the child. Later that day, the Father filed a verified motion to transfer temporary custody of the child to him until the Mother underwent a psychological evaluation. On November 15, 2010, the trial court entered an order awarding the Father temporary custody of the child during the pendency of the proceedings and gave Mother supervised contact with the child. Father was allowed to remove the child from Florida to his home in Virginia. Mother had not seen the child since November 15, 2010.

On March 8, 2011, the Mother filed a motion to dissolve the ex parte temporary order transferring custody of the minor child to the Father. A hearing was held on April 4, 2011, at which time Mother, Father, and the child's maternal grandmother testified. The Mother denied having suicidal ideations and filed a psychological report indicating same with the trial court. She also explained that she was living and working in Orlando and capable of taking care of the child. The maternal grandmother testified that the child was happy, healthy and cheerful with the Mother. She also testified that Mother never indicated to her that she wanted to commit suicide or otherwise harm the child. The Father testified regarding positive changes in the child's health and academics and provided a transcript of the November 5, 2010 hearing as evidence of proof of Mother's erratic behavior. At the conclusion of the hearing, the trial court indicated it would not disturb the status quo because it appeared the child was thriving with Father. No written order was entered.

A second hearing was held on September 20, 2011. Father offered no testimony at the hearing. At that time, Mother asked the trial court to determine whether or not Father proved the verified motion he filed on November 12, 2010. On September 22, 2011, the trial court entered an order denying Mother's motion to dissolve the ex parte temporary order without further comment. Mother appealed. The District Court reversed:

1. "Father's verified petition alleging Mother was a flight risk and had threatened to kill herself and the child, arguably, established an emergency sufficient to support the trial court's issuance of the initial ex parte order."

2. "The issue we must now resolve is whether the trial court erred when it refused to dissolve the ex parte order after the April and September hearings on Mother's motions. We find that it did."

3. "Where a party 'challenges the entry of an ex parte order or injunction by a motion to dissolve, at the hearing on the motion the burden is on the party who obtained such a ruling to show that the complaint and supporting affidavits are sufficient to support the injunction…. [The party] who has obtained ex parte relief based simply on allegations in its complaint cannot shift the burden to the [opposing party] until it has established an evidentiary basis to support such relief.'"

4. "Here, Father failed to meet his burden when the only evidence he presented was his own testimony and a transcript of the November 5, 2010 hearing where Mother was held in contempt."

5. "Because Father presented insufficient evidence to keep the emergency ex parte order in place at the hearing on Mother's motion to dissolve, we reverse."

6. "However, because the minor child has been living with Father for an extended period of time, the child shall remain with Father until the trial court can conduct a full and proper hearing on the issues of custody and visitation."

Ashby v. Murray, 113 So.3d 951 (Fla. 5th DCA 2013)

VII. EQUITABLE DISTRIBUTION

A. Marital vs. Non-Marital Assets

First District

TRIAL COURT INCORRECTLY CLASSIFIED AUTOMOBILE AS MARITAL PROPERTY WHERE HUSBAND TESTIFIED CAR BELONGED TO HIS MOTHER AND SHE TRANSFERRED TITLE TO HIM BEFORE GOING TO A NURSING HOME.

The Former Wife listed a 1999 Cadillac as a marital asset of the parties in an exhibit she entered into evidence. She gave no testimony, however, about how the parties acquired the car. According to the Former Husband's testimony, the car had belonged to his mother and she transferred title to him before going to a nursing home. The trial court, nonetheless, classified the car as marital property subject to equitable distribution. The Former Husband appealed various aspects of the final judgment. In this regard, the District Court reversed:

1. "'Assets acquired separately by either party by non-interspousal gift' are non-marital assets,"

2. "Absent evidence to the contrary, the trial court erred by classifying the Cadillac as marital property and distributing it to the Former Wife."

McKee v. Mick, 120 So.3d 162 (Fla. 1st DCA 2013)

TRIAL COURT ERRED IN CLASSIFYING AS MARITAL ASSETS SHARES OF STOCK THAT WERE A GIFT TO WIFE FROM HER SON AND THAT WERE NOT COMMINGLED WITH MARITAL ASSETS.

At trial in the underlying dissolution of marriage proceedings, the Wife's son testified that he had purchased Coca–Cola shares for the Wife as a gift. The Wife also testified that the Coca–Cola shares were a gift from her son, and that she neither purchased additional shares nor reinvested the original ones. Nonetheless, in its equitable distribution scheme, the trial court classified the Coca–Cola shares as marital assets and distributed them to the Wife. The District Court agreed that it was error to classify the shares as marital shares and reversed:

1. "A trial court 'shall set apart to each spouse that spouse's non-marital assets,' which include '[a]ssets acquired separately by either party by non-interspousal gift.' § 61.075(1), (6)(b), Fla. Stat. (2010)."

2. "In light of the testimonies of the Wife and her son, the trial court erred by classifying the Coca–Cola shares as marital assets because the Wife had received the shares as a gift from her son and did not commingle them with marital assets."

Madson v. Madson, 128 So.3d 207 (Fla. 1st DCA 2013)

Second District

TRIAL COURT PROPERLY FOUND HUSBAND'S BUSINESS WAS A MARITAL ASSET AS EVIDENCE DID NOT SUPPORT CLAIM THAT HIS FATHER CONTRIBUTED TOWARD THE DOWN PAYMENT AND OWNS FIFTY PERCENT; COURT PROPERLY FOUND THAT ANY NON-MARITAL PORTION LOST ITS CHARACTER AS SUCH BECAUSE HUSBAND USED OPERATING ACCOUNT TO PAY FAMILY'S PERSONAL EXPENSES; EVIDENCE SUPPORTED THE COURT'S VALUATION

The parties married in California in 1989 when the Former Husband worked in his family's dry-cleaning business. The Former Husband's father sold the business in 1990 and moved to Tampa. The parties also moved to Tampa where the Former Husband bought a Tampa dry-cleaning business and named it Al Capote's Dry Cleaning, Inc. The parties separated in 2008. Unconvinced about the Former Husband's claims that his father contributed $75,000 towards the down payment and owned fifty percent of the business pursuant to an oral agreement, the trial court ruled that Al Capote's Cleaners was a marital asset. There were no documents memorializing the father's alleged interest in the business. The business was incorporated by the Former Husband in his sole name. Neither business records nor tax returns reflected the father's alleged interest. The parties' joint accountant testified that, as far as he knew, the Former Husband was the sole owner. As for the alleged contribution towards the down payment, the trial court concluded that it was a gift. With regard to the valuation of the business, neither party hired an appraiser. The Former Wife valued the business property on Seventh Avenue at $275,000. The Former Husband testified that it was worth $220,000. The trial court assigned a $275,000 value and subtracted a $60,000 mortgage, for a net value of $215,000. The parties agreed that the Twenty–First Street property was worth $100,000. Subtracting its debt netted a value of $64,201. Thus, the combined value was $279,000. The trial court then added $80,233 in good will as listed on an August 2009 balance sheet. This resulted in a total valuation of $359,201. As to any non-marital portion of the business value, the trial court ruled that same lost its separate non-marital character because the Former Husband consistently used the business operating account to pay the family's personal expenses. The Former Husband cross-appealed. The District Court affirmed:

1. "No documentary evidence supported the former husband's claim on this point."

2. "We cannot say that the trial court erred. Thus, we must affirm on this issue."

3. "The trial court ruled that any non-marital portion of the business value lost its separate non-marital character because the former husband consistently used the business operating account to pay the family's personal expenses. We find no error and affirm on this point."

4. "Competent, substantial evidence supports the trial court's valuation."
Capote v. Capote, 117 So.3d 1153 (Fla. 2d DCA 2013)

Third District

TRIAL COURT ABUSED ITS DISCRETION BY ALTERING CHILD CUSTODY AND VISITATION ARRANGEMENT SET FORTH IN MEDIATED SETTLEMENT AGREEMENT; FINDING THAT THERE WAS PARENTAL ALIENATION BY MOTHER AND ORDERING IMMEDIATE CHANGE IN CUSTODY WHICH WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE GIVEN PSYCHOLOGIST'S TESTIMONY THAT ANY TRANSITION SHOULD TAKE PLACE SLOWLY.

In September 2005, a final judgment of dissolution of marriage was entered, ratifying and approving the mediated settlement agreement entered into by the parties. The agreement provided that the parties would have shared parental responsibility of their three minor children (a girl, born in April 1999, and younger twins, a girl and a boy, born in October 2003), that their primary residence would be with the Mother, and that the Father would have liberal visitation.

Starting in October 2010, more than five years after the final judgment of dissolution of marriage was entered, the Father filed several petitions or motions seeking, in part, enforcement of the parties' time-sharing provisions of the final judgment, modification of child support, and modification of the final judgment of dissolution of marriage as to several issues, including child custody. Commencing in April 2012, the petitions/motions were heard, with the parties acting pro se. Approximately four months later, the trial court entered an order granting the Father's motions/petitions.

In its order, the trial court found that the Father had established a substantial change in circumstances warranting a change in the child custody arrangement; specifically, that the clinical psychologist appointed by the trial court to assist with the reunification process between the children and the Father had "confirmed parental alienation by [the Mother]." Based on this finding of "alienation," the trial court: (1) awarded sole parental responsibility of the twins to the Father; (2) awarded sole parental responsibility of the oldest child to the Mother; (3) held that, on a temporary basis, there shall be no timesharing between the twins and their Mother, however, once the twins have become stable in their new environment, the trial court would "welcome recommendations" from the twins' therapists; and (4) ordered that the transfer of the twins to the Father shall immediately take place. The Mother appealed. The District Court reversed:

1. "[W]e conclude the trial court's order modifying the child custody and visitation arrangement in the mediated settlement agreement must be reversed for the following two reasons."

2. "First, the trial court's finding that there was parental alienation by the [M]other 'as confirmed by Dr. Miguel Firpi,' is not supported by competent, substantial evidence . . . Our independent review of Dr. Firpi's testimony demonstrates that, although the oldest child made every attempt to thwart visitation with the Father and to negatively influence her younger siblings' view toward the Father, there was no evidence that the Mother encouraged the oldest child's behavior."

3. "Rather, the evidence showed that the Mother allowed the children to attend the visitations that were scheduled as part of the reunification process, and when the children would refuse to enter the vehicle or the 'play room,' the Mother would encourage the children to go."

4. "Therefore, because the trial court's finding as to parental alienation is not supported by competent, substantial evidence, we reverse the portions of the trial court's order altering the child custody and visitation arrangement in the mediated settlement agreement."

5. "Secondly, we conclude that based on Dr. Firpi's testimony, the immediate change of custody, at least at that point, was not in the best interest of the twins."

6. "Specifically, Dr. Firpi clearly testified that any transition of the children to the Father's home should take place slowly, not immediately, as ordered by the trial court."

7. "As Dr. Firpi's testimony was the only evidence presented regarding how to transition the children in a manner that is in their best interest, there was no competent substantial evidence to support the trial court's decision to immediately transfer the children to the Father."

8. "Accordingly, we conclude the trial court abused its discretion by modifying the child custody provisions set forth in the parties' mediated settlement agreement, and reverse the portions of the trial court's order pertaining, directly or indirectly, to a change in child custody and/or visitation."

Sueiro v. Gallardo, 105 So.3d 585 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT ERRED IN INCLUDING DEPLETED BANK ACCOUNT IN EQUITABLE DISTRIBUTION AND IN ATTRIBUTING TO HUSBAND THE UNDIMINISHED AMOUNT OF THE ACCOUNT WHERE THERE WAS NO FINDING OF INTENTIONAL MISCONDUCT ON PART OF HUSBAND.

The parties were married in 1994, and a petition for dissolution of marriage was filed in 2009. Two children were born of the marriage in 1997 and 1999. The Wife was not employed and had not worked during the sixteen-year marriage. The Husband worked as a painting contractor for his own company. The parties' tax returns reflected adjusted gross income of $394,510 in 2006, $269,014 in 2007, $116,055 in 2008, and $71,467 in 2009. The final judgment of dissolution of marriage awarded the Wife durational alimony of $1,500 a month for fourteen years and ordered the Husband to pay $656 per month for child support, as well as $100 per month to pay for $1,300 in arrearages. He was further required to purchase life insurance to secure the payment of alimony and child support. In distributing the marital assets, the trial court attributed to the Husband $117,315, which was the value of a bank account more than a year before trial. The trial court recognized that the value of the account had fallen to $3,284, but the court determined that the Husband had "not properly accounted for the dissipation of this asset." The Husband appealed, raising several issues, including whether the trial court erred in including a diminished or depleted asset as part of the equitable distribution scheme and attributing to him the undiminished value thereof. The District Court reversed:

1. "In the present case, no testimony was presented with respect to the bank account except as to the balance of money in the account. There was no testimony as to how the funds were used or if the funds were used for a purpose unrelated to the marriage."

2. "Finally, the trial court did not make a finding of intentional misconduct by the [H]usband related to the reduced balance in the bank account."

3. "Therefore, the inclusion of the depleted asset in the equitable distribution by the trial court was error."
Zvida v. Zvida, 103 So.3d 1052 (Fla. 4th DCA 2013)

GENERAL MAGISTRATE PROPERLY DETERMINED MONEY WITHDRAWN FROM JOINT CHECKING ACCOUNT BY HUSBAND TO PAY FOR MINOR CHILD'S CRIMINAL DEFENSE WAS SPENT ON MARITAL OBLIGATIONS AND THUS NOT SUBJECT TO EQUITABLE DISTRIBUTION; BUT, MONEY WITHDRAWN TO PAY FOR ADULT CHILD'S TUITION WAS IMPROPERLY DETERMINED TO HAVE BEEN SPENT ON MARITAL OBLIGATIONS AS NO LEGAL OBLIGATION EXISTS TO SUPPORT A GROWN CHILD AND THE ONLY EVIDENCE SHOWING HOW THE FUNDS WERE SPENT WAS THE ARGUMENT OF COUNSEL, WHICH DOES NOT CONSTITUTE EVIDENCE.

The General Magistrate herein, in fashioning its equitable distribution scheme, held that two withdrawals made by the Former Husband from joint checking accounts— which amounts totaled $4600—were used to pay marital obligations and thus were not subject to equitable distribution. At trial, the Former Husband presented evidence that $1,400 was used to pay for the minor child's attorney in a criminal case, and that $728.60 was spent on tuition for an adult child. His attorney then explained that the remainder of the money was spent on miscellaneous family expenses, but no other evidence showing how the funds were actually spent was presented. On appeal, the District Court affirmed the trial court's determination regarding the money spent on the minor child's criminal defense, but reversed in every other regard:

1. "We find no error in determining the $1400 was spent on marital obligations."
2. "Regarding the payment of tuition to an adult child, the marital settlement agreements or temporary support order did not require [the Former Husband] to pay the adult son's tuition. 'Any duty a parent has to pay an adult child's college expenses is moral rather than legal.' This court has previously held that 'since a parent has no obligation to support a grown child, any expenses associated with that child are not properly considered in awarding alimony.'"
3. "It follows that since there is no legal obligation to support a grown child (absent a contractual arrangement not present here), [the Former Husband's] expenditure of marital funds on the adult child should not have been considered a marital obligation, and the $728.60 in marital funds spent by [him] should be equitably divided."
4. "Regarding the remaining $2471.40 for miscellaneous family expenses, the only evidence showing how these marital funds were spent was argument of counsel. '[A]rgument of counsel does not constitute evidence.'"

Kunsman v. Wall, 125 So.3d 868 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN FAILING TO CONSIDER PASSIVE APPRECIATION OF WIFE'S NON-MARITAL NORTH CAROLINA PROPERTY.

In the final judgment of the dissolution proceedings below, the Husband was awarded $6,783 as part of equitable distribution, which was a credit for one-half of the mortgage payments made during the marriage on Wife's premarital North Carolina home. At the time the Wife originally purchased the property, it was worth approximately $13,500; and in their Joint Pretrial Statement, the parties stipulated that the property was now worth $46,837. The passive

appreciation of the home was not considered in determining equitable distribution. The Husband appealed various portions of the final judgment, including this decision of the trial court. Finding this was error by the trial court to fail to consider the passive appreciation, the District Court reversed:

1. "Although Husband did not make any improvements to the property, a portion of the appreciated value should have been included as a marital asset."

2. "As noted by the Florida Supreme Court: [I]n the absence of improvements, the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage. If, for example, one party brings to the marriage an asset in which he or she has an equity of fifty percent, the other half of which is financed by marital funds, half the appreciated value at the time of the petition for dissolution was filed should be included as a marital asset. The value of this marital asset should be reduced, however, by the unpaid indebtedness marital funds were used to service. *Kaaa v. Kaaa*, 58 So.3d 867, 872 (Fla.2010) . . . . The trial court, here, did not perform the above calculation."

3. "Further, Wife concedes the trial court was presented with insufficient evidence to properly determine the amount of indebtedness encumbering the property at the time of the marriage."

Burton v. Burton, 127 So.3d 656 (Fla. 4th DCA 2013)

TRIAL COURT DID NOT ERR IN FINDING BUILDING THAT WAS NON-MARITAL ASSET OF HUSBAND AT TIME OF MARRIAGE WAS TRANSFORMED INTO MARITAL ASSET WHERE WIFE WAS INSTRUMENTAL IN IMPROVEMENTS MADE DURING MARRIAGE.

The Former Husband and Former Wife were married in 1992. Two children were born during the marriage. The Former Husband owned and operated a private practice as a chiropractor in a building that had been deeded to him by his parents before the marriage. During the marriage, the Former Wife coordinated and helped perform a series of extensive renovations and improvements to the building.

In 2001, the Former Husband created a company called Jordan Realty, LLC, and soon after he transferred his chiropractic building to the company. The building was later sold during the marriage, and then the Former Husband and Former Wife began looking for places to invest the money or begin another business for the family. The parties decided to purchase a salon in 2009 with the proceeds from the sale of the building. The salon was sold in 2010 and the proceeds went back into the Jordan Realty, LLC account. The Former Husband and Former Wife used part of the money to pay for household and living expenses during the marriage.

The Former Wife petitioned for dissolution of marriage in January 2011. At the end of the trial, the trial court made a series of oral rulings, from which the parties drafted proposed final judgments. The trial court adopted Former Wife's proposed final judgment, including an equitable distribution schedule. Although the trial court made changes to the provisions in the Former Wife's proposal before signing it, her proposed equitable distribution schedule remained unchanged and was attached to the final judgment. Former Husband appealed. The District Court affirmed the determination that Jordan Realty was a marital asset:

1. "In the present case, there is no question that the chiropractic building was a non-marital asset of Former Husband at the time the marriage began. However, during the marriage, Former Wife was an instrumental part in coordinating and helping with the vast improvements that were done to the building, which included replacing walls, installing new flooring, adding columns and a flag pole to the front, modifying lighting and other electrical work, adding an additional parking lot, replacing the roof, and putting in new doors and windows."

2. "Contrary to Former Husband's arguments, these actions went beyond mere maintenance and were improvements that enhanced the value of the building. These actions, combined with how the proceeds from the sale of the building were used, sufficiently transformed the non-marital asset into a marital asset."

3. "Former Husband did not offer evidence to show that only a portion of the asset was transformed rather than the entire asset."

4. "We thus affirm the trial court's determination that the Jordan Realty asset is a marital asset; on remand, the trial court must account for it on the corrected equitable distribution schedule accordingly."

Jordan v. Jordan, 127 So.3d 794 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT ERRED IN AWARDING FORMER HUSBAND HALF-INTEREST IN CONDOMINIUM, WHICH FORMER WIFE INHERITED DURING THE MARRIAGE AND WHICH CONSTITUTED A NON-MARITAL ASSET

The Former Wife inherited a condominium located in Virginia during the parties' marriage. It was titled in her mother's name with the Former Wife having a right of survivorship. The title was never changed. No marital funds were used to purchase the property and, thus, it constituted a non-marital asset. At trial, the Former Husband testified that he contributed to the value of the condominium through repairs and services and that marital funds were used at times to pay the mortgage. However, the court did not make factual findings to support an enhancement in value award on the non-marital asset. Further, the Former Husband failed to support his testimony with evidence from which the trial court could have extrapolated the requisite findings, other than a few pages of bank records indicating mortgage payments and condominium fees were paid from marital funds. Nonetheless, the trial court awarded Former Husband a one-half interest in the condominium. Wife appealed. The District Court reversed: "As Former Husband failed to prove he was entitled to an enhancement award, the non-marital asset should be removed from the equitable distribution scheme."

Davis v. Davis, 108 So.3d 660 (Fla. 5th DCA 2013)

B. Valuation

First District

REMAND FOR RECONSIDERATION OF ENTIRE EQUITABLE DISTRIBUTION SCHEME REQUIRED WHERE WIFE'S RETIREMENT ACCOUNTS WERE INCORRECTLY VALUED AND SUCH ERROR CANNOT BE CORRECTED IN ISOLATION.

In a case with very little stated facts, the equitable distribution portion of the final judgment included a value of $8,059.92 for the Wife's retirement account, although the evidence in the record established a value of exactly twice that amount ($16,119.84). In this regard, the District Court reversed: "Because this error cannot be corrected in isolation, on remand, the trial court shall reconsider the equitable distribution scheme."
Allen v. Allen, 114 So.3d 1102 (Fla. 1st DCA 2013)

TRIAL COURT'S $20,000 VALUATION OF HUSBAND'S TOOLS FOR PURPOSES OF EQUITABLE DISTRIBUTION NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The final judgment entered in the dissolution of marriage proceedings assigned a $20,000 value to the Husband's tools for purposes of equitable distribution. The only evidence below as to what tools had been accumulated during the marriage came from the Husband, who valued them at $100 in his deposition testimony and at $500 during the dissolution hearing. The Wife, however, assigned a $20,000 value to "Misc. Tools" in her financial affidavit, but acknowledged during the dissolution hearing that that was a "blanket statement . . . with no specifics." She further acknowledged that she had no documentation showing what tools the couple had, nor did she give any testimony regarding any specific tools. The Husband appealed, and the District Court reversed:

1. "We agree with Appellant that the trial court's $20,000 valuation of his tools for purposes of equitable distribution is not supported by competent, substantial evidence."

2. "Based upon the foregoing, we reverse the final judgment as to the trial court's $20,000 valuation of the tools and remand the case for further proceedings as to this issue."
Naylor v. Naylor, 127 So.3d 1288 (Fla. 1st DCA 2013)

Second District

WHERE TRIAL COURT INITIALLY ASSIGNED TO HUSBAND THE ENTIRE VALUES OF PROPERTIES ACQUIRED DURING MARRIAGE, BUT ON MOTION FOR REHEARING REDUCED THE AWARDS TO HALF OF THEIR VALUES, TRIAL COURT ERRED IN FAILING TO CORRESPONDINGLY REDUCE MORTGAGE AMOUNTS AND PROPERTY TAX LIABILITIES BY HALF.

The parties married in California in 1989 when the Former Husband worked in his family's dry-cleaning business. The Former Husband's father sold the business in 1990 and moved to Tampa. The parties also moved to Tampa where the Former Husband bought a Tampa dry-cleaning business and named it Al Capote's Dry Cleaning, Inc. The parties separated in 2008. The parties owned various properties they acquired during the marriage. The equitable distribution schedule incorporated into the final judgment assigned to the Former Husband the entire value of the Gulf Boulevard and Bradford Avenue properties, as well as the entire amount of the outstanding mortgages. However, the parties owned only a fifty-percent interest in each property and were responsible for only one-half of each mortgage. On the Former Husband's motion for rehearing, the trial court reduced these awards to one half of their values. Unfortunately, the trial court failed to correspondingly reduce the mortgage amounts by half. The Former Wife appealed. As to this apparent oversight, the District Court reversed:

1. "The Former Husband concedes that the trial court erred in assigning to him the entire mortgage amounts."
2. "He notes, and we agree, that the trial court also failed to reduce by half the $11,402 property tax liability on the Bradford Avenue property."
3. "We reverse and remand for the trial court to correct the equitable distribution of these two properties."

Capote v. Capote, 117 So.3d 1153 (Fla. 2d DCA 2013)

Third District

Fourth District

TRIAL COURT'S VALUATION OF HUSBAND'S BUSINESS REVERSED WHERE VALUE ASSUMED THAT THE HUSBAND WOULD EXECUTE A NON-COMPETE AGREEMENT, MAKING IT CLEAR THAT SUCH VALUATION INCLUDED A PERSONAL GOODWILL COMPONENT, WHICH IS NOT SUBJECT TO EQUITABLE DISTRIBUTION.

The final judgment of dissolution, ending the nearly thirty-year marriage of the parties, distributed nearly $6 million in assets to the Husband, nearly $850,000 in assets to the Wife, and required the Husband to pay the Wife an equalizing payment of approximately $2.5 million. The assets awarded to the Husband include the husband's retail optical business, which the trial court valued at $2,520,562 for purposes of equitable distribution. The trial court accepted the testimony of the Wife's expert in valuing the business, who opined it had a total fair market value of $3,519,519. The expert testified that $974,199 of this figure represented personal goodwill attributable to the Husband and that, after deducting personal goodwill and the Husband's

premarital interests, the business had a value of $2,520,562 for purposes of equitable distribution. The expert expressly testified, however, that this $2,520,562 value assumed and required that the Husband execute both a non-compete and some type of transitional consulting agreement, and that he had not performed an analysis as to the value were the Husband not to sign a non-compete. Both parties appealed various aspects of the final judgment. With regard to the trial court's valuation of the Husband's business, the District Court reversed:

1. "Enterprise goodwill, defined as the value of a business 'which exceeds its tangible assets' and represents 'the tendency of clients/patients to return to and recommend the practice irrespective of the reputation of the individual practitioner,' is a marital asset subject to equitable distribution. Personal or professional goodwill attributable to the skill, reputation, and continued participation of an individual is *not* a marital asset."

2 "When valuing the enterprise goodwill of a business, the necessity of a covenant not to compete is significant as it signals the existence of personal goodwill, which cannot be included in determining the value assigned to the business for purposes of equitable distribution."

3. "Because the $2,520,562 value requires execution of a non-compete agreement, it is clear that such valuation still includes a personal goodwill component. This personal goodwill must be excised from the value assigned to the business for purposes of equitable distribution."

Schmidt v. Schmidt, 120 So.3d 31 (Fla. 4th DCA 2013)

IN CALCULATING ONE-HALF SHARE OF HUSBAND'S 401k PLAN TO BE AWARDED TO WIFE UNDER TERMS OF AGREEMENT, TRIAL COURT ERRED IN INCLUDING VALUE OF OUTSTANDING LOANS TAKEN OUT BY HUSBAND TO SUPPORT PARTIES' LIFESTYLE WHERE INCLUDING SUCH LOANS IN AMOUNT TO BE DISTRIBUTED TO WIFE WOULD RESULT IN INEQUITABLE DISTRIBUTION AND WINDFALL TO HER AND WOULD LEAVE MARITAL LIABILITIES REPRESENTED BY THE LOANS.

The parties entered into a mediated settlement agreement during their dissolution proceedings wherein they agreed to a distribution to the Wife, through a QDRO, of one-half of the marital portion of the Husband's 401(k) plan, which they defined as 50% of the amount accumulated from the date of their marriage to January 1, 2008. They qualified that amount by stating "that loans and [withdrawals] taken during the marriage and not repaid will be taken into account for distribution purposes." However, the trial court found that the parties' agreement was ambiguous because the phrase "taken into account" could have several meanings. It therefore allowed the testimony of both parties, whose testimony was consistent. The Husband testified that the loans he had taken from his account were all used to fund the parties' lifestyle and to the extent that they were still unpaid they were not intended to be included in the accumulated total of the account. The Wife testified that she knew about the loans and thought that they had been repaid, and that it was her understanding that loans which had been repaid would be included in the amount due to her. According to the plan statement introduced in evidence, the repayments on loans increased the account and were part of the ending balance of $60,734.50. Thus, both parties agreed that paid loans, not unpaid loans, would be part of the distribution.

The trial court, however, overlooked the testimony of the Wife, and entered the QDRO to distribute to the Wife one-half of the Husband's retirement account. The order directed the inclusion of the value of the outstanding loans taken in the calculation of the Wife's share. The

Husband appealed, arguing that the trial court erred in including the loans in calculating the amount to be distributed because this would result in the Wife receiving more than half of the balance and would leave the corresponding loan repayment obligation as an undistributed marital liability. The District Court agreed and reversed:

1. "A participant may take loans and withdrawals from a 401(k) account. The only Florida case involving a loan against a retirement plan… supports the exclusion of the outstanding loans from the value of the retirement account in this case. Here, the loans were used to support the parties' lifestyle, and both parties received the benefit from the loans. Because they both received the benefit of the loans, the loans should be excluded from the accumulated amounts to the extent that they are unpaid."

2. "Moreover, if the loans were an asset of the retirement account, then they represent a corresponding liability of the [Husband], as they must be repaid by the plan participant."

3. "Because these loans were incurred during the marriage and for a marital purpose, they are presumed to be a marital debt."

4. "Thus, if the loans are treated as assets of the retirement account subject to distribution, then they should be offset by the marital liabilities created. If they are not treated as part of the retirement account, then the marital liabilities need not be considered. In other words, both the marital asset and marital liabilities should be included in the distribution, or neither should be included."

5. "The latter solution is consistent with not considering the amount of the outstanding loans when calculating the distribution of the 401(k) through the QDRO."

6. "[An earlier decision] provides an analogous situation to this case …. [Therein], the Fifth District noted that 'to enforce a prior judgment, a court may modify a final judgment to provide for reimbursement for a party's share of marital debts.' The court concluded that 'a dissolution judge must equitably distribute the parties' assets and liabilities pursuant to section 61.075, Florida Statutes. Failing to give relief to the husband for his payment of the note would have upset the equitable distribution scheme of the final judgment, which would be an impermissible modification."

7. "The same principle applies to the treatment of the outstanding unpaid loans in this case. If they are treated as assets but not as offsetting liabilities, the equitable distribution of the retirement account is upset, and the [Wife] receives substantially more than the [Husband] from the retirement account. Yet the parties' intent as expressed in the mediated agreement is that they will divide the balance of the account."

8. "In denying relief, the trial court overlooked the consistent testimony from the parties that only paid loans would be added back to the account."

9. "Including the outstanding loan balances in the amount to be distributed to the [Wife] would result in an inequitable distribution and windfall to her and would leave undisposed the marital liabilities represented by the loans. Interpreting the agreement to exclude the outstanding loans would dispose of both the loans as assets and the corresponding liabilities, as they offset each other."

Teague v. Teague, 122 So.3d 938 (Fla. 4th DCA 2013)

TRIAL COURT'S VALUATION OF MARITAL ASSETS AND LIABILITIES NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, ALTHOUGH NOT ERROR TO SET DATE OF FILING AS VALUATION DATE; TRIAL COURT REQUIRED TO RECONSIDER OTHER ORDERS STEMMING FROM ERRONEOUS EQUITABLE DISTRIBUTION SCHEDULE.

The Former Husband and Former Wife were married in 1992. Two children were born during the marriage. The Former Husband owned and operated a private practice as a chiropractor in a building that had been deeded to him by his parents before the marriage. During the marriage, the Former Wife coordinated and helped perform a series of extensive renovations and improvements to the building.

In 2001, the Former Husband created a company called Jordan Realty, LLC, and soon after he transferred his chiropractic building to the company. The building was later sold during the marriage, and then the Former Husband and Former Wife began looking for places to invest the money or begin another business for the family. The parties decided to purchase a salon in 2009 with the proceeds from the sale of the building. The salon was sold in 2010 and the proceeds went back into the Jordan Realty, LLC account. The Former Husband and Former Wife used part of the money to pay for household and living expenses during the marriage.

The Former Wife petitioned for dissolution of marriage in January 2011. At the end of the trial, the trial court made a series of oral rulings, from which the parties drafted proposed final judgments. The trial court adopted the Former Wife's proposed final judgment, including an equitable distribution schedule. Although the trial court made changes to the provisions in the Former Wife's proposal before signing it, her proposed equitable distribution schedule remained unchanged and was attached to the final judgment. The Former Husband appealed. The District Court reversed the equitable distribution award:

1. "In the instant case, we find that competent substantial evidence is lacking to support the trial court's valuation of certain marital assets and liabilities in the equitable distribution schedule attached to the final judgment. These unsupported valuations contribute to totals that were used to determine the ultimate equitable distribution award for Former Wife, leaving Former Husband in a position to pay an amount that appears to be overstated."

2. "The equitable distribution schedule also appears to have typographical errors in regard to account numbers and errors with accounts appearing to be included in the schedule more than once or marital liabilities not being included at all. In [an earlier case] we applauded the trial court's attempt to resolve the issues before it and noted the difficult task that trial courts face to resolve financial issues in these dissolution cases when evidence is lacking. However, in this case… 'the evidence is simply insufficient to support some of the trial court's conclusions.'"

3. "[T]o the extent that Former Husband also challenges the trial court's decision to value the marital assets and liabilities as of the date of filing the petition for dissolution, we find his arguments without merit…. The trial court did not abuse its discretion in determining that the date of filing the petition for dissolution was an appropriate date to value the assets."

4. "A corrected equitable distribution schedule may alter the end financial positions of the parties. Therefore, on remand, the trial court must also reconsider the other orders in the final judgment that stemmed from the erroneous equitable distribution schedule, as it essentially served as a summary of the parties' financial positions upon dissolution."

5. "The trial court must also reconsider the order requiring the sale of the marital home, which was determined to be necessary based on the conclusion that Former Husband was not

able to afford to keep the home, which in turn was based on the erroneous equitable distribution schedule."

6. "Furthermore, the trial court should reconsider the sale of the marital home with consideration of what is in the best interests of the minor children."

7. "Similarly, the trial court must also reconsider orders related to the awarding of (1) permanent alimony, (2) alimony arrearages, (3) child support, and (4) attorneys' fees and costs."

8. "Should the trial court determine that any equitable distribution award is to be paid from Former Husband's retirement accounts, the court should also address the issue of penalty fees and taxes resulting from withdrawing funds from those accounts prematurely."

Jordan v. Jordan, 127 So.3d 794 (Fla. 4th DCA 2013)

Fifth District

ERROR TO FAIL TO MAKE FINDINGS REGARDING VALUATION OF ASSETS DISTRIBUTED IN EQUITABLE DISTRIBUTION SCHEME.

In a case with little facts stated in the opinion, the trial court rendered a final judgment with an equitable distribution scheme that failed to include values of assets distributed. The District Court held:

1. "Section 61.075(3), Florida Statutes (2011) requires a trial court to make specific findings of fact when equitably distributing marital property 'including the individual valuation of significant assets' and the 'identification of marital liabilities.' Failure to comply with the requirements of section 61.075(3) is reversible error."

2. "The final judgment on review lacks the requisite valuation for the marital home and other properties that the court distributed. Without proper valuation of the marital assets, this Court is unable to meaningfully review the trial courts' distribution for an abuse of discretion. Therefore, we reverse and remand for the trial court to make the required findings regarding the equitable distribution of the marital property."

Packo v. Packo, 120 So.3d 232 (Fla. 5th DCA 2013)

C. Pensions and Retirement Benefits

First District

TRIAL COURT ERRED IN DETERMINING AMOUNT WIFE WAS TO RECEIVE FROM FUTURE MONTHLY INSTALLMENTS OF HUSBAND'S RETIREMENT WITHOUT FIRST CALCULATING "DISPOSABLE RETIRED PAY" AND IN SO CALCULATING ERRED IN DEDUCTING AMOUNT HUSBAND WAS PAYING TOWARDS A SURVIVOR BENEFIT PLAN FOR HIS CURRENT SPOUSE AS SAID PAYMENTS WERE NOT BEING MADE PURSUANT TO COURT ORDER.

The Wife appealed from the trial court's determination of the recurring amount awarded to her from future monthly installment of Husband's Army retirement based upon the MSA entered into in September of 1994, which gave her "10/23 of the Husband's Army retirement as

of the date of this Agreement". The MSA required the entry of QDROs, one of which was for her share of her Husband's military retirement benefits, but no QDROs were entered at that time. The Wife did not formally petition for the entry of the QDROs until 2010. After taking evidence, the trial court awarded her $401.39 monthly based on the Husband's Army pension, and arrived at that amount be deducting from the Husband's disposable retirement pay the amount he was voluntarily paying towards a survivor benefit plan for his current spouse. The Wife argued that the statute allows SBP premium payments to be deducted only if they are being made pursuant to a court order. The Husband argued that there would rarely be a need for a court order to require a spouse to pay for an SBP for a current spouse and that the requirement of a court order pertains only to former spouses. The District Court held:

1. "[W]e start with the language of the parties' marital settlement agreement, which gave Ms. Graham '10/23 of the Husband's Army retirement.' Although the rule was once otherwise, state courts may divide a former service member's 'disposable retired pay' between spouses in accordance with 10 U.S.C. §1408(c)(1)(2011). In order to arrive at the amount of Mr. Graham's retirement benefits to which Ms. Graham is entitled, the trial court had first to calculate his disposable retired pay."

2. "In defining disposable retired pay, section 1408(a)(4) enumerates certain deductions from gross retired pay, including amounts which 'are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.' 10 U.S.C. §1408(a)(4)(D)(2011)."

3. "The trial court ruled section 1408(a)(4)(D) required it to deduct from disposable retired pay the amount Mr. Graham was voluntarily paying towards a survivor benefit plan (SBP) for his current spouse."

4. "[S]ection 1408(a)(2) defined 'court order' as 'a final decree of divorce, dissolution, annulment, or *legal separation* issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree which… in the case of a division of property, specifically provides for the payment of an amount… from the disposable retired pay of a member *to the spouse* or former spouse of that member.' The inclusion of 'legal separation' in this language, along with the specific reference to a current spouse… shows that Congress contemplated court orders requiring payments for current spouses and former spouses alike, and that court orders are required if SBP payments are to be deducted from a retiree's disposable retired pay."

5. "In short, when calculating disposable retired pay, SBP premiums should be deducted from gross retirement pay only if they are being made pursuant to court order. The trial court erred by deducting Mr. Graham's voluntary SBP premium payments when calculating his disposable retired pay."

Graham v. Graham, 123 So.3d 625 (Fla. 1st DCA 2013)

Second District

Third District

Fourth District

IN CALCULATING ONE-HALF SHARE OF HUSBAND'S 401k PLAN TO BE AWARDED TO WIFE UNDER TERMS OF AGREEMENT, TRIAL COURT ERRED IN INCLUDING VALUE OF OUTSTANDING LOANS TAKEN OUT BY HUSBAND TO SUPPORT PARTIES' LIFESTYLE' INCLUDING SUCH LOANS IN AMOUNT TO BE DISTRIBUTED TO WIFE WOULD RESULT IN INEQUITABLE DISTRIBUTION AND WINDFALL TO HER AND WOULD LEAVE MARITAL LIABILITIES REPRESENTED BY THE LOANS.

The parties entered into a mediated settlement agreement during their dissolution proceedings wherein they agreed to a distribution to the Wife, through a QDRO, of one-half of the marital portion of the Husband's 401(k) plan, which they defined as 50% of the amount accumulated from the date of their marriage to January 1, 2008. They qualified that amount by stating "that loans and [withdrawals] taken during the marriage and not repaid will be taken into account for distribution purposes." However, the trial court found that the parties' agreement was ambiguous because the phrase "taken into account" could have several meanings. It therefore allowed the testimony of both parties, whose testimony was consistent. The Husband testified that the loans he had taken from his account were all used to fund the parties' lifestyle and to the extent that they were still unpaid they were not intended to be included in the accumulated total of the account. The Wife testified that she knew about the loans and thought that they had been repaid, and that it was her understanding that loans which had been repaid would be included in the amount due to her. According to the plan statement introduced in evidence, the repayments on loans increased the account and were part of the ending balance of $60,734.50. Thus, both parties agreed that paid loans, not unpaid loans, would be part of the distribution.

The trial court, however, overlooked the testimony of the Wife, and entered the QDRO to distribute to the Wife one-half of the Husband's retirement account. The order directed the inclusion of the value of the outstanding loans taken in the calculation of the Wife's share. The Husband appealed, arguing that the trial court erred in including the loans in calculating the amount to be distributed because this would result in the Wife receiving more than half of the balance and would leave the corresponding loan repayment obligation as an undistributed marital liability. The District Court agreed and reversed:

1. "A participant may take loans and withdrawals from a 401(k) account. The only Florida case involving a loan against a retirement plan… supports the exclusion of the outstanding loans from the value of the retirement account in this case. Here, the loans were used to support the parties' lifestyle, and both parties received the benefit from the loans. Because they both received the benefit of the loans, the loans should be excluded from the accumulated amounts to the extent that they are unpaid."

2. "Moreover, if the loans were an asset of the retirement account, then they represent a corresponding liability of the [Husband], as they must be repaid by the plan participant."

3. "Because these loans were incurred during the marriage and for a marital purpose, they are presumed to be a marital debt."

4. "Thus, if the loans are treated as assets of the retirement account subject to distribution, then they should be offset by the marital liabilities created. If they are not treated as part of the retirement account, then the marital liabilities need not be considered. In other words,

both the marital asset and marital liabilities should be included in the distribution, or neither should be included."

5. "The latter solution is consistent with not considering the amount of the outstanding loans when calculating the distribution of the 401(k) through the QDRO."

6. "[An earlier decision] provides an analogous situation to this case …. [Therein], the Fifth District noted that 'to enforce a prior judgment, a court may modify a final judgment to provide for reimbursement for a party's share of marital debts.' The court concluded that 'a dissolution judge must equitably distribute the parties' assets and liabilities pursuant to section 61.075, Florida Statutes. Failing to give relief to the husband for his payment of the note would have upset the equitable distribution scheme of the final judgment, which would be an impermissible modification."

7. "The same principle applies to the treatment of the outstanding unpaid loans in this case. If they are treated as assets but not as offsetting liabilities, the equitable distribution of the retirement account is upset, and the [Wife] receives substantially more than the [Husband] from the retirement account. Yet the parties' intent as expressed in the mediated agreement is that they will divide the balance of the account."

8. "In denying relief, the trial court overlooked the consistent testimony from the parties that only paid loans would be added back to the account."

9. "Including the outstanding loan balances in the amount to be distributed to the [Wife] would result in an inequitable distribution and windfall to her and would leave undisposed the marital liabilities represented by the loans. Interpreting the agreement to exclude the outstanding loans would dispose of both the loans as assets and the corresponding liabilities, as they offset each other."

Teague v. Teague, 122 So.3d 938 (Fla. 4th DCA 2013)

Fifth District

ERROR FOR TRIAL COURT TO FAIL TO INCLUDE VALUE OF WIFE'S MARITAL RETIREMENT ACCOUNTS IN EQUITABLE DISTRIBUTION CALCULATION.

The Former Husband appealed the Final Judgment of Dissolution of Marriage and the related Order on Equitable Distribution and Other Requested Relief rendered by the trial court. He raised several issues on appeal, all of which were affirmed except one: that the trial court erred by finding that the Former Wife's marital retirement accounts (a State of Florida Retirement System account and two BENCOR retirement accounts) were minimal in value and failing to include them in equitable distribution. The Wife conceded that the trial court erred in failing to include in the equitable distribution amount the State of Florida retirement account. On this issue, the District Court reversed:

1. "We believe that all three accounts should have been included in the equitable distribution amount."

2. "Accordingly, we reverse as to the first issue and remand for further proceedings to determine the value of these accounts, include them in the equitable distribution calculation, and adjust the equitable distribution amount accordingly."

Sotis v. Sotis, 114 So.3d 228 (Fla. 5th DCA 2013)

D. Distribution

First District

ABUSE OF DISCRETION TO ORDER LIQUIDATION OF HUSBAND'S STATE OF FLORIDA DEFERRED COMPENSATION FUND, HIS IRA AND HIS WINE COLLECTION TO PREVENT FORECLOSURE OF MARITAL HOME, WHERE WIFE'S MOTION WAS UNSWORN AND DID NOT REFERENCE HUSBAND'S ASSETS THAT WERE SUBJECT OF LIQUIDATION AND DISTRIBUTION.

At a hearing on the Wife's Motion for Emergency Relief, stemming from complicated proceedings below, the trial court discovered that the parties needed $28,000 to reinstate their mortgage, and that the homeowners' association had placed a lien on the parties' home, thereby prompting the trial court to shift it's focus to what it determined to be the "real" issue of "getting all [the] bills caught up."

The Wife's counsel informed the court that she had $6,000 on hand, and claimed that the husband had over $18,000 in a deferred compensation fund he had opened when he previously worked for the state, and that he also had approximately $4,000 in an IRA account, and, that the husband's wine collection was worth approximately $55,000. After hearing from both parties, the trial court announced its intention to order "whatever accounts and monies that [are] available on both parties be liquidated to catch up the mortgage and catch up these outstanding expense." The Husband's counsel objected on the basis of due process, because the foreclosure issue was not noticed for hearing. In response, the trial court, in its order indicated that the parties were on notice that the nature of the emergency was foreclosure of the home, and therefore any actions taken at the hearing to eliminate that emergency would be properly considered at the noticed hearing. The court ordered the liquidation of the husband's deferred comp fund, his IRA, the wine collection and that the wife pay her almost $6,000 towards the mortgage and homeowners' association delinquency. The District Court held:

1. "[The husband argues the trial court abused its discretion by ordering the liquidation of his assets when that remedy has not been pled in the wife's Motion for Emergency Relief. On this point, we agree with the husband."

2. "While we sympathize with the trial court's concern that the foreclosure of the parties' home would result in the loss of substantial equity, the dictates of procedural due process demand that a party be placed on notice and given a meaningful opportunity to be heard before being divested of his or her property."

3. "Section 61.075(5), Florida Statutes (2011), does not authorize the trial court's action here, contrary to the wife's urging. This section provides in pertinent part as follows: 'If the court finds good cause that there should be an interim partial distribution during the pendency of a dissolution action, the court may enter an order that shall identify and value the marital and non-marital assets and liabilities made the subject of a sworn motion, set apart assets and liabilities, and provide for a partial distribution of those marital assets and liabilities.'"

4. "The wife's argument disregards the portion of the above-quoted statutory language requiring that the marital and non-marital assets subject to the interim partial distribution be '*made the subject of a sworn motion*.' In this case, not only was the wife's motion not sworn, but it did not reference the husband's assets that were ultimately made the subject of liquidation and

distribution by the interim order. Nor, again, did the trial court make any effort to identify which assets were marital and which were non-marital."

5. "Where a party's private property is at stake, the simple fact, according to the trial court, that 'the parties were on notice that the nature of the emergency was the foreclosure of the home,' would not justify, as the court further observed, 'any and all actions taken at the hearing to eliminate that emergency . . . .'"

6. "In the instant case, the husband was wholly without notice that his State of Florida deferred compensation fund, his IRA, and his wine collection would be subject to liquidation in order to reinstate the mortgage. Consequently, it was an abuse of the trial court's discretion to order him to do so."

Austin v. Austin, 120 So.3d 669 (Fla. 1st DCA 2013)

Second District

TRIAL COURT ERRED IN AWARDING HUSBAND HALF THE APPRECIATED VALUE OF WIFE'S PRE-MARITAL HOME RESULTING FROM CAPITAL IMPROVEMENTS WHERE ANTENUPTIAL AGREEMENT PROVIDED THAT HUSBAND'S INTEREST IN WIFE'S PREMARITAL HOME WAS LIMITED TO ONE-HALF OF THE PRINCIPAL PAYMENTS AND ONE-HALF OF CAPITAL IMPROVEMENTS MADE BY THE PARTIES DURING THE MARRIAGE.

The parties married in 1996. They had two children during the marriage. The Husband is a pool contractor, and the Wife is an accountant. During the marriage, they worked together in the Husband's pool construction business. Before the parties married, they signed an antenuptial agreement. The general purpose and intent of the agreement was to protect each party's premarital assets as separate property. The antenuptial agreement contained a specific provision regarding the Wife's premarital home, which stated that the Wife's home would remain her separate property and that:

> If a petition for dissolution of marriage is filed by either of the parties hereto after the date the parties are married, upon the entry of an order dissolving the marriage of the parties, Fran shall pay to Rudy a sum equal to one-half of all principal payments and any capital improvements made with respect to the House between the date of the marriage of the parties and the date on which a petition for dissolution of marriage was filed.

During the marriage, the parties and their children resided in the wife's premarital home. The parties bought adjacent property and made improvements to both the wife's premarital home and the adjacent property for the benefit and use of the family. In the final judgment of dissolution, the trial court assigned the Wife's premarital home an equity value of $285,000 at the time of the marriage in 1996. The trial court found that the home's equity value had appreciated in the amount of $272,813, giving it an equity value of $557,813 at the time of the dissolution. The trial court then found that "[o]ne half of those capital improvements would be $136,406.50," awarding the Husband that amount in the equitable distribution calculations. The premarital home was awarded to the Wife as a non-marital asset. Both the husband and the Wife appealed. In her cross-appeal, the Wife argued that the trial court made three errors in the equitable

distribution plan, including the calculated amount of the Husband's interest in her premarital home. The District Court agreed and reversed:

1. "We conclude that the trial court erred in interpreting the antenuptial agreement to provide that the husband is entitled to half of the appreciated value of the property resulting from capital improvements."

2. "The plain language of the agreement clearly limits the husband's interest in the wife's premarital home to one-half of principal payments and one-half of capital improvements made by the parties during the marriage."

3. "The trial court's calculation erroneously took into consideration the appreciation of the premarital home, which was not contemplated by the terms of the antenuptial agreement."

4. "The husband's benefit regarding the wife's premarital home was limited to one-half of the cost of the improvements and one-half of the amount of the principal payments made during the marriage. Accordingly, we reverse the trial court's finding that the husband was entitled to one-half of the appreciated value of the wife's home."

5. "Additionally, the trial court erred in its finding regarding the premarital value of the wife's premarital home, as argued by the husband on appeal."

6. "The undisputed testimony was that the home was worth $341,000 when the parties married, but the trial court found that the home was worth $375,000 at the time of the marriage. There appears to be no support in the record for the trial court's finding; therefore, we reverse on this matter."

7. "We note that the value of the wife's premarital home is likely irrelevant to the overall equitable distribution plan in light of our conclusion above that the husband has no interest in any appreciated value of the home."

Heiny v. Heiny, 113 So.3d 897 (Fla. 2d DCA 2013)

IN AWARDING RENTAL PROPERTY TO HUSBAND, TRIAL COURT ERRED IN FAILING TO MAKE FINDINGS REGARDING THE AMOUNT OF DEBT HUSBAND PAID ON PROPERTY AND WHETHER HUSBAND USED NON-MARITAL OR MARITAL FUNDS TO PAY; COURT THEREBY FAILED TO IDENTIFY, VALUE AND DISTRIBUTE ALL MARITAL ASSETS.

The parties married in 1996. They had two children during the marriage. The Husband is a pool contractor, and the Wife is an accountant. During the marriage, they worked together in the Husband's pool construction business. Before the parties married, they signed an antenuptial agreement. The general purpose and intent of the agreement was to protect each party's premarital assets as separate property. At the time of the dissolution, the marital property subject to equitable distribution included the property adjacent to the Wife's premarital home; their rental property, known as the Genessee property; various investment, retirement, and bank accounts; a car; and other personal property. The parties' marital debts consisted of a home mortgage with a balance of $276,000 and a mortgage on the Genessee property with a disputed balance somewhere between $36,000 and $60,000.

Regarding the Genessee rental property, while it was undisputed that there was a marital mortgage on this property, there was conflicting evidence regarding the balance of the mortgage when it was paid off by the Husband. The Wife's accountant testified at trial that according to the Wife's financial affidavit, the Genessee rental property had a mortgage in the amount of $60,000 at the time the Wife filed for divorce. The Wife acknowledged that the Husband paid off the debt

and that he would be entitled to credit, depending on the source of the funds he used to pay off the debt. The Husband testified that he paid off the $60,000 loan. Regarding the funds he used, he testified that he borrowed money from his uncle in the amount of either $17,000 or $27,000. The Husband did not produce any documentation to support his assertion that he paid off the loan with nonmarital funds. In addition, his financial affidavit listed the Genessee rental property mortgage as having a $36,000 balance. The record further indicated that when the parties fell behind on their payments on the loan, the Wife's father bought the note and filed suit to foreclose the mortgage. The assignment of the note to the Wife's father indicated that the principal amount of the note was $40,000.

In the final judgment, the trial court awarded the Husband the Genessee rental property, valued at $103,898.69. Both parties appealed. The Husband argued that the trial court failed to make findings regarding the mortgage debt on the property that he paid off during the dissolution proceedings, while the Wife responded that even though the Husband would be entitled to credit for the amount of debt he satisfied by paying off the mortgage, he failed to produce any evidence to show the source of the funds he used to pay off the debt. The District Court reversed:

1. "Although this property was distributed to the husband in the final judgment as part of the equitable distribution plan, the marital mortgage debt on this property that was satisfied by the husband was not credited to the husband or mentioned in the final judgment."

2. "Section 61.075, Florida Statutes (2009), requires a trial judge to identify all marital assets and liabilities as defined therein, value them, and distribute them equitably between the parties. A trial court's failure to include all marital assets or debts in an equitable distribution plan violates section 61.075 and requires reversal."

3. "Accordingly, we reverse this portion of the equitable distribution plan. On remand, the trial court shall make findings regarding the amount of debt the husband paid on the Genessee rental property and whether the husband used nonmarital or marital funds to pay the debt. The trial court shall factor the findings into the overall equitable distribution plan."

Heiny v. Heiny, 113 So.3d 897 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN TREATING A PAYMENT MADE TO POOL BUSINESS, WHICH WAS AWARDED TO HUSBAND, AS A RECEIVABLE MARITAL ASSET SUBJECT TO EQUITABLE DISTRIBUTION WHERE BOTH PARTIES USED THE PAYMENT AND THERE WAS NO EVIDENCE THAT PAYMENT WAS LOANED TO BUSINESS WITH THE INTENTION OF IT BEING REPAID.

The parties married in 1996. The husband is a pool contractor, and the wife is an accountant. During the marriage, they worked together in the husband's pool construction business. Before the parties married, they signed an antenuptial agreement, the purpose of which was to protect each party's premarital assets as separate property. During the marriage, the parties and their two minor children resided in the wife's premarital home. The parties bought adjacent property and made improvements to both the wife's premarital home and the adjacent property for the benefit and use of the family.

At the time of the dissolution, the marital property subject to equitable distribution included the property adjacent to the wife's premarital home; rental property (the Genessee property); various investment, retirement, and bank accounts; a car; and other personal property. The parties also sought a determination regarding the husband's interest in the wife's premarital home and the wife's interest in the pool business. The parties' marital debts consisted of a home

mortgage with a balance of $276,000 and a mortgage on the Genessee property with a disputed balance somewhere between $36,000 and $60,000.

Regarding $75,000 paid to the pool business, the Wife, who is an accountant, testified that when the parties refinanced the marital home in 1999, they put $75,000 of the loan proceeds into the pool business to pay business debts and some of their personal expenses associated with "the pool improvements" to the marital property adjacent to the Wife's premarital home. In the final judgment, the trial court found that the parties had loaned the $75,000 to the pool business and awarded the Husband the pool business as a nonmarital asset, "with the exception of the one-half of the $75,000 investment ($37,500) that shall be made payable back to the Wife."

Both parties appealed. The husband contended that the trial court erred in including the amount in the equitable distribution plan because the evidence showed that after the parties paid the money to the pool business, they used it to pay for business and personal expenses. The District Court reversed:

1. "The evidence demonstrates that both parties jointly depleted the $75,000, and the trial court erred in treating it as a marital asset subject to equitable distribution."

2. "The wife testified that this money was loaned to the company and claimed that it was a receivable marital asset. But there was no loan document, written promise, or any other indication that the company had any legal obligation to repay that money."

3. "The evidence demonstrated, and the trial court found, that the business employed both parties, paid both parties' salaries, and paid "for many of the couple's personal and household expenses during the marriage."

4. "In light of the undisputed evidence that both parties jointly used the $75,000 and in the absence of evidence that the $75,000 was loaned to the business with the intention of being repaid by the business, the trial court erred in treating the $75,000 as a receivable marital asset subject to equitable distribution."

Heiny v. Heiny, 113 So.3d 897 (Fla. 2d DCA 2013)

TRIAL COURT PROPERLY AWARDED HUSBAND INSURANCE PROCEEDS FROM HOME BURGLARY WHERE PROCEEDS HAD BEEN DEPLETED BY HUSBAND WITHOUT WIFE'S KNOWLEDGE OR CONSENT.

The parties married in California in 1989 when the Former Husband worked in his family's dry-cleaning business. The Former Husband's father sold the business in 1990 and moved to Tampa. The parties also moved to Tampa where the Former Husband bought a Tampa dry-cleaning business and named it Al Capote's Dry Cleaning, Inc. The parties separated in 2008. In it's equitable distribution scheme, the trial court awarded the Former Husband $72,917 in insurance proceeds from a home burglary after finding that the Former Husband had deposited these proceeds into the business account without the Former Wife's knowledge or consent and spent it. On cross-appeal, the former husband argued that the trial court erred because (1) these funds were depleted before the final hearing for family and business expenses, and (2) because $62,917 of the proceeds covered his premarital property. The District Court affirmed:

1. "If a spouse's misconduct resulted in the dissipation of a marital asset, it is proper to assign the dissipated asset to the spending spouse."

2. "The record supports the trial court's ruling and we affirm on this issue."

Capote v. Capote, 117 So.3d 1153 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN AWARDING HUSBAND, AS CONTINGENT ASSET, TOTAL AMOUNT OF LOAN HE MADE AND ITS RISK OF NON-REPAYMENT, THEN EQUALLY DIVIDING THE PARTIES' TOTAL ASSETS AND LIABILITIES, THEREBY AWARDING WIFE AN AMOUNT EQUAL TO HALF THE LOAN AMOUNT IN OTHER ASSETS IN PLACE OF HER HALF OF ANY LOAN REPAYMENT.

The trial court awarded the Former Husband herein, as a contingent asset, the total amount of a $55,000 loan he made to a Mr. Villa against the Former Wife's wishes. The final judgment, however, stated that the Former Wife was entitled to one half of any repayment. The trial court then equally divided the parties' total assets and liabilities, effectively awarding the Former Wife $27,500 in other assets in place of her half of any loan repayment. On cross-appeal, the Former Husband argued this was error. The District Court reversed:

1. "To resolve the conflict between the equitable distribution schedule and the statement in the final judgment, the trial court on remand should remove the conflicting statement."

Capote v. Capote, 117 So.3d 1153 (Fla. 2d DCA 2013)

Third District

Fourth District

DECISION REGARDING EQUITABLE DISTRIBUTION OF MARITAL HOME IS DEFICIENT WHERE NO FINDING AWARDING EQUITY IN HOME CAN BE DISCERNED FROM RECORD

In a case stating very little facts, the District Court reversed the trial court's decisions regarding equitable distribution:

1. "A trial court is obligated to identify, value, and distribute the marital and non-marital assets and liabilities."

2. "The temporary use of the marital home was awarded to Former Wife 'until the full implementation of the equitable distribution schedule" however, without Exhibit 'A' attached to the final order, no findings awarding the equity in the home can be discerned from the record."

3. "Moreover, even though the trial court awarded equity in the martial home to Former Wife, it failed to indicate if there was a shift in title."

4. "Also, the Former Wife requested partition. Where a request for partition complies with section 64.041, Florida Statues (2010), and is not contested by the opposing party, failure to divide the property is reversible error."

5. "Because the trial court did not properly rule concerning the marital residence, the entire scheme of equitable division devised by the trial court may need revision."

6. "We reverse on [the issue of the Former Wife's attorney's fees and costs as of the final hearing] because where equitable distribution is reversed on appeal, it may be appropriate to reexamine attorney's fees to determine if the redistribution of assets and liabilities affects the award for attorney's fees."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

TRIAL COURT IMPROPERLY GRANTED MOTION FOR SUMMARY JUDGMENT SEEKING INTERIM PARTIAL DISTRIBUTION OF MARITAL ASSETS BECAUSE WIFE DID NOT SHOW THE STATUTORILY REQUIRED GOOD CAUSE—THAT EXTRAORDINARY CIRCUMSTANCES REQUIRED INTERIM DISTRIBUTION.

The Former Wife filed an amended sworn motion for summary judgment, seeking an interim partial distribution of marital assets. However, the motion did not expressly address section Florida Statute Section 61.075(5)'s good cause requirement. Instead, the Former Wife alleged that, pursuant to a pretrial stipulation, the parties agreed to divide certain of their liquid assets equally, but after the pretrial stipulation, the Former Husband continued to retain her one-half share. She further alleged that the Former Husband had acknowledged at his deposition that she was entitled to her one-half share. The motion argued: "In light of the Husband's [repeated] testimony acknowledging that the Wife is… entitled to the [one-half share], it is enigmatic to the Wife that he could contest this Motion and continue to withhold the dollars; nevertheless, the Husband continues to do so."

The Former Husband filed a memorandum in opposition, arguing that the Former Wife's motion offered no showing of good cause—extraordinary circumstances which required an interim partial distribution of her one-half share. He pointed out that the stipulation upon which she relied created no entitlement to receive her one-half share before trial or a final settlement. The Former Husband also reminded the court that the Former Wife requested the same interim partial distribution in two prior motions in the prior two years, and the court denied both because she had not shown good cause. He further argued that the Former Wife could not show good cause for the interim partial distribution because she already had received a stipulated eight-figure interim partial distribution during the dissolution proceedings. After a non-evidentiary hearing, the circuit court granted the Wife's motion. This appeal by the Former Husband's estate followed (Former Husband passed away during appeal). Reversing, the District Court held:

1. "Normally, we would review an order granting an interim partial distribution for an abuse of discretion…. However, because the Former Wife sought the interim partial distribution through a motion for summary judgment, our review is de novo."

2. "We conclude that the Former Wife did not show without genuine issue of material fact that extraordinary circumstances required an interim partial distribution of her one-half share of the liquid assets."

3. "As the Former Husband's memorandum in opposition argued, the Former Wife's motion offered no showing of good cause, that is, extraordinary circumstances which required the interim partial distribution."

4. "Thus, the circuit court should have denied the Former Wife's motion pending trial, at which time the court could have included [her] one-half share as part of its determination of whether to impose an equal or unequal distribution of the parties' marital assets and liabilities pursuant to section 61.075(1), Florida Statutes (2012)."

Defanti v. Russell, 126 So.3d 377 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT ERRED IN AWARDING FORMER HUSBAND HALF-INTEREST IN CONDOMINIUM, WHICH FORMER WIFE INHERITED DURING THE MARRIAGE AND WHICH CONSTITUTED A NON-MARITAL ASSET

The Former Wife inherited a condominium located in Virginia during the parties' marriage. It was titled in her mother's name with the Former Wife having a right of survivorship. The title was never changed. No marital funds were used to purchase the property and, thus, it constituted a non-marital asset. At trial, the Former Husband testified that he contributed to the value of the condominium through repairs and services and that marital funds were used at times to pay the mortgage. However, the court did not make factual findings to support an enhancement in value award on the non-marital asset. Further, the Former Husband failed to support his testimony with evidence from which the trial court could have extrapolated the requisite findings, other than a few pages of bank records indicating mortgage payments and condominium fees were paid from marital funds. Nonetheless, the trial court awarded Former Husband a one-half interest in the condominium. Wife appealed. The District Court reversed: "As Former Husband failed to prove he was entitled to an enhancement award, the non-marital asset should be removed from the equitable distribution scheme."
Davis v. Davis, 108 So.3d 660 (Fla. 5th DCA 2013)

ERROR FOR TRIAL COURT TO FAIL TO INCLUDE VALUE OF WIFE'S MARITAL RETIREMENT ACCOUNTS IN EQUITABLE DISTRIBUTION CALCULATION.

The Former Husband appealed the Final Judgment of Dissolution of Marriage and the related Order on Equitable Distribution and Other Requested Relief rendered by the trial court. He raised several issues on appeal, all of which were affirmed except one: that the trial court erred by finding that the Former Wife's marital retirement accounts (a State of Florida Retirement System account and two BENCOR retirement accounts) were minimal in value and failing to include them in equitable distribution. The Wife conceded that the trial court erred in failing to include in the equitable distribution amount the State of Florida retirement account. On this issue, the District Court reversed:

1. "We believe that all three accounts should have been included in the equitable distribution amount."

2. "Accordingly, we reverse as to the first issue and remand for further proceedings to determine the value of these accounts, include them in the equitable distribution calculation, and adjust the equitable distribution amount accordingly."

Sotis v. Sotis, 114 So.3d 228 (Fla. 5th DCA 2013)

E. Judgment

First District

REMAND FOR RECONSIDERATION OF ENTIRE EQUITABLE DISTRIBUTION SCHEME REQUIRED WHERE WIFE'S RETIREMENT ACCOUNTS WERE INCORRECTLY VALUED AND SUCH ERROR CANNOT BE CORRECTED IN ISOLATION.

In a case with very little stated facts, the equitable distribution portion of the final judgment included a value of $8,059.92 for the Wife's retirement account, although the evidence in the record established a value of exactly twice that amount ($16,119.84). In this regard, the District Court reversed: "Because this error cannot be corrected in isolation, on remand, the trial court shall reconsider the equitable distribution scheme."
Allen v. Allen, 114 So.3d 1102 (Fla. 1st DCA 2013)

EQUITABLE DISTRIBUTION PORTION OF FINAL JUDGMENT REMANDED WHERE FINAL JUDGMENT DID NOT ADDRESS ALL STATUTORILY MANDATED FACTORS.

At the final hearing in these dissolution of marriage proceedings, both parties testified and presented evidence concerning their respective incomes, personal property located at rental storage facilities, personal and child support expenses, educational levels, earning capacities, and contributions to the marriage. Following the hearing, the trial court issued its Final Judgment, including findings as to the contribution each spouse made to the marriage, to the care and education of the children and services rendered as homemaker' as to the economic circumstances of the parties' as to the duration of the marriage' and as to the desirability of retaining any asset intact and free from any claim by the other party.

In fashioning its equitable distribution scheme, the trial court considered the factors described in subparts (a), (b), (c), and (f) of section 61.075(1). The court also found that the Former Wife expended money to preserve the items held in the storage facility, and that the value of those items was less than half the cost of storage. The trial court ultimately ordered that each party receive the personal property presently in their respective possessions, and that the Former Wife would receive all the personal property in the storage facilities. On appeal, the Former Wife argued that the trial court's distribution should be upheld because, under section 61.075(1)(j), the trial court may consider any factor necessary to do equity and justice' and that awarding her all of the items in storage, resulting in an unequal distribution, was justified because she had paid the costs to store the items and their total value was less than half of the storage costs. The District Court remanded and held:

1. "While the goal of equity and justice is certainly a factor to be considered in constructing a distribution, it is not the only factor, nor does the statute provide that it should carry more weight than the other enumerated factors."

2. "Rather, the statute provides that an unequal distribution can be made if it is justified after 'all relevant factors' have been considered, including the factors contained in section 61.075(1)(a)-(j)."

3. "In the Final Judgment section entitled 'Findings Relative to Equitable Distribution,' it is apparent that the trial court considered the factors described in subparts (a), (b), (c), and (f) of section 61.075(1)."

4. "The trial court also found that the former wife expended money to preserve the items held in the storage facility, and that the value of those items was less than half the cost of storage. Although this finding is listed under the section entitled 'Findings Relative to Alimony,' it is perhaps congruent to the equitable distribution consideration contained in section 61.075(1)(j)."

5. "Nonetheless, it is evident that the Final Judgment does not address those mandatory factors listed in subparts (d), (e), (g), (h), or (i) of section 61.075(1)."

6. "Due to the omission of these statutorily mandated findings, we remand the equitable distribution portion of the Final Judgment to allow the trial court to make the requisite findings and, if necessary, craft a new equitable distribution scheme."

Watson v. Watson, 124 So.3d 340 (Fla. 1st DCA 2013)

Second District

WHERE FINAL JUDGMENT AWARDED WIFE SPECIFIC PERCENTAGE IN HUSBAND'S EMPLOYMENT-RELATED PENSION, TRIAL COURT LACKED JURISDICTION TO SUBSEQUENTLY MODIFY THAT AWARD TO APPLY THE PERCENTAGE TO BOTH THE EMPLOYMENT-RELATED PENSION AND HUSBAND'S SOCIAL SECURITY RETIREMENT BENEFIT OR TO CHANGE THE PERCENTAGE AWARDED WHEN, AS A RESULT OF HUSBAND'S RETIREMENT INTO SOCIAL SECURITY SYSTEM, THE EMPLOYMENT-RELATED BENEFIT DECREASED AND WIFE BEGAN RECEIVING REDUCED PAYMENT EACH MONTH.

In the final judgment of dissolution of marriage, the marital portion (67.59%) of the Former Husband's Chrysler pension was equally distributed between the parties. Although the court was aware that when the Former Husband retired into the social security system there would be a decrease in the Chrysler pension benefit, the court did not reserve jurisdiction to modify the percentage shares of the Chrysler pension benefit as part of the equitable distribution scheme. Accordingly, the Former Wife was awarded 33.795% of the Chrysler pension and the Former Husband was awarded 66.205% (his marital share, 33.795%, plus his non-marital share, 32.41%). The court ordered the Former Husband's counsel to submit a QDRO dividing the pension benefit by these percentages and reserved jurisdiction for enforcement.

After the Former Husband retired into the social security system, the Former Wife's monthly benefit was reduced. She received $445.10 less each month, and the Former Husband correspondingly received his percentage share of the Chrysler pension as well as his full social security payment. The Former Wife filed a motion to clarify judgment/modify QDRO, which the court granted. The court explained that the Former Husband had started receiving social security payments and that his Chrysler pension had accordingly been reduced. This resulted in the ratio in the judgment being applied to the Chrysler pension only and the entire social security

payment going to the Former Husband. The judge explained that it was not his intention to have the Former Wife's income reduced. The court stated: "Such a windfall to the Former Husband and deficit to the Former Wife was not ordered in the judgment. Rather, the judgment ordered that the ratio of the Former Husband's total pension benefit, whether paid from Chrysler before he retired or from Chrysler and social security after he retired, would be the same, that is, 33.795% to the Former Wife and 66.205% to the Former Husband. As stated in the judgment: ". . . the husband's retirement in the social security system will not increase his income." Likewise, it will not reduce the Former Wife's income.

The judge concluded that he could properly enforce the judgment as opposed to modifying it, stating, "I think the final judgment cannot be read any other way than to say she is entitled to 33.795 percent of the pension." The second amended QDRO was entered in accordance with the court's ruling. The Former Husband appealed both the order granting the motion to clarify and the second amended QDRO, arguing that the trial court was without jurisdiction to modify the percentage shares. The District Court reversed:

1. "Though we recognize that the trial court's ruling was equitable, we are compelled to reverse."

2. "'[A] court has no jurisdiction to modify property rights after those rights have been adjudicated in a final judgment of dissolution.'"

3. "A general reservation of jurisdiction in a dissolution order is typically insufficient to preserve a court's jurisdiction to subsequently alter property rights."

4. "And '[a] trial court may not, in the guise of an enforcement proceeding, readdress the distribution of property when the property has been previously distributed.'"

5. "Here, the trial court fashioned an equitable remedy but, unfortunately, did not have jurisdiction to do so. The final judgment distributed the Former Husband's Chrysler pension benefit between the parties—not his social security benefit. "

6. "Though the court noted in the final judgment that the Chrysler pension benefit would change with social security, regrettably the judgment did not have a provision indicating that the distribution would be any different."

7. "Indeed, there is no indication in the final judgment that the Former Wife would receive an increased percentage share of the Chrysler pension in the event her monthly pension benefit was reduced when the Former Husband entered into the social security system."

8. "Because the trial court did not have jurisdiction to readdress the distribution of the Chrysler pension, we must reverse."

George v. George, 113 So.3d 972 (Fla. 2d DCA 2013)

WHERE TRIAL COURT INITIALLY ASSIGNED TO HUSBAND THE ENTIRE VALUES OF PROPERTIES ACQUIRED DURING MARRIAGE, BUT ON MOTION FOR REHEARING REDUCED THE AWARDS TO HALF OF THEIR VALUES, TRIAL COURT ERRED IN FAILING TO CORRESPONDINGLY REDUCE MORTGAGE AMOUNTS AND PROPERTY TAX LIABILITIES BY HALF.

The parties married in California in 1989 when the Former Husband worked in his family's dry-cleaning business. The Former Husband's father sold the business in 1990 and moved to Tampa. The parties also moved to Tampa where the Former Husband bought a Tampa dry-cleaning business and named it Al Capote's Dry Cleaning, Inc. The parties separated in 2008. The parties owned various properties they acquired during the marriage. The equitable

distribution schedule incorporated into the final judgment assigned to the Former Husband the entire value of the Gulf Boulevard and Bradford Avenue properties, as well as the entire amount of the outstanding mortgages. However, the parties owned only a fifty-percent interest in each property and were responsible for only one-half of each mortgage. On the Former Husband's motion for rehearing, the trial court reduced these awards to one half of their values. Unfortunately, the trial court failed to correspondingly reduce the mortgage amounts by half. The Former Wife appealed. As to this apparent oversight, the District Court reversed:

1. "The Former Husband concedes that the trial court erred in assigning to him the entire mortgage amounts."

2. "He notes, and we agree, that the trial court also failed to reduce by half the $11,402 property tax liability on the Bradford Avenue property."

3. "We reverse and remand for the trial court to correct the equitable distribution of these two properties."

Capote v. Capote, 117 So.3d 1153 (Fla. 2d DCA 2013)

Third District

Fourth District

FINAL JUDGMENT REVERSED WHERE IT CONTAINED CONFLICTING LANGUAGE REGARDING TREATMENT OF TAX LIABILITY, REMAND REQUIRED FOR TRIAL COURT TO CLARIFY ITS INTENT AND FINDINGS .

The final judgment of dissolution, ending the nearly thirty-year marriage of the parties, distributed nearly $6 million in assets to the Husband, nearly $850,000 in assets to the Wife, and required the Husband to pay the Wife an equalizing payment of approximately $2.5 million. The assets awarded to the Husband include the husband's retail optical business, which the trial court valued at $2,520,562 for purposes of equitable distribution. The trial court accepted the testimony of the Wife's expert in valuing the business, who opined it had a total fair market value of $3,519,519. The expert testified that $974,199 of this figure represented personal goodwill attributable to the Husband and that, after deducting personal goodwill and the Husband's premarital interests, the business had a value of $2,520,562 for purposes of equitable distribution. The expert expressly testified, however, that this $2,520,562 value assumed and required that the Husband execute both a non-compete and some type of transitional consulting agreement, and that he had not performed an analysis as to the value were the Husband not to sign a non-compete. Both parties appealed various aspects of the final judgment. With regard to the parties' tax liabilities, it was agreed that the Husband underreported the income earned by his business for the 2004–2009 tax years and, thus, underreported the parties' personal income. During the pendency of the divorce, the Husband hired a tax attorney and sent the IRS a check for $586,795.58, representing the estimated tax due on the underreported income. The IRS returned $379,000 of the funds, which the Wife was in possession of at the time of the hearing. Paragraphs I and 12 of the final judgment included findings that it was the Husband who was to be responsible for the underreported income. However, the provisions did not actually distribute the debt to the Husband and, in fact, paragraph I provided that the $379,000 was to be split equally between the parties. Paragraph 11 of the judgment stated "[t]he Husband and Wife shall pay and be responsible for all debts including interest and penalties due and owing the Internal

Revenue Service due to their failure to properly report their income," suggesting that the court intended to allocate the debt equally. Meanwhile, the spreadsheet appended to the judgment stated that the accrued interest and penalties were non-marital and distributed all of the "to be determined" liability to the Husband.

1. "The Husband contends the judgment treated the tax liability as a marital debt and the trial court erred in failing to credit him for any non-marital funds used to make the $586,795.58 payment to the IRS [while] the Wife contends the language in paragraph 11 making the parties jointly liable for the debt is a 'clerical' error."

2. "We decline the Wife's invitation to deem the language in paragraph 11, making the parties jointly responsible for the tax liability, as a mere clerical error."

3. "Nevertheless, since the judgment has conflicting language regarding the treatment to be afforded the tax liability, leaving the trial court's intent in question, we remand for the trial court to clarify its intent and findings on this issue."

Schmidt v. Schmidt, 120 So.3d 31 (Fla. 4th DCA 2013)

DECISION REGARDING EQUITABLE DISTRIBUTION OF MARITAL HOME IS DEFICIENT WHERE NO FINDING AWARDING EQUITY IN HOME CAN BE DISCERNED FROM RECORD.

In a case stating very little facts, the District Court reversed the trial court's decisions regarding equitable distribution:

1. "A trial court is obligated to identify, value, and distribute the marital and non-marital assets and liabilities."

2. "The temporary use of the marital home was awarded to Former Wife 'until the full implementation of the equitable distribution schedule" however, without Exhibit 'A' attached to the final order, no findings awarding the equity in the home can be discerned from the record."

3. "Moreover, even though the trial court awarded equity in the martial home to Former Wife, it failed to indicate if there was a shift in title."

4. "Also, the Former Wife requested partition. Where a request for partition complies with section 64.041, Florida Statues (2010), and is not contested by the opposing party, failure to divide the property is reversible error."

5. "Because the trial court did not properly rule concerning the marital residence, the entire scheme of equitable division devised by the trial court may need revision."

6. "We reverse on [the issue of the Former Wife's attorney's fees and costs as of the final hearing] because where equitable distribution is reversed on appeal, it may be appropriate to reexamine attorney's fees to determine if the redistribution of assets and liabilities affects the award for attorney's fees."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN DISTRIBUTING MARITAL ASSETS AND LIABILITIES WITHOUT STATING VALUE OF EACH ASSET AND AMOUNT OF EACH LIABILITY, AS IS REQUIRED BY §61.075, FLORIDA STATUTES.

Reversing the equitable distribution scheme herein, the District Court held:

1. "We again remind trial judges of the importance of making explicit findings as to all statutorily mandated factors for the determination of alimony in final judgments, as well as

establishing a value (even if zero or *de minimus*) for all marital assets and liabilities when devising an equitable distribution scheme."

2. "Section 61.075, Florida Statutes (2011), provides that in any contested action, specific written findings must be made identifying, valuing, and distributing the marital and non-marital assets and liabilities."

3. "In [an earlier case] this court explained: 'Even when no trial transcript is provided to the reviewing court, failure to make sufficient findings regarding value of property and identification of marital assets and debts constitutes reversible error and requires remand for appropriate findings to be made.'"

4. "Here, the final judgment distributes marital property without stating the value of each asset and distributes marital debts without stating the amount of each liability. Because the final judgment as to equitable distribution is not supported by the required factual findings, it is insufficient, and we reverse so that the trial court may enter an order including these values."

Patino v. Patino, 122 So.3d 961 (Fla. 4th DCA 2013)

Fifth District

ERROR TO FAIL TO MAKE FINDINGS REGARDING VALUATION OF ASSETS DISTRIBUTED IN EQUITABLE DISTRIBUTION SCHEME.

In a case with little facts stated in the opinion, the trial court rendered a final judgment with an equitable distribution scheme that failed to include values of assets distributed. The District Court held:

1. "Section 61.075(3), Florida Statutes (2011) requires a trial court to make specific findings of fact when equitably distributing marital property 'including the individual valuation of significant assets' and the 'identification of marital liabilities.' Failure to comply with the requirements of section 61.075(3) is reversible error."

2. "The final judgment on review lacks the requisite valuation for the marital home and other properties that the court distributed. Without proper valuation of the marital assets, this Court is unable to meaningfully review the trial courts' distribution for an abuse of discretion. Therefore, we reverse and remand for the trial court to make the required findings regarding the equitable distribution of the marital property."

Packo v. Packo, 120 So.3d 232 (Fla. 5th DCA 2013)

F. Procedure

First District

Second District

Third District

Fourth District

Fifth District

G. Fault

First District

TRIAL COURT ERRED IN DISTRIBUTING ENTIRE VALUE OF HUSBAND'S 401(k) ACCOUNT TO WIFE IN PART AS SANCTION FOR HIS ACTS OF DOMESTIC VIOLENCE AGAINST HER IN FRONT OF MINOR CHILDREN; ALTHOUGH TRIAL COURT ALSO CITED PRIVATE SCHOOL TUITION ARREARAGE AS BASIS FOR AWARD, JUDGMENT PROVIDED NEITHER VALUATION FOR 401(k) NOR AMOUNT OF ANY SUCH ARREARAGE.

Pursuant to the final judgment, the Former Husband was ordered to pay child support plus $595 per month as part of the tuition for the oldest child's private school. The debts and assets of the parties were evenly distributed, except for the assets of the Former Husband's 401(k) account, which was not assigned a value in the final judgment and was awarded to the Former Wife. The trial court explained that the award was based upon "the Husband's criminal acts of domestic violence against the Wife in front of the minor children, violation of the Final Judgment of Injunction, and that the Husband did not contribute his pro-rata share of the oldest minor child's private school education for the 2011–2012 school year warrant an unequal distribution of this asset." The trial court never articulated the amount allegedly due for the school tuition. The District Court reversed:

1. "While the 401(k) account may be subject to distribution to satisfy that arrearage, the account cannot be distributed to the Former Wife for punitive reasons."
2. "[M]arital misconduct is not a valid basis for a distribution scheme."
3. "As the court in [an earlier case]: '[t]he issue of fault, removed by the legislature as a requirement for dissolution of marriage, should not be expanded beyond that expressly intended by the legislature, in deciding the economic issues between the parties whose union is ending.'"
4. "Section 61.075(3), Florida Statutes (2010), requires that any distribution of marital assets or debts be supported by factual findings in the judgment including 'the individual valuation of significant assets.'"
5. "As noted, the judgment provided neither a valuation for the Former Husband's 401(k) account nor an amount for any arrearage in tuition payments. Thus, it cannot be determined from the judgment how much of that account must be distributed to satisfy the tuition arrearage."
6. "Any amount above the tuition arrearage should be equitably distributed."

Nassirou v. Nassirou, 117 So.3d 451 (Fla. 1st DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN ALLOCATING THE FULL VALUE OF THE DEPLETED 401(k), INCLUDING ALL TAX CONSEQUENCES, TO HUSBAND WHERE HUSBAND LIQUIDATED 401(k) AND EXPENDED A LARGE PORTION ON ATTORNEY'S FEES FOR HIMSELF AND THE WIFE.

The parties were married nearly thirty-eight years at the time of the filing for dissolution. Throughout the marriage, the Former Husband worked for Waste Management, Inc. and

contributed to a retirement account with the company (the "401(k)"). At the time of the proceedings below, Former Husband worked as a garbage collector for a different company, earning a gross wage of $3,776.78 per month. The Former Wife did not have any significant means of income; however, the parties shared a small rental income from a marital property. After Former Wife filed her petition for dissolution, Former Husband liquidated the 401(k)—then valued at $76,718. He was taxed $15,343.74 on the liquidation. The Former Husband expended a large portion of the 401(k) funds on attorney's fees for himself and Former Wife. He also spent some of the funds on property taxes for marital property and home repairs.

In the final judgment, the court - while acknowledging that attorney's fees and costs are necessities - nevertheless found that the Former Husband's actions in liquidating the entire 401(k) account, incurring an income tax liability of $15,343.74 and netting the sum of $61,374.94, were "intentional, wrongful and contrary to the Court's Standing Order." With regard to how the funds were spent, the final judgment found that the Former Husband spent $9,500 on attorney's fees and costs for Former Wife, and approximately $30,500 on attorney's fees for himself and for taxes, insurance and maintenance on the marital properties. There was some suggestion that the withdrawal was used to pay taxes and insurance on the marital properties, which had previously been paid for out of regular income, because he had spent some of his regular income on his paramour. Because of his "wrongful conduct," the trial court assessed the entire account value, minus "permitted and appropriate expenditures," to Former Husband as and for equitable distribution, as well as the entire tax consequence of liquidation.

Thereafter, Former Wife filed a motion for rehearing requesting, in part, that the entire pre-liquidation amount of the 401(k) be allocated to Former Husband. The court agreed and subsequently amended the final judgment, removing the portion that deducted "permitted and appropriate expenditures" from the 401(k) allocation, thereby awarding the entire $76,718.68 to Former Husband, which included all tax consequences and nearly $40,000 in attorney's fees. Former Husband appealed. The District Court reversed:

1. "One party's use of an asset out of necessity and for reasonable living expenses does not justify an award of a depleted asset absent evidence of misconduct . . . Attorney's fees spent on the dissolution of the marriage are considered reasonable living expenses."

2. "Here, the trial court found misconduct because Former Husband spent a portion of his monthly income on his girlfriend—which it reasoned would normally be available to pay for property taxes and home improvements. This finding, however, does not permit the court to allocate depleted funds that were properly used, such as attorney's fees."

3. "Indeed, the trial court's amended final judgment properly acknowledges that attorney's fees are 'necessities.' Therefore, the only depleted funds that should be allocated to Former Husband are those that the trial court found were spent on Former Husband's girlfriend—not the 401(k)'s entire previous balance of $76,718.68."

4. "The trial court also allocated the entire 401(k) tax burden of $15,343.74 to Former Husband. Such distribution presupposes that Former Husband liquidated the 401(k) to improperly dissipate the funds on his girlfriend and fails to account for the overwhelming purpose of the 401(k) liquidation—the nearly $40,000 in attorney's fees. The attorney's fees expense constituted roughly 65% of the after-tax value of the 401(k)."

5. "There is no indication in the record that Former Husband would have been able to pay the attorney's fees from his net income of $3,047.52 per month, considering his other monthly expenses."

6. "Additionally, the parties did not have any other assets from which Former Husband could draw funds to pay for the litigation."

7. "Therefore, because the 401(k) was liquidated primarily and necessarily for the payment of legitimate expenses—attorney's fees—the trial court erred by allocating the tax consequences solely on Former Husband."

Lopez v. Lopez, 38 FLW D1765 (Fla. 5th DCA 2013)

Second District

TRIAL COURT PROPERLY AWARDED HUSBAND INSURANCE PROCEEDS FROM HOME BURGLARY WHERE PROCEEDS HAD BEEN DEPLETED BY HUSBAND WITHOUT WIFE'S KNOWLEDGE OR CONSENT.

The parties married in California in 1989 when the Former Husband worked in his family's dry-cleaning business. The Former Husband's father sold the business in 1990 and moved to Tampa. The parties also moved to Tampa where the Former Husband bought a Tampa dry-cleaning business and named it Al Capote's Dry Cleaning, Inc. The parties separated in 2008. In it's equitable distribution scheme, the trial court awarded the Former Husband $72,917 in insurance proceeds from a home burglary after finding that the Former Husband had deposited these proceeds into the business account without the Former Wife's knowledge or consent and spent it. On cross-appeal, the Former Husband argued that the trial court erred because (1) these funds were depleted before the final hearing for family and business expenses, and (2) because $62,917 of the proceeds covered his premarital property. The District Court affirmed:

1. "If a spouse's misconduct resulted in the dissipation of a marital asset, it is proper to assign the dissipated asset to the spending spouse."

2. "The record supports the trial court's ruling and we affirm on this issue."

Capote v. Capote, 117 So.3d 1153 (Fla. 2d DCA 2013)

Third District

Fourth District

TRIAL COURT ERRED IN INCLUDING DEPLETED BANK ACCOUNT IN EQUITABLE DISTRIBUTION AND IN ATTRIBUTING TO HUSBAND THE UNDIMINISHED AMOUNT OF THE ACCOUNT WHERE THERE WAS NO FINDING OF INTENTIONAL MISCONDUCT ON PART OF HUSBAND.

The parties were married in 1994, and a petition for dissolution of marriage was filed in 2009. Two children were born of the marriage in 1997 and 1999. The Wife was not employed and had not worked during the sixteen-year marriage. The Husband worked as a painting contractor for his own company. The parties' tax returns reflected adjusted gross income of $394,510 in 2006, $269,014 in 2007, $116,055 in 2008, and $71,467 in 2009. The final judgment of dissolution of marriage awarded the Wife durational alimony of $1,500 a month for fourteen years and ordered the Husband to pay $656 per month for child support, as well as $100 per month to pay for $1,300 in arrearages. He was further required to purchase life insurance to secure the payment of alimony and child support. In distributing the marital assets, the trial court

attributed to the Husband $117,315, which was the value of a bank account more than a year before trial. The trial court recognized that the value of the account had fallen to $3,284, but the court determined that the Husband had "not properly accounted for the dissipation of this asset." The Husband appealed, raising several issues, including whether the trial court erred in including a diminished or depleted asset as part of the equitable distribution scheme and attributing to him the undiminished value thereof. The District Court reversed:

1. "In the present case, no testimony was presented with respect to the bank account except as to the balance of money in the account. There was no testimony as to how the funds were used or if the funds were used for a purpose unrelated to the marriage."

2. "Finally, the trial court did not make a finding of intentional misconduct by the [H]usband related to the reduced balance in the bank account."

3. "Therefore, the inclusion of the depleted asset in the equitable distribution by the trial court was error."

Zvida v. Zvida, 103 So.3d 1052 (Fla. 4th DCA 2013)

Fifth District

VIII. MARITAL HOME

A. Payment of Expenses of Ownership/Right to Credit for Payment

First District

Second District

Third District

Fourth District

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADOPTING GENERAL MAGISTRATE'S REPORT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE; HOWEVER, REMAND REQUIRED FOR CLARIFICATION OF FINAL JUDGMENT TO REFLECT WIFE ENTITLED TO CREDIT FOR HER PAYMENT OF HUSBAND'S PORTION OF MORTGAGE INTEREST ON JOINTLY OWNED HOME.

In this dissolution proceeding, the parties' long-term marriage was dissolved by final judgment, in which the trial court adopted the report of the general magistrate for a parenting plan, equitable distribution, the marital home, child support, alimony, and attorneys' fees and costs. Former Wife appealed the various determinations in the final judgment. The District Court affirmed, but remanded the final judgment for clarification regarding Former Wife's ability to receive credits for paying Former Husband's portion of the mortgage on the jointly owned home:

1. "We find that the trial court did not abuse its discretion in making its determinations related to the dissolution of this marriage as the recommendations and findings in the magistrate's report are supported by competent and substantial evidence."

2. "As there is no basis in the record to relieve Former Husband of his responsibility for half of the entire mortgage payment, the final judgment must be clarified to reflect that Former Wife is entitled to receive credit for her payment of Former Husband's portion of the mortgage interest just as with the 'mortgage/equity line principal.'"

Preudhomme v. Gutierrez, 127 So.3d 683 (Fla. 4th DCA 2013)

Fifth District

B. Miscellaneous

First District

Second District

Third District

Fourth District

WHERE REQUEST FOR PARTITION COMPLIES WITH STATUTE, AND IS NOT CONTESTED BY OPPOSING PARTY, FAILURE TO DIVIDE PROPERTY IS REVERSIBLE ERROR.

In a case stating very little facts, the District Court reversed the trial court's decisions regarding equitable distribution:

1. "A trial court is obligated to identify, value, and distribute the marital and non-marital assets and liabilities."

2. "The temporary use of the marital home was awarded to Former Wife 'until the full implementation of the equitable distribution schedule" however, without Exhibit 'A' attached to the final order, no findings awarding the equity in the home can be discerned from the record."

3. "Moreover, even though the trial court awarded equity in the martial home to Former Wife, it failed to indicate if there was a shift in title."

4. "Also, the Former Wife requested partition. Where a request for partition complies with section 64.041, Florida Statues (2010), and is not contested by the opposing party, failure to divide the property is reversible error."

5. "Because the trial court did not properly rule concerning the marital residence, the entire scheme of equitable division devised by the trial court may need revision."

6. "We reverse on [the issue of the Former Wife's attorney's fees and costs as of the final hearing] because where equitable distribution is reversed on appeal, it may be appropriate to reexamine attorney's fees to determine if the redistribution of assets and liabilities affects the award for attorney's fees."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT ERRED IN ORDERING PARTITION OF MARITAL HOME WHERE NEITHER REQUESTED PARTITION.

In an appeal from the underlying dissolution of marriage proceedings, the Husband challenged several aspects of the final judgment, including the trial court's order to partition the marital home. The marital home was the only significant asset available for distribution. In the final judgment, the trial court distributed it to the Husband, but with the proviso that he pay the Wife her equity in the home within six months or the home would be sold, a result that neither party sought. In this regard, the District Court reversed:

1. "[W]e reverse the order to the extent that it requires sale of the property. On remand, the trial court may revisit the distribution scheme."

2. "Alternatively, [the Wife] may move to enforce the directive to pay [her] equity, in which case the trial court may order the sale of the property as a mechanism to enforce that aspect of the order, if requested in a motion."

Hodges v. Hodges, 128 So.3d 190 (Fla. 5th DCA 2013)

IX. PATERNITY

A. Genetic Testing/Disestablishment

First District

Second District

Third District

Fourth District

Fifth District

RELIEF FROM CHILD SUPPORT PAYMENTS GRANTED BY STATUTE TO DISESTABLISHED FATHER DOES NOT INCLUDE RELIEF FROM CHILD SUPPORT ARREARAGES.

The Father and Mother were never married to each other. The Mother gave birth to A.J.H. in 2001 and both parties executed his birth certificate, declaring themselves his natural parents. In May 2005, the Mother brought a paternity action against the Father resulting in a paternity judgment that found Father was the child's father. By separate order, the Father was ordered to pay $751 in monthly ongoing child support and $49 monthly toward the $20,277 in child support arrearages.

In early 2011, DNA test results revealed that Father was not the child's biological father. As a result, pursuant to section 742.18, Florida Statutes (2011), the Father filed a petition to disestablish paternity. Following a hearing, the trial court granted his petition and entered an order disestablishing his paternity and terminating his ongoing child support obligation, but continuing to hold him responsible for the previously determined support arrearage.

On appeal, the Father contended that the trial court erred by concluding that under section 742.18, Florida Statutes, he remained responsible for previously adjudicated child support arrearages. He argued that the plain meaning of "prospective child support payments" includes all future payments, regardless of whether such payments are for ongoing support or arrearages. Thus, he contended that the statute absolves a disestablished father of the obligation to pay previously established but unpaid child support arrearages. The Father also suggested that the legislature specifically employed language relieving the disestablished father from prospective "payments" as opposed to prospective "obligations," evidencing the intent that successful application of the statute ceases all prospective payments, including those for arrearages. The District Court disagreed and affirmed:

1. "When a statute's language conveys a clear and definite meaning, the statute is given its plain and obvious meaning . . . However, when reasonable differences exist as to the meaning or application of a statute, the rules of statutory construction control its interpretation."

2. "When construing a statute, it must be considered in its entirety and all parts of a statute read together in order to achieve a consistent whole."

3. "Here, we conclude there is a reasonable question as to whether 'prospective child support payments' include arrearages."

4. "Section 742.18(5) specifically confirms all previous legal actions based on the father's status prior to disestablishment, and disallows its use to recover previously paid child support. By confirming past lawful actions, the statute, by its plain language, supports the continued efficacy of the previous arrearage order entered by the court."

5. "Courts generally hold that money judgments are final, and not prospective, even when they compel future payments of the judgment . . . Consequently, even when a money judgment is prospective in the sense that it remains unpaid, such a judgment is nevertheless a final order and not prospective for purposes of relief under section 742.18."

6. "Thus, we hold that the relief from prospective child support payments granted by section 742.18 to disestablished fathers does not include relief from arrearages."

7. "Still, [Father] suggests that the legislature specifically employed language relieving the disestablished father from prospective 'payments' as opposed to prospective 'obligations,' evidencing the intent that successful application of the statute ceases all prospective payments, including those for arrearages. We again disagree."

8. "Section 742.18 indicates the intent to relieve the disestablished father of future obligations, not previously established support, and, despite the statute's failure to employ that specific term, courts, in dicta, have suggested as much."

Hickman v. Milsap, 106 So.3d 513 (Fla. 5th DCA 2013)

B. Miscellaneous

First District

TRIAL COURT'S NON-FINAL ORDER DENYING LEGAL FATHER'S MOTION FOR SUMMARY JUDGMENT CHALLENGING BIOLOGICAL FATHER'S STANDING TO FILE PATERNITY PETITION QUASHED.

The legal father petitioned for writ of certiorari seeking review of trial court's non-final order denying his motion for summary judgment wherein he challenged biological father's standing to file paternity petition. The District Court held: "We grant the petition and quash the trial court's order. *See Slowinski v. Sweeney*, 64 So.3d 128, 128-29 (Fla. 1st DCA 2011)(holding that a child born to an intact marriage cannot be the subject of a paternity proceeding brought by a biological father and determining that it was fundamental error for the trial court to grant relief pursuant to a nonexistent cause of action)."
Sirdevan v. Strand, 120 So.3d 1280 (Fla. 1st DCA 2013)

Second District

TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT "DE-LEGITIMIZING" WIFE'S CHILD WHERE THE HUSBAND IS THE LEGAL, BUT NOT BIOLOGICAL, FATHER OF THE CHILD BY FOCUSING SOLELY ON BIOLOGY AND FAILING TO CONSIDER WHETHER THERE WAS A CLEAR AND COMPELLING REASON BASED ON CHILD'S BEST INTERESTS TO OVERCOME PRESUMPTION OF LEGITIMACY; WHERE BOTH PARTIES SIGNED A SWORN VOLUNTARY ACKNOWLEDGMENT OF PATERNITY WHEN CHILD WAS BORN MOTHER MAY BE ESTOPPED FROM CHALLENGING SAME WHERE SHE SIGNED WITH KNOWLEDGE THAT HUSBAND WAS NOT CHILD'S FATHER AND SPENT FIRST FOUR YEARS OF CHILD'S LIFE ACKNOWLEDGING HIM AS SUCH.

When the Husband and Wife first met, the Wife was already pregnant with the child at issue, R.D.W. There was no dispute that the Husband was not the biological father of R.D.W. However, the Husband was present at R.D.W.'s birth in 2006, the Husband is named on R.D.W.'s birth certificate as the father, and the Husband and Wife both signed a voluntary Acknowledgement of Paternity pursuant to section 382.013(2)(c), Florida Statutes (2006), naming the Husband as R.D.W.'s father.

The Husband and Wife married when R.D.W. was approximately sixteen months old. For the entirety of R.D.W.'s life, the Husband has been held out as his father, and the Husband is the only father R.D.W. has ever known. R.D.W.'s alleged biological father is reportedly living in Texas, has had no contact with R.D.W. at any time since his birth, and has done nothing to support R.D.W.

When the Wife filed her petition for dissolution of marriage, she alleged that there were no minor children born of the marriage. The sole basis for this allegation was that the Husband was not the biological father of R.D.W. In his answer and counter-petition, the Husband

admitted that he was not R.D.W.'s biological father, but he argued that he is the legal father of R.D.W. and that both he and R.D.W. have the right to maintain that legal status. Nevertheless, the trial court granted the Wife's motion for summary judgment on this issue, concluding that the Husband's admission that he is not the biological father of R.D.W. was dispositive of the matter. Thus, the trial court denied the Husband's request for a time-sharing schedule and a determination of child support and effectively "de-legitimized" R.D.W.

The Husband appealed the trial court's ruling granting the Wife's motion for summary judgment and thereby "de-legitimizing" R.D.W. On appeal, as she did in the trial court, the Wife contended that the Husband's fraud in signing the voluntary Acknowledgement of Paternity when he was not the biological father prevented him from enforcing his rights, pointing to section 742.10(4), which provides that a voluntary Acknowledgement of Paternity creates only a rebuttable presumption of paternity that can be challenged based on fraud or mistake. She argued that the Husband committed fraud when he signed the voluntary Acknowledgement of Paternity knowing that he was not the biological father and that this fraud eliminates his rights as the legal father. The District Court reversed:

1. "Nothing in either section 382.013(2)(c) or section 742.10 requires that the person signing the voluntary Acknowledgement of Paternity be the child's biological father. Instead, the statutes create a mechanism for establishing legal paternity regardless of biology."

2. "Here, both the Husband and Wife signed a voluntary Acknowledgement of Paternity pursuant to section 382.013(2)(c) when R.D.W. was born, and neither of them challenged that Acknowledgement during the sixty-day period provided for in the statute. Thus, this unchallenged voluntary Acknowledgement of Paternity established the Husband's paternity of R.D.W. He was neither required nor permitted to take action under chapter 742 to further establish his paternity. Nor was he required or permitted to take steps to adopt R.D.W. Instead, once the voluntary Acknowledgement of Paternity was signed and the Husband's name was placed on R.D.W.'s birth certificate, the Husband became R.D.W.'s legal father for all purposes."

3. "As a child with both a mother and father named on his birth certificate, R.D.W. was a legitimate child. And this became even more true when the Husband and Wife subsequently married."

4. "Twenty years ago, the Florida Supreme Court stated that 'the presumption of legitimacy is based on the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child.' The court recognized that '[o]nce children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interests.' Moreover, '[t]he child's legally recognized father likewise has an unmistakable interest in maintaining the relationship with his child unimpugned.' Thus, '*there must be a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy even after the legal father is proven not to be the biological father*.'

5. "And the burden of proof required to overcome this presumption is equivalent to that needed to terminate the legal father's parental rights because the proceedings 'will have the effect of vesting parental rights in the putative natural father and removing parental rights from the legal father.'"

6. "Here, the trial court erred by focusing solely on biology and failing to consider whether there was a clear and compelling reason based on R.D.W.'s best interests to overcome his presumption of legitimacy and to remove the Husband's rights as his legal father."

7. "Because the trial court used the incorrect legal standard, it did not consider whether it was in R.D.W.'s best interests to 'de-legitimize' him, and the Wife's desire to dissolve her marriage to the Husband, standing alone, is not a clear and compelling reason to do so. This legal error requires this court to reverse and remand for the trial court to reconsider the issue of the Husband's rights as R.D.W.'s legal father under the correct legal standard."

8. "There are three problems with [the Wife's fraud] argument. First, as noted above, section 382.013(2)(c) does not require that the 'person to be named as the father' be the biological father. Thus, it is not clear that the Husband's signature on the voluntary Acknowledgement of Paternity constituted fraud in the first instance."

9. "Second, the Wife also signed the voluntary Acknowledgement of Paternity with full knowledge that the Husband was not the biological father, and thus she was complicit in any alleged fraud. In such circumstances, a parent may be estopped from challenging the validity of the acknowledgement of paternity."

10. "Third, the Wife may be equitably estopped from disputing the Husband's paternity of R.D.W. at this point in time. In *Privette*, the supreme court noted that parents can be equitably estopped from disputing paternity when they have previously acknowledged the legal father's paternity."

11. "Moreover, a legal father's paternity may be ruled unassailable when 'the legal father has established a mutually rewarding relationship with the child, he desires to continue exercising parental rights, he is supporting the child to the best of his ability, and maintaining the existing relationship is in the child's best interests.' *Id.* [at 308]."

12. "Here, the Wife spent the first four years of R.D.W.'s life acknowledging the Husband as R.D.W.'s father. The Husband was listed as the father with R.D.W.'s child care providers and health care providers. He was held out to all as the child's father. More importantly, it appears that the Husband has established a mutually rewarding relationship with the child, he understandably desires to continue exercising parental rights, and he is supporting the child to the best of his ability. These facts would seem to support a finding that the Wife was equitably estopped from challenging the Husband's status as the legal father in the first instance."

13. "Certainly, summary judgment was improper on this basis as the Wife failed to prove a negative, i.e., that it was not in R.D.W.'s best interest to maintain a relationship with his legal father."

14. "While we hold that the trial court erred in granting summary judgment in favor of the Wife, it is not this court's role when a case is in this posture to determine whether the Husband should retain his legal rights to R.D.W. Instead, because the trial court applied the incorrect legal standard when considering the Wife's motion for summary judgment, we must reverse and remand for the trial court to reconsider the motion using the correct legal standard."

Van Weelde v. Van Weelde, 110 So.3d 918 (Fla. 2d DCA 2013)

TRIAL COURT ERRED IN GRANTING PARENTAL RIGHTS TO BIOLOGICAL FATHER OF CHILD CONCEIVED VIA "DO-IT-YOURSELF" ARTIFICIAL INSEMINATION WHERE THE SPERM DONOR WAS THE BROTHER OF ONE OF THE SAME-SEX PARTNERS WHO WERE TO PARENT THE CHILD, BUT WHOSE RELATIONSHIP LATER SOURED RESULTING IN BIOLOGICAL MOTHER DENYING FORMER PARTNER ACCESS; STATUTE DENYING PARENTAL RIGHTS TO SPERM DONORS APPLIES EQUALLY WHERE DONOR'S IDENTITY IS KNOWN TO BIOLOGICAL MOTHER AND WHERE INSEMINATION OCCURRED OUTSIDE A LABORATORY.

The appellant, A.A.B., and her partner, S.C., lived together in a committed relationship. Upon deciding to raise a child together, they asked S.C.'s brother, appellee B.O.C., to donate his sperm to be used to impregnate A.A.B. He agreed, and after three attempts at performing "do-it-yourself" artificial insemination, the parties were successful at conceiving a child. A.A.B. and S.C. assumed sole responsibility for all prenatal decisions and expenses. When C.D.B. was born in 2002, B.O.C. lived in another state and did not assume a parental role with the child. About three years later, A.A.B. and S.C. ended their relationship. While at first, A.A.B. and S.C. shared rotating custody of the child, their relationship later deteriorated and A.A.B. refused to allow S.C. to continue contact with the child. Later, B.O.C. filed suit to establish paternity and visitation with C.D.B. A.A.B. disputed that B.O.C. had any parental rights because he had agreed to be a sperm donor *only*, and she and S.C. were to parent the child. A.A.B. further argued that under section 742.14, B.O.C. relinquished all paternal rights and obligations with respect to C.D.B. Following a hearing, the trial court found that because the parties employed a "do-it-yourself" insemination procedure rather than a clinical one, section 742.14 did not apply. The court also declined to recognize the oral agreement between the parties that B.O.C. was to be merely a sperm donor. Consequently, B.O.C. was granted parental rights. A.A.B. appealed, arguing that the trial court erred in failing to find that B.O.C. was a sperm donor within the meaning of section 742.14. The District Court agreed and reversed:

1. "A plain reading of section 742.14 reveals that the donor of any sperm shall relinquish all paternal rights and obligations with respect to the resulting children. The only exceptions in the statute are when (1) 'a commissioning couple' employs 'assisted reproductive technology' or (2) a father has executed a preplanned adoption agreement under the adoption statutes."

2. "The facts in [an earlier case] are similar to the facts in this case. A.A.B. and B.O.C.'s sister, S.C., entered into an agreement with B.O.C. whereby B.O.C. would provide the sperm to artificially inseminate A.A.B. in the hope of conceiving a child that S.C. and A.A.B. could raise together. Although the agreement was not reduced to writing, the parties all abided by its terms for over five years until the relationship between A.A.B. and S.C. soured."

3. "B.O.C. provided no financial support either before or after the birth, nor was he involved in any decisions concerning the welfare of the child. Although B.O.C. occasionally visited the child, B.O.C. did not assert any parental rights over C.D.B. until his sister's relationship with the child was jeopardized."

4. "As the trial court in this case correctly found, A.A.B. and B.O.C. were not a 'commissioning couple….' A.A.B. testified that she was in a committed relationship with B.O.C.'s sister and had no interest in a relationship with a male. The trial court specifically found in the Final Judgment of Paternity that it was the intent of the parties 'that [B.O.C.] would

provide the donor sperm with which [A.A.B.] became pregnant and that the child would be raised by [A.A.B.] and [B.O.C.'s] sister as the child's Parents.'"

5. "The 'do-it-yourself' manner in which the artificial insemination was conducted does not alter the fact that B.O.C. was a sperm donor under section 742.14. The statute does not require that the artificial insemination be performed in a clinical setting to apply."

6. "Because B.O.C. was a sperm donor he relinquished his paternal rights and obligations to C.D.B. Accordingly, we reverse the final judgment of paternity and the orders establishing visitation and child support."

A.A.B. v. B.O.C., Jr., 112 So.3d 761 (Fla. 2d DCA 2013)

ALTHOUGH SECTION 742.045 DOES NOT EXPRESSLY AUTHORIZE AN AWARD OF APPELLATE ATTORNEY'S FEES IN PATERNITY ACTIONS, RELATED CASE LAW SHOULD BE APPLIED TO ALLOW FOR SAME.

In this appeal for review of a final judgment entered in an underlying paternity action, the Mother timely filed a motion for appellate attorneys' fees and costs. Remanding for the trial court to determine her entitlement to same, the District Court held:

1. "Section 742.045 does not expressly authorize an award of appellate attorneys' fees in paternity actions. But, when section 742.045 was enacted in 1991, it mirrored the attorneys' fees provision of section 61.16, Florida Statutes (1991). At that time, Florida courts interpreted section 61.16 to allow for appellate attorney fees even though it contained no such express language…. In 1994, the legislature codified this case law by amending chapter 61 to be consistent therewith."

2. "With or without the amendment it is apparent to us that this same case law, for the sake of consistency and logic, should be applied to allow appellate fees under section 742.045, and we now so hold. Not to do so would likely run afoul of equal protection concerns."

3. "For reasons further outlined below, we certify conflict with sister district court holdings to the contrary."

4. "In *Starkey v. Linn*.... the Fifth District based its determination that section 742.045 does not provide for appellate attorney's fees on the 'conspicuous absence of authority to award appellate fees' when compared with section 61.16….' However, 'the legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute….' Therefore, in enacting section 742.045, the legislature is presumed to have known and approved of the judicial construction of section 61.16 to include appellate attorneys fees."

5. "Had the legislature intended the statutes to be interpreted differently, it would have expressed such an intent in enacting section 742.045; instead it chose to mirror the language of section 61.16."

6. "Hence, we hold that an award of appellate attorneys' fees may be obtained under section 742.045."

B.K. v. S.D.C., 122 So.3d 980 (Fla. 2d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING WITH PREJUDICE DEPARTMENT OF REVENUE'S PETITION TO ESTABLISH PATERNITY AND CHILD SUPPORT FOR FAILURE TO JOIN AN INDISPENSIBLE PARTY WITHOUT GIVING AN OPPORTUNITY TO AMEND.

The Department of Revenue filed a petition to establish paternity, child support, and for the award of other relief. The trial court entered an order dismissing with prejudice the Department's petition for failure to join an indispensable party, the indispensable party being the child's legal father. The Department appealed, arguing that because the dismissal was for a procedural error, not on the merits, the trial court should have dismissed the petition without prejudice. The District Court agreed and reversed:

1. "Dismissal with prejudice is a severe sanction…. The trial court should grant such relief only when the pleader has failed to state a cause of action and it conclusively appears that the pleader cannot possibly amend the pleading to state a cause of action."

2. "A dismissal with prejudice can constitute an abuse of discretion where a party may be able to plead additional facts to support its cause of action or support another cause of action under a different legal theory…. Thus, the trial court should hesitate to dismiss without giving the pleading party an opportunity to amend."

3. "Further, an order dismissing a pleading for lack of an indispensable party is not a merits adjudication…. A dismissal for failing to join an indispensable party should be without prejudice, unless the pleader refuses to amend to add a party necessary for a determination on the merits."

4. "Additionally, although not raised by the Department, it appears that the trial court may have erred in dismissing the case on the theory that the Department failed to join an indispensable party. From the record, it appears that another man was listed as the father on the child's birth certificate. However, an order entered in 2001 vacated a judgment of paternity against that man. Another order entered in 2010 clarified that this other man was not the biological father and his name should be removed from the birth certificate."

5. "The trial court should have entered an order of dismissal with leave to amend in order for the Department to allege the facts necessary to establish that the other man was not a necessary party to this proceeding."

Dept. of Revenue v. S.B., 124 So.3d 377 (Fla. 2d DCA 2013)

Third District

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN GRANTING MOTION TO AMEND PATERNITY PETITION TO ADD CLAIMS FOR CONVERSION AND REPLEVIN AND TO ADD ADDITIONAL DEFENDANTS NOT RELATED TO THE PATERNITY ACTION; PATERNITY ACTIONS ARE MEANT TO DETERMINE ISSUES OF PATERNITY AND SUPPORT FOR THE CHILD, NOT TO DETERMINE ISSUES RELATING TO DIVISION OR OWNERSHIP OF PROPERTY.

In this paternity action, Ms. Hernandez (the Mother) sought leave of court to file an "Amended Petition to Determine Paternity, Complaint for Conversion, Replevin and for Related Relief." As the title indicates, in addition to petitioning for a determination of paternity under chapter 742, she also asserted two counts completely unrelated to the paternity petition, and

added two additional defendants that were also unrelated to the paternity action. Following a hearing, the trial court granted the Mother's motion to amend her pleading. The Father's petition, which was treated as a petition for writ of certiorari, followed. Because the trial court departed from the essential requirements of law by granting the Mother's motion to amend her paternity petition filed under chapter 742 to add unrelated claims and additional defendants also unrelated to the paternity action, the District Court quashed the relevant portions of the Order under review: "A paternity action filed under chapter 742 is not to be utilized by formerly cohabiting individuals to determine issues relating to the division or ownership of property. Accordingly, we quash the portion of the order granting [the Mother's] motion to amend her paternity petition without prejudice to assert these claims in a separate action."
Carmenates v. Hernandez, 127 So.3d 631 (Fla. 3d DCA 2013)

Fourth District

Fifth District

X. PROCEDURAL MATTERS

A. Service and Jurisdiction

First District

Second District

REMAND REQUIRED FOR DETERMINATION REGARDING WHETHER TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO ORDER HUSBAND TO CHANGE BENEFICIARY ON MILITARY GROUP LIFE INSURANCE POLICY; IF BENEFICIARY DESIGNATION IS PROTECTED BY FEDERAL SERVICEMEMBERS' GROUP LIFE INSURANCE ACT, COURT IS WITHOUT JURISDICTION TO ORDER CHANGE OF BENEFICIARY.

During the trial in the dissolution of marriage proceedings, the Former Husband testified that he maintained a group life insurance policy acquired through his military service in the Army Reserve. He testified that at the time of trial, he had named his children, his parents, and his fiancée as the policy's beneficiaries. Although the existence, amount, and monthly cost of a life insurance policy were established through testimony, neither the name nor the specific type of policy was provided. Furthermore, the policy was not entered into evidence. Other than this testimony, the only evidence in the record addressing the policy were pay stubs referring to an unspecified military group life insurance policy.

At the conclusion of the trial, the court found that the Former Husband "does have a life insurance policy available to him at an extremely reasonable rate" and ordered him to maintain the policy and name the Former Wife as the beneficiary. The final judgment reflected that this was done and ordered pursuant to section 61.08(3), Florida Statutes (2011). The Former

Husband neither objected to this order at trial nor moved for rehearing after the final judgment issued. The Former Husband subsequently appealed, arguing for the first time that the trial court lacked subject matter jurisdiction to interfere with his choice of beneficiary. Finding that it was not clear from the record whether the trial court had subject matter jurisdiction to order as it did, the District Court reversed:

1. "Regarding beneficiaries, the [Servicemembers' Group Life Insurance Act (SGLIA)] provides that following the death of an insured, payment is to be made '[f]irst, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death (1) in the uniformed services if insured under Servicemembers' Group Life Insurance . . . .' 38 U.S.C. § 1970(a)."

2. "The SGLIA has been interpreted by the United States Supreme Court to 'bestow upon the service member an absolute right to designate the policy beneficiary.' Accordingly, due to the operation of the Supremacy Clause of the United States Constitution, state laws interfering with the right to designate the beneficiary under a qualifying policy are federally preempted."

3. "The issue of federal preemption is a question of subject matter jurisdiction that may be raised for the first time on appeal."

4. "Here, it is undisputed that the trial court directed the Former Husband to change the beneficiary designation of his existing life insurance policy. However, it is unclear from the record whether the policy is one whose beneficiary designation is protected under the SGLIA. The policy was not entered into evidence, nor does the record contain other evidence resolving the issue. We are therefore unable to determine whether this application of section 61.30(3) has been federally preempted by the SGLIA."

5. "Consequently, we remand for an evidentiary hearing for the trial court to determine whether it had subject matter jurisdiction to order the beneficiary designation changed."

6. "If the court, after the evidentiary hearing, concludes that the existing beneficiary designation is protected by the SGLIA, then it cannot order the change. However, the trial court may nonetheless order the Former Husband to obtain an additional policy pursuant to section 61.08(3) if the trial court deems it appropriate under the circumstances."

Hirsch v. Hirsch, 38 FLW D2241 (Fla. 2d DCA 2013)

Third District

TRIAL COURT ABUSED ITS DISCRETION IN TRANSFERRING VENUE FOR MOTHER'S PETITION FOR MODIFICATION OF CHILD SUPPORT AND TO ESTABLISH PARENTING PLAN TO BROWARD COUNTY, WHERE PARTIES CURRENTLY RESIDE; VENUE WAS PROPER IN MIAMI-DADE COUNTY WHERE SHE INITIALLY OBTAINED FINAL ADMINISTRATIVE SUPPORT ORDER

An Administrative Law Judge in Miami–Dade County, where the Department of Revenue filed its administrative action to establish child support, issued a Final Administrative Support Order wherein the court adjudged the following: that Mr. Sheard was the biological father and non-custodial parent of the parties' minor child; that paternity had been legally established by an affidavit or voluntary acknowledgement; that the Mother was the custodial parent; and that the minor child primarily resided with the Mother. The Order also required the Father to pay $243 per month in child support, to pay twenty dollars per month towards child support arrearages of $2,230, and to maintain health insurance for the minor child. At the time of

the entry of the Order, the Mother resided in Miami–Dade County. Currently, the parties reside in Broward County.

The Mother filed a Verified Petition for Establishment of Parenting Plan and for Modification of Child Support in Miami–Dade County, seeking an upward modification of child support. She also moved to establish parental responsibility, and a timesharing and parenting plan. The Father moved to transfer the case to Broward County, pursuant to section 742.021, Florida Statutes (2012), which provides that proceedings for the determination of parentage "must be in the circuit court of the county where the plaintiff resides or the county where the defendant resides." In his motion, the Father acknowledged that a Final Administrative Support Order had been issued and that it provided that paternity had already been established by affidavit or voluntary acknowledgment. The Father further argued in his motion that section 409.2563, Florida Statutes (2012), does not confer jurisdiction upon the Division of Administrative Hearings to hear or determine issues of timesharing, such as the issue the Mother raised in her petition; rather, it merely provides that a parent may at any time file an action in a circuit that has jurisdiction and proper venue, and that an order entered by the circuit court would supersede any order entered by the Division of Administrative Hearings to hear or determine issues of time sharing.

In its order that granted the Father's motion to transfer, the trial court did not set forth any reasons or grounds upon which it relied to transfer the case for improper venue. The court's order simply granted the Father's motion. The court did not state any reasons or grounds to support its decision during the hearing on the Father's motion, either. The Mother appealed the trial court's order that granted the Father's motion to transfer venue to Broward County and the denial of her motion for rehearing in which she argued that venue was proper in Miami–Dade County. The District Court agreed and reversed:

1. "The Father's contentions, however, are entirely misplaced insofar as they are applied to preclude Miami–Dade County as a proper forum."

2. "Miami–Dade County is a proper venue for the Mother's petition where, as here, Miami–Dade County had continuing jurisdiction to modify the amount of child support."

3. "Section 61.14(a), Florida Statutes (2012), specifically permits a child support modification action to be filed in the county within which the court entered a child support order."

4. "Miami–Dade County is the forum within which the court entered the original child support order . . . Thus, Miami–Dade County is a proper venue for the [M]other's child support modification action."

5. "Miami–Dade County is also a proper venue pursuant to section 409.2563(10)(c), Florida Statutes (2012). That section provides, in pertinent part, that a parent may at any time file an action in a circuit court that has jurisdiction of the parties and proper venue, and that a circuit court order supersedes any administrative support order."

6. "Because Miami–Dade County is the venue within which the administrative support order issued, jurisdiction and venue properly lie in a circuit court of Miami–Dade County and any subsequent order would supersede the previously entered administrative support order."

7. "Furthermore, if a petition for modification is filed in an appropriate venue, it is improper to transfer it to another venue solely because venue is appropriate there as well."

8. "The Father's argument that venue must be based on section 742.021, Florida Statutes (2012), is misplaced. He is correct that this section provides that paternity proceedings 'must be in the circuit court of the county where the plaintiff resides or the county where the defendant

resides.' However, paternity is not an issue in this case because the Father previously acknowledged paternity and the administrative support order established it."

9. "We thus conclude that the Mother correctly filed her petition in Miami–Dade County, and the trial court abused its discretion when it granted the Father's motion to transfer venue to Broward County."

Ozuna v. Sheard, 109 So.3d 1176 (Fla. 3d DCA 2013)

MOTHER, A CITIZEN OF RUSSIA, WAS NOT ENTITLED TO A PRESUMPTION IN FAVOR OF HER CHOICE OF FORUM FOR HER PATERNITY ACTION AS PLAINTIFFS FROM ANOTHER COUNTRY ARE NOT ENTITLED TO THE PRESUMPTION; RUSSIA CONSTITUTES AN ADEQUATE ALTERNATIVE FORUM.

A non-final order was entered denying the Father's motion to dismiss the Mother's paternity action for forum non conveniens. The Mother is a Russian citizen who had the child in Russia over seventeen years ago. She petitioned the Florida court to establish paternity and also sought an award of prospective and retrospective child support. The Father appealed the non-final order, arguing that because the Mother is a plaintiff from another country with little to no connection to Florida, she was not entitled to the presumption in favor of the plaintiff's forum choice in a forum non conveniens analysis. The District Court agreed and reversed:

1. "The trial court in this case determined that the private interests of the parties were equipoise, but it appears that the court mainly relied upon the general presumption in favor of the plaintiff's forum choice. This presumption, however, is inapplicable to plaintiffs from another country."

2. "The only remaining issue in this case is whether Russia constitutes an adequate alternative forum. We hold that it does. The Mother and child reside in Russia; Russia has jurisdiction over the related issues of custody, visitation, and time-sharing; the Father recently filed an action for paternity in Russia; the Russian court determined he was the father under Russian law; and the Father stated that he has already agreed to submit to the jurisdiction of the Russian court on the remaining matters that are presently before the trial court."

3. "We therefore reverse and remand with instructions that the trial court abate the action, upon the Father's stipulation before the trial court that he will submit to the jurisdiction of the Russian court, to give the Father an opportunity to appear and litigate the action before the Russian court."

4. "After abatement, upon the trial court's receipt of satisfactory evidence that the Russian court has accepted jurisdiction of the matter, the Florida action should be dismissed."

Sazonov v. Karpova, 38 FLW D2378 (Fla. 3d DCA 2013)

Fourth District

ORDER MODIFYING PARENTING PLAN REVERSED WHERE IT FAILED TO REFLECT THAT THE REMEDIAL CUSTODY ARRANGEMENT WAS TEMPORARY AS THE ORAL PRONOUNCEMENT HELD.

On August 19, 2011, the parties herein filed a parenting plan and settlement agreement which provided that during the Father's time-sharing week, the Mother was allowed to select three school-day afternoons to pick up the child from school and return the child to the Father by

6:30 p.m. A hearing was later held on the Mother's supplemental petition for the modification of child support and the Father's motion seeking additional time-sharing, attorney's fees, and enforcement of a previous court order. At that time, the trial court found that the Mother had refused to comply with the parties' time-sharing agreement and had wrongfully kept the child from the Father from December 16, 2011, through the date of the order, January 26, 2012. To allow the Father to recover this time, the trial court announced that during his week with the child, the Mother's right to pick up the child from school and keep the child with her until 6:30 p.m. would be suspended until the Father's missed time was recovered. However, the order reflected that this change was permanent, stating that "the Parenting Plan is hereby modified to dispense with the Mother's selection of three (3) afternoons on the Father's week. The Mother shall no longer pick the child up from school on three (3) days during the Father's week, and will not otherwise be entitled to time-sharing during the Father's week." The Mother appealed. The District Court reversed:

1. "Because this portion of the written order is materially different from the trial court's oral pronouncement, this part of the order must be reversed."

2. "Accordingly, that part of the order modifying the parenting plan to dispense with the Mother's opportunity to see the child after school three afternoons during the Father's week is reversed and remanded for the trial court to note that this change is temporary."

Fernandez v. Wright, 111 So.3d 229 (Fla. 2d DCA 2013)

FORMER HUSBAND'S VERIFIED ANSWER TO PETITION FOR RELOCATION RELATED BACK TO ORIGINAL UNVERIFIED ANSWER AND WAS THUS TIMELY FILED; FAILURE TO FILE A VERIFIED PLEADING WHERE VERIFICATION IS REQUIRED IS NOT A JURISDICTIONAL DEFECT.

The trial court entered a non-final order authorizing the Former Wife to relocate to North Carolina with the parties' minor child on a temporary basis. However, the trial court failed to hold an evidentiary hearing before allowing the temporary relocation. The trial court also found that the Former Husband's verified answer to the petition for relocation was untimely. The Former Husband appealed. The District Court reversed:

1. "We reverse because the trial court failed to hold an evidentiary hearing before allowing the temporary relocation, contrary to the requirements of section 61.13001(6)(b), Florida Statutes."

2. "Furthermore, contrary to the trial court's ruling, we conclude that the [Former Husband's] verified answer to the [Former Wife's] petition for relocation related back to his original unverified answer, which was timely filed."

3. "The failure to verify a pleading which, by statute, is required to be verified does not constitute a jurisdictional defect; verification may be supplied by an amendment and relate back to the time the original unverified pleading was filed."

4. "We therefore reverse and remand the cause for an evidentiary hearing from which the court can determine the necessary findings required by section 61.13001." (internal quotations omitted).

Rivero v. Rivero, 111 So.3d 233 (Fla. 4th DCA 2013)

TRIAL COURT DID NOT ERR IN DETERMINING THAT IT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER DISSOLUTION OF MARRIAGE PETITION BECAUSE WIFE, WHO WAS IN THE U.S. ON NON-IMMIGRANT TOURIST VISA, HAD NOT ESTABLISHED ACTUAL RESIDENCY WITH AN INTENT TO REMAIN PERMANENTLY IN STATE; CLAIM THAT UNDER UCCJEA, TRIAL COURT HAD JURISDICTION INSOFAR AS SHE SOUGHT CHILD CUSTODY COULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL, AND EVEN IF COURT HAD JURISDICTION, TRIAL COURT PROPERLY DISMISSED ACTION ON GROUNDS THAT FLORIDA WAS INCONVENIENT FORUM WHERE PARTIES AND CHILD WERE GERMAN CITIZENS AND HUSBAND'S SUIT FOR DIVORCE WAS PENDING THERE.

The parties and their child are all German citizens. Although the parties married in Florida in 2002 while on vacation, they executed a prenuptial agreement under German law and continued to live in Germany. The Husband owns an interest in a company in Germany, and all of the parties' income and property is located in Germany. In July 2009, the Wife and the daughter moved to Boca Raton for the daughter to study here and to distance themselves from the Husband, who the Wife accused of domestic violence. They entered the United States on a non-immigrant tourist visa. To maintain her status in this country, the Wife filed required certificates of eligibility with the immigration authorities every several months, including forms filed both before and after she filed the petition for dissolution of marriage. In renewing her tourist visa, she swore on each affidavit that she sought to remain in the United States temporarily and "solely for the purpose of pursuing a full course of study." To comply with the tourist visa, she would also leave the United States periodically and return to Germany. She returned to Germany in December 2009 and stayed until the end of January 2010.

When asked in her deposition whether she had filed any document with the United States indicating that she intended to stay permanently in this country, she testified that she had not. When asked whether she intended to do so, she answered "Maybe, yes." She also admitted that she had not notified the German government of her removal from her home district in Germany, something she is required to do under German law when she moves out of a district. She also testified that she had not taken all of her personal effects when she left Germany.

The Husband had agreed to allow the child to come to Florida to attend school. He paid the lease on their rental and otherwise supported the Wife and his daughter. Originally, the agreement was for six months, but he later agreed to support the wife and child until the end of the school year. He testified that they had return airfare tickets home for the end of summer in 2010. The Husband visited the girls in Florida in October 2009 and March 2010; and the couple tried to reconcile, but after the March 2010 visit, the Wife determined that the marriage could not be saved.

In July 2010, the Husband filed a petition for dissolution of marriage in Germany. That suit remained active at the time of the appeal, although there were issues regarding proper service on the Wife. However, several emails between the parties indicated the Wife's desire to settle the dissolution proceeding filed in Germany without litigation. On August 6, 2010, the wife received an email from the Husband that he was flying into Miami International Airport on August 11, 2010, to pick up the child for a vacation to the Bahamas. She did not respond until August 10, telling him that they would meet him at the airport, although she had no intention of allowing the child to accompany the Father. On that same day, she filed a petition for protection

from domestic violence, and the trial court granted an ex parte temporary injunction prohibiting the Husband from contact with the Wife or child. The next day, the Wife filed a petition for dissolution of marriage, and the Husband was served with the domestic violence petition, the temporary injunction, and the petition for dissolution of marriage upon arrival at the Miami airport on August 11th. The Husband then returned to Germany immediately.

The Husband moved to dismiss the Wife's petition for dissolution because of lack of subject matter jurisdiction, as the wife was not a domiciliary of the state, for lack of personal service on him, and for forum non conveniens. He also moved to abate the action because of his pending petition for dissolution in Germany. The trial court conducted an evidentiary hearing on the issues of subject matter and personal jurisdiction, and, over objection on grounds of lack of notice, on the issue of the domestic violence injunction. The Husband did not testify in order to preserve his objection to personal jurisdiction on which the trial court had not ruled. The court heard from experts on German law with respect to the forum non conveniens claim, as well as the testimony of the Wife and her friend as to her intention to stay in this country and her fear of her Husband. The court also heard testimony from the child's psychologist.

Based upon the facts, the court granted the motion to quash service of process and the motion to dismiss for lack of subject matter jurisdiction and personal jurisdiction over the Husband. It found that it did not have jurisdiction because the Wife had not proved her permanent residence or intention to remain in Florida when she filed repeated affidavits to renew her passport certifying that she was in the country temporarily. In addition, the court considered that her failure to notify the German government, as required by law, that she was no longer a resident. The court determined that it did not have jurisdiction over the Husband because service was obtained through the Wife's deceptive conduct in luring him to the jurisdiction. It also made findings that the German courts had jurisdiction over the marriage, the child, and the property of the parties, and the court declined to exercise jurisdiction under these circumstances. The wife appealed. With regard to the jurisdictional issues, the District Court affirmed:

1. "The [W]ife argues that the court made an implicit finding that she could not have an intention to reside in Florida as a matter of law because of the various immigration forms she signed indicating that she was only in the U.S. on a 'temporary' basis. The Wife argues that this is contrary to the holding of *Weber v. Weber*…."

2. "*Weber* looked to [earlier cases] as authority for its ruling…. [Those cases] stand for the proposition that a trial court does not lack subject matter jurisdiction as a matter of law based upon the non-permanent status of the petitioning party, but that status may be taken into consideration in the factual determination of domiciliary intent."

3. "We conclude that the trial court in this case did not determine that the Wife could not establish residency as a matter of law but determined based upon the facts presented that the Wife had not established actual residency with an intent to remain permanently."

4. "It emphasized, as powerful evidence of her lack of intent, the affidavits that the Wife signed as late as May 2010, in which she swore that she did not intend to remain permanently in the United States. The trial court is not compelled to disregard her sworn statements in determining her intent."

5. "Moreover, there was other evidence at the hearing which would support the trial court's conclusion."

6. "She had never notified the German government that she had moved from her home district, something she knew she was required to do. In her deposition, [she] was equivocal as to her intent to apply for permanent residency status in the United States. At the hearing as well as

in her deposition, she testified that she and her daughter first came to Florida so her daughter could go to school and to put some distance between her and her husband. She did not state that she was intending at the time to move to Florida permanently, and she left personal possessions in Germany. She spent the month of January in Germany. When she returned, the Husband came for a visit in March at which time they were still trying to reconcile the marriage. Obviously, if they were attempting reconciliation, that would entail her moving back to Germany, the parties' home and workplace. Thus, the court could conclude that the Wife had not determined to stay in Florida until she filed for dissolution of marriage, and the intent and the act of residency had not concurred for the prescribed period."

7. "Because the trial court did not rule as a matter of law that the Wife's tourist visa prevented the court from acquiring subject matter jurisdiction but ruled, based upon the facts, that she had not established the intent to remain, we affirm the trial court's ruling dismissing the dissolution petition for lack of subject matter jurisdiction as it is supported by competent substantial evidence."

8. "With respect to the Wife's argument the trial court had jurisdiction that under the UCCJEA]… even if the trial court did have jurisdiction pursuant to section 61.514, Florida Statutes, it is apparent that the court dismissed the action on the grounds that Florida was an inconvenient forum…. At the hearing on the Husband's motions, the court heard evidence on the factors in section 61.520(2) that a court should consider in determining whether Florida is an inconvenient forum. Again, in ruling, the court found: 'There is no rational basis for this Court to assume jurisdiction over the German court in a case involving German citizens, a minor child who is a German citizen, and all marital real and personal property interests in Germany.' Therefore, we hold that the court did not err in dismissing the petition even as to child custody."
Rudel v Rudel, 111 So.3d 285 (Fla. 4th DCA 2013)

WHERE FORMER WIFE FILED PETITION FOR MODIFICATION OF CHILD SUPPORT, AS WELL AS VARIOUS COUNTS OF FRAUD, DECEPTIVE AND UNFAIR TRADE PRACTICES, AND NEGLIGENCE AGAINST FORMER HUSBAND'S COMPANY, ITS MANAGERS, AND ITS C.P.A., FAMILY COURT ERRED IN DISMISSING FOR LACK OF JURISDICTION ALL FRAUD, STATUTORY VIOLATION, AND NEGLIGENCE COUNTS WITHOUT PREJUDICE TO FORMER WIFE FILING IN CIVIL DIVISION; PROPER REMEDY WAS TO TRANSFER CASE TO CORRECT DIVISION.

The Former Wife filed a petition for modification of child support, as well as various counts of fraud, deceptive and unfair trade practices, and negligence against the Former Husband's company, its managers, and the company's C.P.A. for their alleged assistance in helping him hide his income so as to lower his child support. The trial court, presiding in the Family Division, dismissed all of the fraud, statutory violation, and negligence counts without prejudice to the Former Wife filing them in the Civil Division. The Former Wife appealed, challenging the dismissal, claiming that the court had jurisdiction to hear all claims. While all the parties conceded that all circuit court judges have the same jurisdiction within their respective circuits, the Appellees nevertheless claim that dismissal was proper because the fraud and negligence claims should have been brought in the Civil Division. The District Court reversed:

1. "We agree [with the Former Wife] that the circuit court had jurisdiction, and dismissal was an improper remedy."

2. "'If an action is filed in the incorrect division, the proper remedy is to transfer the case to the correct division, subject to the payment of any filing fee and subject to the requirements of any local administrative rule.'"

3. "While the [Appellees note that the [Former Wife] did not request transfer, she opposed dismissal, and dismissal was not the proper remedy."

Chanin v. Feigenheimer, 111 So.3d 292 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT DID NOT ERR IN TRANSFERRING SUPPLEMENTAL PETITION TO MODIFY CHILD SUPPORT FROM PUTNAM COUNTY TO HILLSBOROUGH, WHERE PATERNITY ACTION ORIGINATED, WHERE ALTHOUGH VENUE WAS NOT ORIGINALLY IMPROPER, COURT HAD DISCRETION TO TRANSFER IN THE INTERESTS OF JUSTICE

In early 2011, the Mother's counsel informed the Father of her intention to file a supplemental petition for increase in child support in Hillsborough County, where the original action herein originated. In response, the Father hired counsel and filed a petition in Putnam County claiming that circumstances had changed since the previous order in that he was now disabled and unable to pay child support without a reduction, and with regard to venue, that the witnesses and doctors who would testify resided in Northeast Florida, and that he was not physically able to travel to Hillsborough County.

The Mother then filed her supplemental petition to increase child support in Hillsborough County. She also filed a verified motion to transfer in Putnam County, requesting a transfer of the Father's petition to Hillsborough County. The motion outlined the procedural history of the case and alleged that the proper forum was in Hillsborough County, where the court had retained jurisdiction for the purpose of modifying and enforcing its orders and judgments.

A hearing was subsequently held on the motion to transfer. While the Mother argued that venue in Hillsborough County was proper and all related proceedings should remain there, the Father maintained that the proceedings should remain in the Putnam court. A ruling on the transfer was reserved on that day because the parties represented that they were close to resolving the issue. However, when the parties failed to announce a settlement, the Putnam court scheduled a case management conference, during which the Father's counsel attempted to file a partial deposition of his doctor in support of his venue argument, but the Mother's objection to its admission was sustained based on a finding that the venue hearing had previously closed. Thereafter, the trial court entered an order changing venue to Hillsborough County and finding that the Father's filing in Putnam County was "legal posturing through gamesmanship and an attempt to be clever in two counties . . . ." On appeal by the Father, the District Court affirmed:

1. "Although venue in Putnam County was not improper, pursuant to section 47.122, Florida Statutes, the trial court had the discretion to transfer the action to Hillsborough County in the interest of justice."

2. "Based on the findings made by the trial court, the decision to transfer the action back to Hillsborough County fell within the bounds of the court's discretion."

Mann v. Yeatts, 111 So.3d 934 (Fla. 5th DCA 2013)

TRIAL COURT ERRED IN DETERMINING THAT SERVICE OF PROCESS ON FORMER HUSBAND HAD BEEN EFFECTUATED WHERE THE RECORD CONTAINED NO BASIS FOR SUCH A DETERMINATION.

The Former Wife filed a petition for domestication and enforcement of a foreign judgment from Tennessee in 2007. The Sheriff attempted service of process on the Former Husband at 144 Deerpath Road, DeBary, FL 32713, on September 11, 2007, but, according to the return of non-service, after diligent search and inquiry, he was unable to find him in Volusia County, Florida. According to the resident at the address where service was attempted, the Former Husband lived in the Cayman Islands at the time.

Thereafter, on May 23, 2008, the Former Wife filed an amended petition for domestication and enforcement of the foreign judgment, as well as a motion for contempt for the Former Husband's alleged failure to pay child support. She filed a notice of filing "Original Affidavit Of Service Of Alias Summons: Personal Service On An Individual, Served Upon Substitute For Respondent On June 7, 2008." The affidavit indicated that substitute service of process was made on the Former Husband through his son at 144 Deerpath Road, DeBary, FL 32713, on June 7, 2008. Through an untitled pro se pleading, which was sent via certified mail to the Clerk of Court, the Former Husband objected to the substitute service, asserting that he did not reside in Florida and was residing and working in the Cayman Islands. The trial court treated the Former Husband's objection as a motion to quash service and directed that a hearing on the motion be held. As a result of a hearing held on August 16, 2010, counsel for the Former Wife sent the Former Husband copies of the documents that had been filed in the case, including but not limited to the summons and alias summons, through certified mail with return receipt requested to 144 Deerpath Road, DeBary, FL 32713 and P.O. Box 30751 SMB Grand Cayman, Cayman Islands, KY1–1204.

Two years later, on September 2, 2010, the trial court entered an order setting the case for trial. Thereafter, on November 3, 2010, the trial court entered a final judgment of domestication and enforcement. In the final judgment, the trial court provided that the Former Husband "failed to appear" and found that he "was provided with proper notice of the trial on this matter at both of his mailing addresses in Florida and the Cayman Islands." It provided that the Former Husband was in arrears on child support in the amount of $138,005.00, and that the interest on the arrearage totaled $45,451.30.

The Former Husband filed a motion for reconsideration, for rehearing, to vacate final judgment, and to dismiss. He asserted that the purported substitute service of the amended petition was invalid because the substitute service was made at an address at which he was not then residing, and that the scheduled hearing for his pleading that the trial court treated as a motion to quash service was never held. On March 3, 2011, the trial court entered an order on the Former Husband's motion for reconsideration, for rehearing, to vacate final judgment, and to dismiss the amended petition. In the order, the trial court found that venue was not proper, granted the motion to vacate final judgment and the motion to quash service, and denied the motion to dismiss the amended petition.

On May 3, 2011, counsel for the Former Wife sent a copy of all pleadings in the case to counsel for the Former Husband, explaining in a cover letter: "Enclosed herewith please find a copy of all pleadings filed by my office in the above entitled matter. In accordance with Fla. R. Civ. P. 1.080(b) and Fla. Fam. L.R.P. 12.080(a)(1), this perfects service of process upon your client, and a timely response is expected."

Subsequently, on June 15, 2011, the trial court entered a case management order, finding: 1) the Former Wife filed an Amended Petition for Domestication and Enforcement of Final Judgment of Dissolution of Marriage on May 13, 2008; 2) to date, service of said Petition has not yet occurred; 3) counsel for the Former Wife has indicated that she has registered a foreign judgment pursuant to Florida Statutes § 55.501– § 55.509; 4) the Court finds that certain requirements for proper registration of a foreign judgment in accordance with the above referenced statutes have not yet been met. It ordered the Former Wife to "send a Notice of Recording of Foreign Judgment via registered mail with return receipt requested to Former Husband at the address given in the Affidavit setting forth the name, address, and social security number of judgment creditor and debtor and shall record proof of mailing with the Clerk, within sixty (60) days."

On August 12, 2011, the Former Wife filed a certificate of service of pleadings with an attached domestic return receipt, certifying that a true and correct copy of the certificate of service of pleadings and the attached domestic return receipt had been furnished to counsel for the Former Husband. Included among the pleadings that were certified to have been "served by Certified mail, Return Receipt" upon the Former Husband were the petition for domestication and enforcement, the summons, the notice of recording foreign judgment, the amended petition for domestication and enforcement, and the alias summons. The attached domestic return receipt indicates that the Former Husband received an article at 144 Deerpath Road, DeBary, FL 32713 on August 3. The signed domestic return receipt bears a date stamp of August 3, 2010, but a track and confirm print-out lists a delivery date of August 3, 2011.

On October 25, 2011, the Former Wife filed a motion for judicial default, asserting that the Former Husband had been served and failed to file an Answer. The following day, the trial court entered an order on the second case management conference held on October 25, 2011. In the order, the trial court explained that counsel for the Former Wife, as well as counsel for the Former Husband, were present, that service had been effectuated, and that a final hearing would be held on November 28, 2011.

On November 7, 2011, the Former Husband filed a motion for relief from the order on the second case management conference, and an objection to entry of judicial default. He asserted in part, that he had never been personally served with the Petition for Domestication or the Amended Petition for Domestication and that the court's finding that service had been effectuated was erroneous. Thereafter, the court denied the Former Husband's motion to dismiss and ordered him to comply with discovery requests. The Former Husband appealed. On the issue of whether service of process was properly established, the District Court reversed:

1. "Based upon our review of the record, at the time the trial court made the finding that service had been effectuated, the following events had occurred: (1) [the Former Wife] was unable to effectuate service of the initial petition for domestication and enforcement, as is evidenced by the notice of non-service; (2) [the Former Wife] was unable to effectuate service of process in relation to the amended petition for domestication and enforcement, as is evidenced by the trial court's order wherein it granted [the Former Husband's] motion to quash service of process; and (3) counsel for [the Former Wife] sent [the Former Husband] and [his] counsel, through certified mail with return receipt requested, copies of the pleadings in the case."

2. "The record does not contain a return of service for any service of process that occurred subsequent to the trial court's order granting [the Former Husband's] motion to quash service of process."

3. "Nor does it contain an order vacating its grant of [the Former Husband's] motion to quash service of process."

4. "We have accordingly been unable to find in the record the basis for the trial court's determination that service had been effectuated."

5. "On appeal, [the Former Wife] argues… facts that she contends establish that [the Former Husband's] residence was, in fact, the DeBary address at the time service of process was attempted, but it is unclear whether this or any other evidence was ever put before the court or whether this could have been the basis of the trial court's decision."

7. "It does not appear from the record that a hearing was ever conducted for the purpose of determining the issue of service of process, and the trial court never made any findings to explain its conclusion as to how or when proper service was made."

8. "Accordingly, we reverse and remand to the trial court to conduct a hearing to determine the issue of service of process and to enter a proper order."

Gorny v. Leger, 114 So.3d 238 (Fla. 5th DCA 2013)

B. Discovery

First District

Second District

Third District

Fourth District

Fifth District

C. Pleadings and Motions

First District

ABUSE OF DISCRETION TO ORDER LIQUIDATION OF HUSBAND'S STATE OF FLORIDA DEFERRED COMPENSATION FUND, HIS IRA AND HIS WINE COLLECTION TO PREVENT FORECLOSURE OF MARITAL HOME, WHERE WIFE'S MOTION WAS UNSWORN AND DID NOT REFERENCE HUSBAND'S ASSETS THAT WERE SUBJECT OF LIQUIDATION AND DISTRIBUTION.

At a hearing on the Wife's Motion for Emergency Relief, stemming from complicated proceedings below, the trial court discovered that the parties needed $28,000 to reinstate their mortgage, and that the homeowners' association had placed a lien on the parties' home, thereby prompting the trial court to shift it's focus to what it determined to be the "real" issue of "getting all [the] bills caught up."

The Wife's counsel informed the court that she had $6,000 on hand, and claimed that the husband had over $18,000 in a deferred compensation fund he had opened when he previously worked for the state, and that he also had approximately $4,000 in an IRA account, and, that the husband's wine collection was worth approximately $55,000. After hearing from both parties, the trial court announced its intention to order "whatever accounts and monies that [are] available on both parties be liquidated to catch up the mortgage and catch up these outstanding expense." The Husband's counsel objected on the basis of due process, because the foreclosure issue was not noticed for hearing. In response, the trial court, in its order indicated that the parties were on notice that the nature of the emergency was foreclosure of the home, and therefore any actions taken at the hearing to eliminate that emergency would be properly considered at the noticed hearing. The court ordered the liquidation of the husband's deferred comp fund, his IRA, the wine collection and that the wife pay her almost $6,000 towards the mortgage and homeowners' association delinquency. The District Court held:

1. "[The husband argues the trial court abused its discretion by ordering the liquidation of his assets when that remedy has not been pled in the wife's Motion for Emergency Relief. On this point, we agree with the husband."

2. "While we sympathize with the trial court's concern that the foreclosure of the parties' home would result in the loss of substantial equity, the dictates of procedural due process demand that a party be placed on notice and given a meaningful opportunity to be heard before being divested of his or her property."

3. "Section 61.075(5), Florida Statutes (2011), does not authorize the trial court's action here, contrary to the wife's urging. This section provides in pertinent part as follows: 'If the court finds good cause that there should be an interim partial distribution during the pendency of a dissolution action, the court may enter an order that shall identify and value the marital and non-marital assets and liabilities made the subject of a sworn motion, set apart assets and liabilities, and provide for a partial distribution of those marital assets and liabilities.'"

4. "The wife's argument disregards the portion of the above-quoted statutory language requiring that the marital and non-marital assets subject to the interim partial distribution be '*made the subject of a sworn motion*.' In this case, not only was the wife's motion not sworn, but it did not reference the husband's assets that were ultimately made the subject of liquidation and distribution by the interim order. Nor, again, did the trial court make any effort to identify which assets were marital and which were non-marital."

5. "Where a party's private property is at stake, the simple fact, according to the trial court, that 'the parties were on notice that the nature of the emergency was the foreclosure of the home,' would not justify, as the court further observed, 'any and all actions taken at the hearing to eliminate that emergency . . . .'"

6. "In the instant case, the husband was wholly without notice that his State of Florida deferred compensation fund, his IRA, and his wine collection would be subject to liquidation in order to reinstate the mortgage. Consequently, it was an abuse of the trial court's discretion to order him to do so."

Austin v. Austin, 120 So.3d 669 (Fla. 1st DCA 2013)

Second District

TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING WITH PREJUDICE DEPARTMENT OF REVENUE'S PETITION TO ESTABLISH PATERNITY AND CHILD SUPPORT FOR FAILURE TO JOIN AN INDISPENSIBLE PARTY WITHOUT GIVING AN OPPORTUNITY TO AMEND.

The Department of Revenue filed a petition to establish paternity, child support, and for the award of other relief. The trial court entered an order dismissing with prejudice the Department's petition for failure to join an indispensable party, the indispensable party being the child's legal father. The Department appealed, arguing that because the dismissal was for a procedural error, not on the merits, the trial court should have dismissed the petition without prejudice. The District Court agreed and reversed:

1. "Dismissal with prejudice is a severe sanction…. The trial court should grant such relief only when the pleader has failed to state a cause of action and it conclusively appears that the pleader cannot possibly amend the pleading to state a cause of action."

2. "A dismissal with prejudice can constitute an abuse of discretion where a party may be able to plead additional facts to support its cause of action or support another cause of action under a different legal theory…. Thus, the trial court should hesitate to dismiss without giving the pleading party an opportunity to amend."

3. "Further, an order dismissing a pleading for lack of an indispensable party is not a merits adjudication…. A dismissal for failing to join an indispensable party should be without prejudice, unless the pleader refuses to amend to add a party necessary for a determination on the merits."

4. "Additionally, although not raised by the Department, it appears that the trial court may have erred in dismissing the case on the theory that the Department failed to join an indispensable party. From the record, it appears that another man was listed as the father on the child's birth certificate. However, an order entered in 2001 vacated a judgment of paternity against that man. Another order entered in 2010 clarified that this other man was not the biological father and his name should be removed from the birth certificate."

5. "The trial court should have entered an order of dismissal with leave to amend in order for the Department to allege the facts necessary to establish that the other man was not a necessary party to this proceeding."

Dept. of Revenue v. S.B., 124 So.3d 377 (Fla. 2d DCA 2013)

Third District

TRIAL COURT ERRED IN AWARDING ALIMONY TO WIFE WHERE SHE NEVER ASKED FOR SAME IN HER PLEADINGS; HER FILING OF A MOTION TO AMEND HER ANSWER TO HUSBAND'S PETITION FOR DISSOLUTION TO INCLUDE A COUNTER-CLAIM FOR ALIMONY, ON WHICH SHE NEVER OBTAINED AN ORDER, DID NOT CONSTITUTE AN ACTUAL AMENDMENT TO THE PLEADINGS.

The Husband filed a petition for dissolution of marriage seeking equitable distribution, exclusive possession of the marital home, shared parental responsibility, and child support. The Wife, who was represented by counsel in the court below, filed an answer to the petition, which

did not seek alimony or spousal support. At one point in the proceedings, the Wife moved to amend her answer to include counterclaims for alimony and for damages resulting from an alleged tort, but she never obtained an order on that motion. As trial approached, the Wife filed a pretrial statement, which listed "child support, child time-sharing, and division of marital property"—but not alimony—as the issues to be tried. At the end of the trial, the judge indicated that he intended to award alimony. The Husband objected specifically on the basis that alimony "was never plead and there is no counterclaim asking for alimony." Nevertheless, the final judgment required that the Husband pay $1,000/month in alimony "until [the] Wife remarries, lives in a supportive relationship as that term is defined by statute or dies." The Husband appealed, and the District Court reversed the alimony award:

1. "Because the wife never asked for alimony in her pleadings, we vacate the portion of the final judgment of dissolution which awarded alimony."

2. "We agree with the husband that the trial court erred in awarding alimony in these circumstances."

3. "A court is not at liberty to award alimony where the benefitting spouse has failed to seek such relief in the pleadings."

4. "Unless and until is granted, the mere filing of a motion to amend the pleadings does not constitute an actual amendment to the pleadings."

McClain v. McClain. 105 So.3d 641 (Fla. 3d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN DENYING MOTHER LEAVE TO AMEND PETITION FOR MODIFICATION OF CHILD SUPPORT TO SEEK CHILD SUPPORT ON A PERMANENT BASIS FOR SEVERELY MENTALLY INCAPACITATED CHILDREN WHERE RECORD CONTAINED COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT AWARD ON A PERMANENT BASIS, BUT MAGISTRATE FOUND MOTHER WAS LIMITED BY RELIEF REQUESTED IN HER PETITION.

The Mother herein is a single mother of two severely handicapped children. She filed a pro se petition for upward modification of child support and sought to extend the Father's support responsibility until the children reached age twenty-five due to a substantial change in circumstances. The Mother, later represented by counsel, filed a motion for leave to amend her petition and attached a proposed amended petition wherein she requested that the trial court establish child support on a permanent basis due to a substantial change in circumstances. She also alleged that the request was in the best interests of the children because the children required constant care and supervision due to their severe disabilities. The trial court denied the motion without prejudice, but provided no reasons for its ruling. Thereafter, the Mother moved for reconsideration of the court's denial, which motion the trial court also denied.

At the hearing on the Mother's pro se petition, she and a school teacher testified. The children, one of whom was then seventeen and the other who was fifteen, have the intelligence and ability of an infant and a toddler. One of the children must take antipsychotic medication to control his behavior. The children cannot speak, understand when spoken to, feed themselves, dress, bathe, or use the restroom alone. The children must wear diapers, and they both need assistance and supervision twenty-four hours a day. The children attend a school for profoundly mentally handicapped individuals whose IQs range between 0 and 20.

The magistrate found that there was substantial, competent evidence that the children required support and were dependent, and that they were going to be dependent beyond the age of eighteen. The magistrate further found that the testimony regarding the handicap of the children was unrebutted. As such, the father's child support obligation was extended until the children reached the age of twenty-five. The magistrate noted that she would have extended the modification of child support on a permanent basis, but she was limited to the relief requested in the pending petition. The Mother appealed the trial court's order adopting the findings and recommendations of the magistrate. The District Court reversed:

1. "It cannot be said that the Mother abused the privilege to amend. Her motion for leave to amend was the first instance where she requested such relief."

2. "There is no issue of futility either. The Mother clearly stated a claim for relief because the children undeniably have a mental incapacity that requires permanent support."

3. "Nor does the record reflect that the motion for leave to amend would have caused any prejudice to the Father, the opposing party. Any prejudice would have certainly been remedied with a continuance, which the Father did not request."

4. "The interests of justice would have been served under these circumstances where the Mother mistakenly did not request child support on a permanent basis, to which she was entitled under these circumstances."

5. "Accordingly, we hold that the trial court abused its discretion when it denied the Mother leave to amend her petition for modification of child support."

6. "Given that the record contains competent, substantial evidence to support the magistrate's determination that the award should be on a permanent basis, it would be a waste of judicial resources to remand for another hearing on the amended petition."

7. "We therefore reverse the order under review with directions to grant the Mother's motion for leave to amend her petition for modification of child support consistent with the evidence introduced at the hearing before the magistrate."

8. "We further direct the court to enter judgment in the Mother's favor and award her child support on a permanent basis due to the mental incapacity of the children."

Santos v. Flores, 116 So.3d 518 (Fla. 3d DCA 2013)

TRIAL COURT ABUSED ITS DISCRETION IN DENYING WIFE'S MOTION FOR RECONSIDERATION WHERE WIFE'S FAILURE TO APPEAR AT HEARING AND CONTEST HUSBAND'S MOTION WAS RESULT OF EXCUSABLE NEGLECT; WIFE HAD NOT RECEIVED NOTICE OF HUSBAND'S MOTION OR HEARING THEREON; FURTHER, WIFE ESTABLISHED MERITORIOUS DEFENSE WHERE ORDER ESTABLISHING SUPPORT DID NOT MAKE ANY FINDINGS AS TO NET INCOME OF PARTIES AS STARTING POINT OR GIVE ANY EXPLANATION AS TO HOW CALCULATION WAS PERFORMED.

The parties have a seven-year-old son. In the underlying dissolution proceedings, the final judgment granted the Former Wife's petition for relocation and ordered the Former Husband to pay child support in an amount that was to continue for three months and then be recalculated after each party exchanged financial information evidencing income at that time. Several months later, the Former Husband filed a motion to establish child support and enforce the final judgment. This motion was served on the Former Wife's counsel. No response was filed on her behalf, and neither she nor her attorney appeared at the hearing thereon. The trial

court ultimately entered an order granting the Former Husband's motion, and ordered him to continue to pay child support, but in a reduced amount. The order also awarded him attorney's fees and costs and reserved jurisdiction to determine the amount. The trial court's order indicated that it had been served on the Former Wife's former counsel, but not directly on the Former Wife.

The Former Wife was not aware of the proceedings until she was finally served directly via certified mail with the Former Husband's Motion to Determine Claim of Child as Dependent on Tax Returns and to Determine Amount of Attorney's Fee Award, which motion was initially served on the Former Wife's counsel, who then advised the Former Husband's counsel that he no longer represented her (he later formally withdrew prior to the hearing on the parties' competing motions). Thereafter, the Former Wife filed a motion for reconsideration of the trial court's order granting the Former Husband's motion to establish child support, alleging that she was never served with a copy of the motion or notice of hearing, and further explaining her own attempts to resolve the issue of child support through the Department of Revenue.

Several days later, the trial court held a hearing on the parties' motions, with the *pro se* Former Wife appearing by telephone. In the order entered thereon, the trial court granted the Former Husband's motion to permit him to claim the child as a dependent on his 2012 and 2013 tax returns, and denied the Former Wife's motion for reconsideration. The order also granted the Former Husband's motion to determine the amount of attorney's fees and awarded him $1,216.00, finding that amount represented reasonable attorney's fees incurred as a result of the Former Wife's non-compliance with the terms of the final judgment. The Former Wife thereafter appealed this order. The District Court reversed the denial of the Former Wife's motion for reconsideration:

1. "We agree with the Former Wife that her failure to appear at the hearing and contest the Former Husband's motion to establish child support was, at the very least, the result of excusable neglect—if neglect at all."

2. "The Former Wife's motion, in essence, sought to vacate the trial court's order establishing child support because the Former Wife—through no fault of her own—did not receive notice of the motion or the hearing…. Once she was personally served with the Former Husband's subsequent motion, she immediately filed her motion for reconsideration and appeared at the hearing on the motions. This demonstrated excusable neglect and due diligence on the part of the Former Wife."

3. "Moreover, a meritorious defense is clear as the trial court's order establishing child support 'is facially erroneous because it does not make any findings as to the net income of each party as a starting point for calculating child support or explain how the calculation was performed.'"

4. "Accordingly, we find that the trial court's denial of the former wife's motion to vacate the order establishing child support was an abuse of discretion and must be reversed and remanded for the trial court to make its findings as to the net income of each party, and based on those findings calculate the child support . . . award and enter a new order specifying the basis for the award pursuant to section 61.30, Florida Statutes (2012). This award may be made retroactive to the date of filing of the former husband's motion to establish child support as provided in section 61.30(17), Florida Statutes (2012)."

5. "Because we conclude that the Former Wife's non-compliance with the terms of the

final judgment was the result of excusable neglect and not willful, we reverse the award of attorney's fees to the Former Husband."
Pullis v. Pullis, 118 So.3d 937 (Fla. 3d DCA 2013)

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN SUA SPONTE ORDERING MOTHER TO SUBMIT TO PSYCHOLOGICAL EXAMINATION WITH A FOCUS ON ANGER CONTROL AND TO PARTICIPATE IN OLDEST CHILD'S THERAPY DURING HER TIMESHARING WHERE HER MENTAL CONDITION WAS NOT "IN CONTROVERSY" AND THERE WAS NO SHOWING OF "GOOD CAUSE," AS REQUIRED BY FLORIDA RULE OF CIVIL PROCEDURE 1.360

In 2010, an Illinois court dissolved the parties' marriage, subsequently entering a final custody judgment awarding sole custody of the two minor children to the Father in 2011. The trial court also granted the Father's motion to remove the children to Florida. Thereafter, in 2012, the Illinois final custody judgment was registered and domesticated in Florida.

On July 22, 2013, the Father filed in the Florida court an emergency motion to suspend the Mother's timesharing ("Emergency Motion"), requesting that the Mother's timesharing be suspended or, in the alternative, be supervised pending the results of a psychological examination. The primary support for the Emergency Motion was the Mother's behavior during court proceedings in Illinois on July 18 and 19, 2013, including her attempt to discharge her attorney, and her behavior outside of the courthouse in Illinois on July 19, 2013, which involved her sitting outside of the courthouse beneath a sign that stated: "NBA Miami Heat Star Mother of his Children on the Streets." The Father asserted that based on this behavior, he feared that she "may do something drastic to the children or herself." The Mother filed a response, asserting, in part, that the Father's unverified Emergency Motion was not only factually and legally deficient, but it also was "another improper attempt to modify the Mother's timesharing rights without due process."

At the emergency hearing, the only witness who testified was Howard Rosenberg, a licensed Illinois attorney who was the appointed Parent Coordinator. Over a hearsay objection, he testified that he was concerned with the Mother's above-described behavior. He acknowledged that he had not personally observed the Mother's behavior, but later received video of the incident. Over the Mother's counsel's objections based on hearsay, relevance, and lack of authentication, the trial court allowed the Father's counsel to play the video so that Mr. Rosenberg could ascertain whether this was the YouTube video he viewed and identify the Mother. Thereafter, the YouTube video was admitted into evidence.

The trial court then viewed the video in its entirety, which depicted the Mother speaking to who appeared to be reporters in front of the Illinois courthouse. During the video, she discussed the following: First, she stated that the Father's counsel filed a motion to enforce a settlement, which she had not agreed to or signed. During the court proceeding earlier that day, she was allegedly told that her counsel had agreed and therefore, the court would later decide whether to force the Mother to accept the agreement. Second, the Mother explained that when she arrived in Florida for her timesharing, she learned that the oldest child would be attending a basketball tournament during her time. Also, when the children were in Chicago for her timesharing, the Father informed her that someone would pick up the children on two of her three days so they could play basketball for eight or nine hours each day. The Mother explained that during her timesharing, she should be able to plan the children's activities, such as visiting

the children's grandparents and grandmother. In addition, the Mother stated that Mr. Rosenberg told her that if she did not allow the above, he would recommend to the Florida court that she not be able to see her children. Finally, the Mother stated that she filed a separate lawsuit against the Father and one of her attorneys withdrew the lawsuit without her knowledge.

Over hearsay objection, the trial court also permitted Mr. Rosenberg to testify as to an alleged telephone conversation initiated by the parties' oldest child regarding the YouTube video. He further testified that he spoke to the Mother on the morning of July 22, 2013 and she assured him that she had no intention of being vocal around the children, so he then wrote a letter to the parties' Illinois counsel recommending that her parenting time should go forward. Mr. Rosenberg made the following recommendations: (1) the Mother's summer visitation should be shortened from two week periods to four night periods; (2) the oldest child should remain in therapy with his current therapist; (3) the Mother should participate in his therapy sessions in Miami; (4) she should attend individual therapy; (5) both parties should begin to communicate directly with each other; (6) the Mother should stop making disparaging comments about the Father in public; and (7) the Mother's two-hour window to return the oldest child's phone calls should be shortened to half an hour. Mr. Rosenberg clarified that he was not recommending that the Mother's timesharing be suspended, or that she submit to a psychological evaluation because that "is not [his] job" as the Parenting Coordinator. In essence, he testified, he was recommending modifications to the final custody judgment.

At the conclusion of the hearing, the Mother's counsel moved for a "directed finding" that the Father failed to establish that her timesharing should be suspended. The trial court ruled that, based on the YouTube video and Mr. Rosenberg's testimony, there was insufficient evidence to support the Father's claim; however, it *sua sponte* ordered the Mother to (1) undergo a psychological evaluation with a focus on anger control under Florida Rule of Civil Procedure 1.360, and (2) participate in the oldest child's therapy sessions while in Miami for her parenting time. Meanwhile, the Father's motion to suspend the Mother's timesharing was denied, and the children were ordered to go home with her that same day. While the trial court found that it had "a degree of concern about the Mother's recent behavior, which is erratic at best and irresponsible at worst," the order did not specify the behavior providing the basis for such concern; although, it did express concern about her actions in front of the courthouse which brought "her feelings regarding this litigation into the public domain." Based on the "totality of the circumstances," the trial court found that "good cause" existed to require the Mother to submit to a compulsory psychological evaluation with a focus on anger control. The trial court also sua sponte ordered that she participate in the oldest child's therapy during her parenting time in Florida. The Mother's petition for writ of certiorari followed. Granting the petition and quashing the relevant portions of the order, the District Court held:

1. "Florida Rule of Civil Procedure 1.360(a)(1) provides that '[a] party may request any other party to submit to… examination by a qualified expert when the condition that is the subject of the requested examination is in controversy.'"

2. "Further, an examination under rule 1.360(a) 'is authorized only when the party submitting the request has good cause for the examination.' Fla. R. Civ. P. 1.360(a)(2)."

3. "At any hearing on the request for compulsory examination, the party submitting the request has the burden of showing that both the 'in controversy' and 'good cause' prongs have been satisfied."

4. "There is a heightened burden of proof when the party subject to the forced examination has not voluntarily placed that issue in controversy."

5. "Thus, the trial court's sua sponte order requiring the Mother to submit to a compulsory mental examination is a departure from the essential requirements of law unless both prongs of rule 1.360 were adequately established."

6. "In addressing whether the Mother's mental condition was 'in controversy,' we note that the trial court's written order completely fails to address this 'essential prerequisite.' This alone may be sufficient to overturn the trial court's order."

7. "While a parent's emotional state is certainly relevant in making a custody determination, 'the fact that custody is at issue should not alone create a reason to order a psychological evaluation.' A parent's mental state is typically at issue in a custody hearing only when there are verified allegations that the parent in question is having mental problems that could substantially impact his or her ability to properly raise children."

8. "In support of his 'fear,' the Father relied primarily on the Mother's interaction with her attorney during the Illinois court proceedings and the Mother's actions outside of the Illinois courthouse…. The video merely depicts a woman who is passionately voicing her views as to several matters that allegedly occurred during her divorce action. This video is insufficient to place the Mother's mental condition 'in controversy.' While the Father may disapprove of this behavior, he has not properly alleged or explained how this behavior makes the Mother unfit to exercise her parenting time with the children."

9. "Moreover, on the very day that it ordered the Mother to submit to a compulsory psychological examination, the trial court also ruled that the Mother's scheduled parenting time would take place. Thus, it appears that the trial court did not 'genuinely' believe that the Mother's mental condition was 'in controversy' or that the children would be at risk if the scheduled visitation took place."

10. "Although we acknowledge that the sign erroneously suggests that the Father is allowing the mother of his children to be homeless, we conclude that the sign, in conjunction with her behavior during the Illinois court proceedings, did not demonstrate that the Mother's mental condition was 'in controversy' because it has little to do with her parental fitness."

11. "There has been no evidence, other than the Father's conclusory allegations in his Emergency Motion, that any of the Mother's behavior has had, or will have, an adverse effect on the children, or that the Mother cannot meet the needs of the children."

12. "To reiterate, the trial court ordered that the children should go home with the Mother for visitation *the very same afternoon* that it ordered her to undergo a mental evaluation. Thus, the trial court clearly did not think there was 'good cause' to believe that the Mother's mental status jeopardized the children's well-being."

13. "We agree that the Mother's actions in front of the Illinois courthouse erroneously suggested that she was homeless, but this is insufficient to satisfy the 'good cause' prerequisite under rule 1.360."

14. "We conclude that the pleadings and the admissible evidence presented at the hearing do not demonstrate that the Mother's mental condition is 'in controversy' or that 'good cause' exists to subject her to a compulsory mental examination, and thus, the trial court's order departs from the essential requirements of law."

16. "Accordingly, we grant the petition for writ of certiorari and quash the portions of the order relating to the compulsory psychological examination of the Mother and the Mother's participation in the oldest child's therapy."

Wade v. Wade, 124 So.3d 369 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT ERRED IN STRIKING WIFE'S PLEADINGS AND ENTERING FINAL JUDGMENT AS SANCTION FOR HER REFUSAL TO COMPLY WITH DISCOVERY ORDERS AND FAILURE TO ATTEND COURT-ORDERED VIDEO DEPOSITION WITHOUT FIRST AFFORDING HER AN OPPORTUNITY TO BE HEARD AND TO OFFER MITIGATING OR EXTENUATING EVIDENCE.

The Husband herein was arrested and charged with aggravated assault for allegedly threatening the Wife with a wine bottle. She obtained a Temporary Injunction for Protection Against Domestic Violence and later an Agreed Permanent Injunction Against Domestic Violence. Shortly thereafter, the Wife relocated outside of Florida. The Husband filed a petition for dissolution of marriage. He then served the Wife with interrogatories, which she failed to timely comply with and the trial court compelled her to respond. She requested a protective order allowing her to omit her current home and work addresses, asserting as grounds her fear of further abuse from her Husband. As to the other requested information, she was willing to comply. The trial court denied her motion.

Immediately thereafter, the Wife's counsel moved to have the Husband's counsel barred from providing the Husband with her current home or work addresses. Counsel for the Husband agreed as to the Wife's current home address, but argued that his client needed access to her current work address. The trial court then entered an agreed order as to the Wife's home address, but denied the request to have her work address omitted.

When the Wife failed to respond to the interrogatories, the trial court held another hearing and warned her that her pleadings would be stricken and a default entered against her if she failed to comply with the discovery request. The trial court also ordered the Wife to attend a scheduled video deposition to take place in Washington D.C. Counsel for the husband was to attend telephonically, and the Husband would not be attending. Minutes after the trial court's deadline for complying, the Wife's counsel provided a partial response to the interrogatories, still refusing to provide her current home or work addresses. The Wife also failed to attend the deposition after learning that her Husband could have been aware of the location where she would be.

A hearing was held on the Husband's subsequent Motion to Strike Wife's Pleadings Based on Wife's Refusal to Comply with Order on Husband's Motion for Contempt, and Wife's Refusal to Attend Court Ordered Deposition. The Wife's counsel asked the trial court not to strike her pleadings without first conducting an evidentiary hearing. She argued that her client suffered from grave paranoia as a result of the domestic violence she'd suffered. The trial court denied the request and granted the Husband's motion, stating: "The Wife acted and continues to act in a deliberate, willful, and contumacious manner, whereby she continues to act in defiance and disobedience of numerous orders issued by this court." All of the Wife's pleadings were stricken and as a sanction, she was ordered to pay the Husband's attorney's fees and costs. Thereafter, a trial was conducted and a final judgment of dissolution of marriage entered. The Wife appealed. The District Court reversed:

1. "We reverse, because the trial court erred by striking the Wife's pleadings and entering a final judgment without affording the Wife an opportunity to be heard and [to] offer mitigating or extenuating evidence."

2. "The Wife argues that the trial court erred by striking her pleadings without a hearing to determine if her conduct warranted such an extreme sanction. We agree."

3. "Sanctions imposed pursuant to Florida Rule of Civil Procedure 1.380 are reviewed for an abuse of discretion, and a trial court may exercise its discretion by striking a party's pleadings 'where evidence shows deliberate and contumacious disregard of the court's discovery orders.'"

4. "However, the striking of pleadings is the severest of penalties and should only be exercised under 'extreme circumstances….' If the trial court can impose a less severe sanction as a viable alternative, then it should use the alternative."

5. "In any case, the trial court should have granted the request by the Wife's counsel to hold an evidentiary hearing before striking the Wife's pleadings."

6. "Accordingly, we reverse the order striking the Wife's pleadings and remand for an evidentiary hearing to determine whether the Wife's failure to obey the discovery orders rose to the level of disobedience which would justify the severe sanction of striking pleadings or whether some lesser sanction would suffice."

Tobin v. Tobin, 117 So.3d 893 (Fla. 4th DCA 2013)

TRIAL COURT ABUSED DISCRETION IN DENYING FORMER HUSBAND'S MOTION FOR CONTINUANCE OF FINAL HEARING WHERE HE WAS NOT ABLE TO ATTEND HEARING BECAUSE HE WAS OUT OF STATE TO BE WITH HIS SISTER-IN-LAW, WHO WAS SUFFERING FROM LUNG CANCER AND NEAR DEATH.

The parties herein divorced in 1990, and the Former Husband was obligated to pay alimony to the Former Wife. In January 2012, the Former Husband petitioned for a reduction or termination of alimony, which petition the former wife answered denying its substantive portions. The Former Wife also counter-petitioned for additional alimony and requested attorneys' fees. The case was set for final hearing on August 7, 2012. In July, the Former Wife moved for a three-month continuance on the grounds that additional time was needed to complete discovery. The trial court denied her motion. Then, on August 3rd, four days before the hearing, the Former Husband moved for a continuance, stating that his sister-in-law was suffering from lung cancer, and that he was travelling to Massachusetts to be with her and needed a continuance because his testimony was crucial to his petition, which denial would result in "extreme prejudice" to him. The trial court denied his motion. Thereafter, the Former Husband filed an amended motion for continuance.

Before the final hearing began, the Former Husband's amended motion was heard. The motion was based on the same facts as the earlier motion, except that he now stated the sister-in-law "may soon pass." The amended motion also reiterated that the Former Husband would suffer "extreme prejudice" if the continuance were not granted because he had been unable to assist his attorney before in preparing for the final hearing and because he would be unable to appear and testify. In fact, the Former Husband did not appear. The court denied the amended motion, as well.

Thereafter, the Former Husband's counsel stated that without the Former Husband's testimony he "would be wasting [the court's] time" by presenting any evidence. As such, the court summarily denied the petition modification of alimony based on a lack of evidence. The Former Wife then attempted to prove her counter-petition for an increase in alimony, but without

the Former Husband's presence, she was also unable to introduce the proper evidence. As such, she voluntarily dismissed her claim.

The Former Husband's sister-in-law passed away in the early morning hours of August 8th. On August 9th, the trial court entered the Judgment denying both parties' petitions for modification of alimony. The Former Husband subsequently appealed. The District Court reversed and held:

1. "In this case, the denial of the Former Husband's motion for continuance created an injustice for [him]."

2. "Here, the Former Husband's case was crippled by his absence. [His] attorney explained to the trial court that he could not prove his client was entitled to a reduction in alimony without the Former Husband's testimony regarding his financial conditions."

3. "Further, even the Former Wife was forced to abandon her request for modification of alimony because some of the relevant financial records were inadmissible hearsay without the Former Husband's testimony."

4. "While the record does not indicate when the Former Husband learned of the seriousness of his sister-in-law's illness, the record is clear that [he] was not engaging in a dilatory practice."

5. "The record contains no indication that the Former Husband was seeking the continuance to delay the hearing or for any other improper purpose."

6. "The Former Husband informed the court of his need for a continuance, and he amended his motion to expressly inform the court that his sister-in-law was close to death. Further, although this information was not before the trial court, we note that the Former Husband's sister-in-law died during the night following the hearing and that if [he] had attended the hearing he would have missed the final day of his sister-in-law's life."

7. "Finally, there is no indication that the Former Wife would have suffered prejudice if the trial court had granted the continuance. The Former Wife did not pose an objection when the Former Husband's counsel presented the motion for continuance and actually had requested a continuance of her own."

8. "Despite our acknowledged deference to the trial court in reviewing a motion for continuance, we must find that the trial court erred in this case. An analysis of the relevant factors indicates that there was a compelling need for a continuance in this case and, as far as we can glean from the record, no compelling reason to deny the motion."

Yaris v. Hartley, 128 So.3d 825 (Fla. 4th DCA 2013)

Fifth District

D. Constitutional Issues

First District

ABUSE OF DISCRETION TO ORDER LIQUIDATION OF HUSBAND'S STATE OF FLORIDA DEFERRED COMPENSATION FUND, HIS IRA AND HIS WINE COLLECTION TO PREVENT FORECLOSURE OF MARITAL HOME, WHERE WIFE'S MOTION WAS UNSWORN AND DID NOT REFERENCE HUSBAND'S ASSETS THAT WERE SUBJECT OF LIQUIDATION AND DISTRIBUTION.

At a hearing on the Wife's Motion for Emergency Relief, stemming from complicated proceedings below, the trial court discovered that the parties needed $28,000 to reinstate their mortgage, and that the homeowners' association had placed a lien on the parties' home, thereby prompting the trial court to shift it's focus to what it determined to be the "real" issue of "getting all [the] bills caught up."

The Wife's counsel informed the court that she had $6,000 on hand, and claimed that the husband had over $18,000 in a deferred compensation fund he had opened when he previously worked for the state, and that he also had approximately $4,000 in an IRA account, and, that the husband's wine collection was worth approximately $55,000. After hearing from both parties, the trial court announced its intention to order "whatever accounts and monies that [are] available on both parties be liquidated to catch up the mortgage and catch up these outstanding expense." The Husband's counsel objected on the basis of due process, because the foreclosure issue was not noticed for hearing. In response, the trial court, in its order indicated that the parties were on notice that the nature of the emergency was foreclosure of the home, and therefore any actions taken at the hearing to eliminate that emergency would be properly considered at the noticed hearing. The court ordered the liquidation of the husband's deferred comp fund, his IRA, the wine collection and that the wife pay her almost $6,000 towards the mortgage and homeowners' association delinquency. The District Court held:

1. "[The husband argues the trial court abused its discretion by ordering the liquidation of his assets when that remedy has not been pled in the wife's Motion for Emergency Relief. On this point, we agree with the husband."

2. "While we sympathize with the trial court's concern that the foreclosure of the parties' home would result in the loss of substantial equity, the dictates of procedural due process demand that a party be placed on notice and given a meaningful opportunity to be heard before being divested of his or her property."

3. "Section 61.075(5), Florida Statutes (2011), does not authorize the trial court's action here, contrary to the wife's urging. This section provides in pertinent part as follows: 'If the court finds good cause that there should be an interim partial distribution during the pendency of a dissolution action, the court may enter an order that shall identify and value the marital and non-marital assets and liabilities made the subject of a sworn motion, set apart assets and liabilities, and provide for a partial distribution of those marital assets and liabilities.'"

4. "The wife's argument disregards the portion of the above-quoted statutory language requiring that the marital and non-marital assets subject to the interim partial distribution be '*made the subject of a sworn motion*.' In this case, not only was the wife's motion not sworn, but

it did not reference the husband's assets that were ultimately made the subject of liquidation and distribution by the interim order. Nor, again, did the trial court make any effort to identify which assets were marital and which were non-marital."

5. "Where a party's private property is at stake, the simple fact, according to the trial court, that 'the parties were on notice that the nature of the emergency was the foreclosure of the home,' would not justify, as the court further observed, 'any and all actions taken at the hearing to eliminate that emergency . . . .'"

6. "In the instant case, the husband was wholly without notice that his State of Florida deferred compensation fund, his IRA, and his wine collection would be subject to liquidation in order to reinstate the mortgage. Consequently, it was an abuse of the trial court's discretion to order him to do so."

Austin v. Austin, 120 So.3d 669 (Fla. 1st DCA 2013)

TRIAL COURT'S MODIFICATION OF VISITATION SCHEDULE, IN THE ABSENCE OF PLEADINGS REQUESTING SAME, CONSTITUTED A DENIAL OF FATHER'S DUE PROCESS RIGHTS.

The Father appealed the trial court's order on his motion for enforcement of a facilitated visitation agreement. Reversing the trial court's modification of the visitation schedule, the District Court held:

1. "The Father argues the trial court's modification of his visitation schedule, in the absence of pleadings requesting such modification, was a denial of due process. We agree."

2. "The visitation schedule in place at the time the Father filed his motion for enforcement is restored."

L.R. v. S.R., 122 So.3d 998 (Fla. 1st DCA 2013)

Second District

Third District

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING MOTHER SOLE CUSTODY OF PARTIES' DAUGHTER FOR ONE MONTH WITHOUT INTERFERENCE BY FATHER OR FATHER'S RELATIVES WITHOUT FIRST GIVING FATHER OPPORTUNITY TO PRESENT EVIDENCE AT HEARING, THEREBY VIOLATING HIS RIGHTS TO PROCEDURAL DUE PROCESS.

The parties' marriage was dissolved in 2002, and pursuant to a settlement agreement incorporated in the judgment, they were granted shared parental responsibility of their two minor children. The children primarily resided with the Mother with the Father having liberal visitation. Regrettably, the un-amicable relationship between the parents post-dissolution gave rise to much litigation in the trial and appellate courts.

In February 2013, after a visit with the Father and his current wife, the children refused to return to the Mother. The Father alleged the children were refusing because she verbally and emotionally abused them. The Mother, on the other hand, claimed the Father and his current wife were alienating the children from her. The trial court heard the matter on the parties' conflicting custody motions and decided a neutral evaluator was required. With the agreement of both

parties, a psychologist was appointed and pending the evaluation, the children remained with the Father.

After meeting with all the parties involved, the evaluator submitted her report, finding parental alienation was occurring within the family and opining that little could be done with regard to the parties' older child, but recommended efforts be made to reconcile the youngest with the Mother. She urged that the youngest child immediately be returned to the Mother, who would have sole parental authority over decisions concerning the child; and further recommended that for a period of time the Father's time-sharing with the child be restricted, her older sister's contact with her be supervised, and there be no contact between her and the Father's current wife. Finally, she proposed that the child engage in therapy to resolve her issues with her Mother. This report resulted in series of motions and hearings.

After the trial judge recused himself from the case, his successor held an evidentiary hearing on all pending motions. The Mother's direct examination consumed most of the first hearing day. On the second day, the Mother was cross-examined, one of the Father's witnesses testified briefly out of order, and then the evaluator took the stand until after 6:00 p.m. When the Mother's counsel rested, the trial judge announced he had heard enough, and proceeded to give his ruling over the Father's objection that he had yet to present his case. Thereafter, the second judge recused himself and a third took his place. The Father appealed the order awarding the Mother sole custody of the parties' younger daughter for one month without interference by the Father or the Father's relatives. The District Court reversed, holding:

1. "We conclude that in ruling, without giving the Father an opportunity to present evidence, the trial court abused its discretion and violated the Father's right to procedural due process."

2. "The constitutional guarantee of due process dictates a full and fair opportunity to be heard in judicial proceedings. The failure to give a party the chance to present witnesses or testify violates this fundamental right."

3. "'[T]he right to be heard at an evidentiary hearing includes more than simply being allowed to be present and to speak. Instead, the right to be heard includes the right to introduce evidence at a meaningful time and in a meaningful manner.'"

4. "Accordingly, we reverse the judgment entered below and remand this cause for further proceedings. Upon remand, the trial court may, with the stipulation of the parties, re-open and conclude the prior evidentiary hearing, or, in the absence of such stipulation, must hold a new evidentiary hearing on the parties' custody motions."

Cole v. Cole, 38 FLW D2376 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT ABUSED DISCRETION IN DENYING FORMER HUSBAND'S MOTION FOR CONTINUANCE WHERE HE WAS NOT ABLE TO ATTEND HEARING BECAUSE HE WAS OUT OF STATE TO BE WITH HIS SISTER-IN-LAW, WHO WAS SUFFERING FROM LUNG CANCER AND NEAR DEATH.

The parties divorced in 1990, and the Former Husband was obligated to pay alimony to the Former Wife. In January 2012, the Former Husband petitioned for a reduction or termination of alimony, which petition the former wife answered denying its substantive portions. The Former Wife also counter-petitioned for additional alimony and requested attorneys' fees. The

case was set for final hearing on August 7, 2012. In July, the Former Wife moved for a three-month continuance on the grounds that additional time was needed to complete discovery. The trial court denied her motion. Then, on August 3rd, four days before the hearing, the Former Husband moved for a continuance, stating that his sister-in-law was suffering from lung cancer, and that he was travelling to Massachusetts to be with her and needed a continuance because his testimony was crucial to his petition, which denial would result in "extreme prejudice" to him. The trial court denied his motion. Thereafter, the Former Husband filed an amended motion for continuance. Before the final hearing began, the Former Husband's amended motion was heard. The amended motion also reiterated that the Former Husband would suffer "extreme prejudice" if the continuance were not granted because he had been unable to assist his attorney before in preparing for the final hearing and because he would be unable to appear and testify. In fact, the Former Husband did not appear. The court denied the amended motion, as well.

Thereafter, the Former Husband's counsel stated that without the Former Husband's testimony he "would be wasting [the court's] time" by presenting any evidence. As such, the court summarily denied the petition modification of alimony based on a lack of evidence. The Former Wife then attempted to prove her counter-petition for an increase in alimony, but without the Former Husband's presence, she was also unable to introduce the proper evidence. As such, she voluntarily dismissed her claim.

The Former Husband's sister-in-law passed away in the early morning hours of August 8th. On August 9th, the trial court entered the Judgment denying both parties' petitions for modification of alimony. The Former Husband subsequently appealed. The District Court reversed and held:

1. "In this case, the denial of the Former Husband's motion for continuance created an injustice for [him]."

2. "Here, the Former Husband's case was crippled by his absence. [His] attorney explained to the trial court that he could not prove his client was entitled to a reduction in alimony without the Former Husband's testimony regarding his financial conditions."

3. "Further, even the Former Wife was forced to abandon her request for modification of alimony because some of the relevant financial records were inadmissible hearsay without the Former Husband's testimony."

4. "While the record does not indicate when the Former Husband learned of the seriousness of his sister-in-law's illness, the record is clear that [he] was not engaging in a dilatory practice."

5. "The record contains no indication that the Former Husband was seeking the continuance to delay the hearing or for any other improper purpose."

6. "The Former Husband informed the court of his need for a continuance, and he amended his motion to expressly inform the court that his sister-in-law was close to death. Further, although this information was not before the trial court, we note that the Former Husband's sister-in-law died during the night following the hearing and that if [he] had attended the hearing he would have missed the final day of his sister-in-law's life."

7. "Finally, there is no indication that the Former Wife would have suffered prejudice if the trial court had granted the continuance. The Former Wife did not pose an objection when the Former Husband's counsel presented the motion for continuance and actually had requested a continuance of her own."

8. "Despite our acknowledged deference to the trial court in reviewing a motion for continuance, we must find that the trial court erred in this case. An analysis of the relevant

factors indicates that there was a compelling need for a continuance in this case and, as far as we can glean from the record, no compelling reason to deny the motion."
Yaris v. Hartley, 128 So.3d 825 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT ERRED IN ORDERING THAT FATHER'S IN-PERSON CONTACT WITH CHILD TAKE PLACE IN A "THERAPEUTIC ENVIRONMENT" AT HEARING IN WHICH THE ONLY MATTER TO BE ADDRESSED WAS THANKSGIVING CONTACT.

In 2000, a final judgment of paternity was entered determining that Winthrop was the legal and natural father of the minor child herein and providing for shared parental responsibility. The parties' relationship had become extremely acrimonious resulting in a significant amount of litigation regarding the parties' time-sharing rights. In 2011, the parties resolved a modification proceeding by a court-approved stipulation, in which it was agreed that the child would reside primarily with the Mother in Florida, and the Father, a New York resident, would be entitled to have reasonable contact and access when he was in Florida. The agreement further provided that the Father would be entitled to have the child with him in New York for the Thanksgiving holiday weekend in even-numbered years.

The minor child has been battling cancer for the past six years. She has been treated at Sloan–Kettering Cancer Center in New York City, as well as Arnold Palmer Children's Hospital in Orlando, Florida. Unfortunately, her medical condition worsened in 2012. On November 1, 2012, the Father filed an emergency motion to establish Thanksgiving contact. He wished to pick-up the child and fly with her to New York for ten days. The Mother objected and filed an "Amended Expedited Motion for Temporary Relief and Response to Father's Emergency Motion to Set Thanksgiving Contact." The trial court set an evidentiary hearing for November 9, 2012 and advised the parties that the only matter to be addressed would be Thanksgiving contact.

During the evidentiary hearing, the trial court heard substantial testimony regarding the child's medical condition and her desire to "not see her father." The trial court's order provided that the minor child would not be required to fly to New York for the Thanksgiving holiday. The trial court went on to find that until there was family counseling between the parties and the minor child, all future contact between the Father and the child was to take place in a therapeutic setting. The Father appealed. The District Court reversed:

1. "We agree with the Father that the trial court's order violated his due process rights by significantly modifying his time-sharing rights when the only matter to be addressed at the November 9, 2012 hearing was the upcoming Thanksgiving contact."

2. "Accordingly we quash that portion of the trial court's order requiring that further in-person contact between the Father and his daughter occur in a therapeutic environment."
Winthrop v. Castellano, 113 So.3d 999 (Fla. 5th DCA 2013)

E. Final Judgments

First District

REVERSAL REQUIRED WHERE TRIAL COURT'S WRITTEN JUDGMENT AS TO THE PARTIES' TIMESHARING SCHEDULE WITH MINOR CHILDREN WAS INCONSISTENT WITH THE TRIAL COURT'S ORAL PRONOUNCEMENT

During the modification proceedings below, the trial court stated during the hearing that the Mother was to have the children every Wednesday night and every other weekend. However, in its written judgment, the trial court gave the Mother an alternating Thursday night, as well. Additionally, the court found that the Father would have fifty-eight percent of the overnights with the children throughout the year and that the Mother would have forty-two percent. The Father appealed, arguing the trial court's written judgment as to the timesharing schedule was inconsistent with the trial court's oral pronouncement. The District Court agreed and reversed:

1. "Reversal is required where a written judgment is inconsistent with a trial court's oral pronouncement."

2. "We, therefore, reverse the written judgment as to the timesharing issue and remand with instructions that the trial court conform the judgment to its oral pronouncement as to this issue and correct the percentages for the parties' overnights with the children."

Butler v. Hall, 118 So.3d 992 (Fla. 1st DCA 2013)

GIVEN INTERNAL INCONSISTENCIES OF FINAL JUDGMENT AND ABSENCE OF FINDINGS BY JUDGE WHO RETIRED DAYS LATER, REVERSAL FOR FURTHER PROCEEDINGS REQUIRED; BECAUSE OF JUDGE'S RETIREMENT, NEW TRIAL BEFORE SUCCESSOR JUDGE REQUIRED UNLESS PARTIES STIPULATE TO USE THE PRIOR RECORD.

The parties each filed petitions for dissolution of marriage. The trial court entered a final judgment on December 21, 2012, just days before the trial judge retired. Immediately after the final judgment was issued, the Former Wife filed an emergency motion to vacate it and for rehearing, asserting numerous errors. But her motion was not addressed by the trial judge before his retirement; instead, a successor trial judge denied the motion's emergency classification and instructed the parties to schedule a status conference. The Former Wife then abandoned her motion by filing an appeal. Because the final judgment lacked required findings and was internally inconsistent, the District Court reversed:

1. "The Former Wife asserts a number of valid concerns with the final judgment, including: an inconsistent parental responsibility allocation between the final judgment and a parenting plan that was incorporated into the final judgment; a division of property without a determination of what was marital and non-marital property; a requirement to maintain life insurance without findings of necessity, cost, or availability of coverage; and a 50/50 distribution of the children's uncovered medical expenses, which was not apportioned in accordance with the child support percentage. In these areas the final judgment was not supported with necessary findings."

2. "Moreover, the final judgment is internally inconsistent because it provides contradictory allocations of parental responsibility. In one place the final judgment provides for shared responsibility, but in another place awards sole responsibility to the Former Husband but without requisite findings. This inconsistency and absence of findings also require us to reverse."

3. "And so, we reverse the final judgment and remand for additional proceedings consistent with this order; which, in view of the trial judge's retirement, appears to require a new trial before a successor judge, unless the parties stipulate to the prior record."

Roberts v. Roberts, 128 So.3d 856 (Fla. 1st DCA 2013)

Second District

WHERE FINAL JUDGMENT AWARDED WIFE SPECIFIC PERCENTAGE IN HUSBAND'S EMPLOYMENT-RELATED PENSION, TRIAL COURT LACKED JURISDICTION TO SUBSEQUENTLY MODIFY THAT AWARD TO APPLY THE PERCENTAGE TO BOTH THE EMPLOYMENT-RELATED PENSION AND HUSBAND'S SOCIAL SECURITY RETIREMENT BENEFIT OR TO CHANGE THE PERCENTAGE AWARDED WHEN, AS A RESULT OF HUSBAND'S RETIREMENT INTO SOCIAL SECURITY SYSTEM, THE EMPLOYMENT-RELATED BENEFIT DECREASED AND WIFE BEGAN RECEIVING REDUCED PAYMENT EACH MONTH.

In the final judgment of dissolution of marriage, the marital portion (67.59%) of the Former Husband's Chrysler pension was equally distributed between the parties. Although the court was aware that when the Former Husband retired into the social security system there would be a decrease in the Chrysler pension benefit, the court did not reserve jurisdiction to modify the percentage shares of the Chrysler pension benefit as part of the equitable distribution scheme. Accordingly, the Former Wife was awarded 33.795% of the Chrysler pension and the Former Husband was awarded 66.205% (his marital share, 33.795%, plus his non-marital share, 32.41%). The court ordered the Former Husband's counsel to submit a QDRO dividing the pension benefit by these percentages and reserved jurisdiction for enforcement.

After the Former Husband retired into the social security system, the Former Wife's monthly benefit was reduced. She received $445.10 less each month, and the Former Husband correspondingly received his percentage share of the Chrysler pension as well as his full social security payment. The Former Wife filed a motion to clarify judgment/modify QDRO, which the court granted. The court explained that the Former Husband had started receiving social security payments and that his Chrysler pension had accordingly been reduced. This resulted in the ratio in the judgment being applied to the Chrysler pension only and the entire social security payment going to the Former Husband. The judge explained that it was not his intention to have the Former Wife's income reduced. The court stated: "Such a windfall to the Former Husband and deficit to the Former Wife was not ordered in the judgment. Rather, the judgment ordered that the ratio of the Former Husband's total pension benefit, whether paid from Chrysler before he retired or from Chrysler and social security after he retired, would be the same, that is, 33.795% to the Former Wife and 66.205% to the Former Husband. As stated in the judgment…. "the husband's retirement in the social security system will not increase his income." Likewise, it will not reduce the Former Wife's income.

The judge concluded that he could properly enforce the judgment as opposed to modifying it, stating, "I think the final judgment cannot be read any other way than to say she is entitled to 33.795 percent of the pension." The second amended QDRO was entered in accordance with the court's ruling. The Former Husband appealed both the order granting the motion to clarify and the second amended QDRO, arguing that the trial court was without jurisdiction to modify the percentage shares. The District Court reversed:

1. "Though we recognize that the trial court's ruling was equitable, we are compelled to reverse."

2. "'[A] court has no jurisdiction to modify property rights after those rights have been adjudicated in a final judgment of dissolution.'"

3. "A general reservation of jurisdiction in a dissolution order is typically insufficient to preserve a court's jurisdiction to subsequently alter property rights."

4. "And '[a] trial court may not, in the guise of an enforcement proceeding, readdress the distribution of property when the property has been previously distributed.'"

5. "Here, the trial court fashioned an equitable remedy but, unfortunately, did not have jurisdiction to do so. The final judgment distributed the Former Husband's Chrysler pension benefit between the parties—not his social security benefit. "

6. "Though the court noted in the final judgment that the Chrysler pension benefit would change with social security, regrettably the judgment did not have a provision indicating that the distribution would be any different."

7. "Indeed, there is no indication in the final judgment that the Former Wife would receive an increased percentage share of the Chrysler pension in the event her monthly pension benefit was reduced when the Former Husband entered into the social security system."

8. "Because the trial court did not have jurisdiction to readdress the distribution of the Chrysler pension, we must reverse."

George v. George, 113 So.3d 972 (Fla. 2d DCA 2013)

Third District

TRIAL COURT ABUSED ITS DISCRETION IN DENYING WIFE'S MOTION FOR RECONSIDERATION WHERE WIFE'S FAILURE TO APPEAR AT HEARING AND CONTEST HUSBAND'S MOTION WAS RESULT OF EXCUSABLE NEGLECT; WIFE HAD NOT RECEIVED NOTICE OF HUSBAND'S MOTION OR HEARING THEREON; FURTHER, WIFE ESTABLISHED MERITORIOUS DEFENSE WHERE ORDER ESTABLISHING SUPPORT DID NOT MAKE ANY FINDINGS AS TO NET INCOME OF PARTIES AS STARTING POINT OR GIVE ANY EXPLANATION AS TO HOW CALCULATION WAS PERFORMED.

The parties have a seven-year-old son. In the underlying dissolution proceedings, the final judgment granted the Former Wife's petition for relocation and ordered the Former Husband to pay child support in an amount that was to continue for three months and then be recalculated after each party exchanged financial information evidencing income at that time. Several months later, the Former Husband filed a motion to establish child support and enforce the final judgment. This motion was served on the Former Wife's counsel. No response was filed on her behalf, and neither she nor her attorney appeared at the hearing thereon. The trial court ultimately entered an order granting the Former Husband's motion, and ordered him to

continue to pay child support, but in a reduced amount. The order also awarded him attorney's fees and costs and reserved jurisdiction to determine the amount. The trial court's order indicated that it had been served on the Former Wife's former counsel, but not directly on the Former Wife.

The Former Wife was not aware of the proceedings until she was finally served directly via certified mail with the Former Husband's Motion to Determine Claim of Child as Dependent on Tax Returns and to Determine Amount of Attorney's Fee Award, which motion was initially served on the Former Wife's counsel, who then advised the Former Husband's counsel that he no longer represented her (he later formally withdrew prior to the hearing on the parties' competing motions). Thereafter, the Former Wife filed a motion for reconsideration of the trial court's order granting the Former Husband's motion to establish child support, alleging that she was never served with a copy of the motion or notice of hearing, and further explaining her own attempts to resolve the issue of child support through the Department of Revenue.

Several days later, the trial court held a hearing on the parties' motions, with the *pro se* Former Wife appearing by telephone. In the order entered thereon, the trial court granted the Former Husband's motion to permit him to claim the child as a dependent on his 2012 and 2013 tax returns, and denied the Former Wife's motion for reconsideration. The order also granted the Former Husband's motion to determine the amount of attorney's fees and awarded him $1,216.00, finding that amount represented reasonable attorney's fees incurred as a result of the Former Wife's non-compliance with the terms of the final judgment. The Former Wife thereafter appealed this order. The District Court reversed the denial of the Former Wife's motion for reconsideration:

1. "We agree with the Former Wife that her failure to appear at the hearing and contest the Former Husband's motion to establish child support was, at the very least, the result of excusable neglect—if neglect at all."

2. "The Former Wife's motion, in essence, sought to vacate the trial court's order establishing child support because the Former Wife—through no fault of her own—did not receive notice of the motion or the hearing…. Once she was personally served with the Former Husband's subsequent motion, she immediately filed her motion for reconsideration and appeared at the hearing on the motions. This demonstrated excusable neglect and due diligence on the part of the Former Wife."

3. "Moreover, a meritorious defense is clear as the trial court's order establishing child support 'is facially erroneous because it does not make any findings as to the net income of each party as a starting point for calculating child support or explain how the calculation was performed.'"

4. "Accordingly, we find that the trial court's denial of the former wife's motion to vacate the order establishing child support was an abuse of discretion and must be reversed and remanded for the trial court to make its findings as to the net income of each party, and based on those findings calculate the child support . . . award and enter a new order specifying the basis for the award pursuant to section 61.30, Florida Statutes (2012). This award may be made retroactive to the date of filing of the former husband's motion to establish child support as provided in section 61.30(17), Florida Statutes (2012)."

5. "Because we conclude that the Former Wife's non-compliance with the terms of the final judgment was the result of excusable neglect and not willful, we reverse the award of attorney's fees to the Former Husband."

Pullis v. Pullis, 118 So.3d 937 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT ERRED IN FINDING ORDER HEREIN WAS NOT A FINAL JUDGMENT WHERE IT DISMISSED WIFE'S PETITION FOR DISSOLUTION AND ORDERED THE PAYMENT OF ALIMONY AND CHILD SUPPORT UNCONNECTED WITH DISSOLUTION PURSUANT TO SECTION 61.09, THEREBY DISPOSING OF WIFE'S CAUSE FOR SUPPORT AND RETAINING JURISDICTION FOR ENFORCEMENT.

At the 2010 final hearing in the dissolution proceedings below, the Wife withdrew her request for dissolution, but proceeded on her claim for alimony and child support unconnected with dissolution pursuant to section 61.09, Florida Statutes (2010). In the final judgment, the trial court dismissed the petition for dissolution and awarded the Wife alimony and child support. The Husband then filed a motion to vacate pursuant to Florida Rule of Civil Procedure 1.540(b), requesting relief from the final judgment due to mistake, inadvertence and/or excusable neglect by him. After an evidentiary hearing, the trial court entered an order denying the motion to vacate and restating some of the testimony of the witnesses, but finding that the final judgment was not a "final judgment" because the petition for dissolution of marriage initially filed had been dismissed by the court and all the rights between the parties had not been adjudicated. The trial court did not address the merits of the Husband's motion. The Husband appealed the denial of his motion to vacate. The District Court reversed:

1. "A final judgment is 'one that determines the rights of the parties and disposes of the cause on its merits leaving nothing more to be done other than to enforce the judgment.'"

2. "The judgment entered by the trial court in 2010 dismissed the dissolution petition and ordered the payment of alimony and child support unconnected with dissolution pursuant to section 61.09. As such, the judgment disposed of the wife's cause for support and alimony and retained jurisdiction to enforce the judgment."

3. "Although the judgment for support and alimony is subject to modification, the judgment is final and subject to a motion to vacate pursuant to rule 1.540(b)."

4. "The trial court erred in finding that the 2010 judgment was not a final judgment."

5. "We reverse the denial of the Husband's motion to vacate and remand for the trial court to address the merits of the husband's motion to vacate."

Khan v. Khan, 115 So.3d 1078 (Fla. 4th DCA 2013)

Fifth District

FINAL JUDGMENT ON FORMER HUSBAND'S PETITION FOR MODIFICATION ENTERED AFTER JUDGE HAD GRANTED FORMER WIFE'S MOTION TO DISQUALIFY JUDGE WAS VOID WHERE EXCEPTION THAT ALLOWS A TRIAL JUDGE TO RETAIN AUTHORITY TO PERFORM MINISTERIAL ACT OF REDUCING RULING TO WRITING DID NOT APPLY.

The parties were divorced in 2008. Part of the final judgment was a contact and access schedule, and the trial court specifically reserved jurisdiction to revise the Former Husband's contact schedule upon the parties' child starting school. Two years later, the Former Husband

filed a supplemental petition to modify the contact schedule. The matter proceeded to trial and at its conclusion, the judge made various findings of fact, issued an oral ruling on the petition, and noted that the parties had stipulated to most of the holiday schedule during the course of the trial. The judge further directed the parties to "figure out" the remaining holiday and summer break schedule issues and work together to prepare a proposed order. Six days later, the Former Wife filed a motion to disqualify the trial judge, alleging among other accusations that the judge had made "inappropriate, disparaging statements about her attorneys and improperly used profane language during the case." Based upon those allegations, the trial judge granted the motion, recusing himself from all future cases involving the Former Wife's counsel and/or the associates within the firm. Two months later, however, the same judge entered a final judgment on the Former Husband's petition for modification. The Former Wife appealed. The District Court reversed:

1. "In the instant case, while the trial court ruled on many of the issues raised and the parties stipulated as to others, there remained issues left for the parties to 'figure out.'"

2. "Nothing within the record on appeal reflects a meeting of the minds on those issues, and the parties contested whether the judgment entered complied with the oral pronouncements and whether it contained provisions not pronounced at the conclusion of the trial."

3. "The judgment provided details not articulated in the trial court's oral pronouncement, and, in family law cases where the parents are unable to resolve issues without court intervention, the devil is often in the details."

4. "As such, the ministerial act exception to the disqualification rule does not apply."

Parnell v. Parnell, 113 So.3d 989 (Fla. 5th DCA 2013)

F. Judges and Special and General Magistrates

First District

Second District

Third District

TRIAL COURT IMPROPERLY RE-WEIGHED EVIDENCE PRESENTED BEFORE GENERAL MAGISTRATE IN REJECTING HIS RECOMMENDATION THAT FATHER'S CHILD SUPPORT OBLIGATION BE REDUCED WHERE ALTHOUGH THERE WAS CONFLICTING TESTIMONY, GENERAL MAGISTRATE'S REPORT AND RECOMMENDATION WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

On July 6, 2011, the Father filed the petition for modification of child support, contending his child support obligation should be lowered because his income had been substantially reduced since the time when the obligation was last determined. The trial judge referred the matter to a General Magistrate who conducted an evidentiary hearing on February 23, 2012. At the hearing, the parties fiercely contested the issue of whether the Father had suffered a reduction in income. The Father, who is an officer on the City of Miami Police Force,

testified his income was reduced because he retired from the Special Weapons And Tactics unit; he no longer worked in the Field Training Program or Crisis Intervention Program; the City changed its policies to require him to deduct more from his paycheck for retirement and certain gasoline expenses; the City cut back on overtime pay; and he was effectively prevented from working off-duty based on new City policies. He submitted financial affidavits showing that his net monthly income fell from $5,115.42 in 2008 to $3,985.96 in 2012.

The Mother, however, pointed to the existence of certain substantial deposits made into the Father's checking account from sources other than the Father's paycheck. A witness also testified for the Mother that he had seen the Father working off-duty. The Mother asserted that the deposits indicated that the Father's income was not reduced. The Father responded that the deposits were the results of (1) transfers from his savings account; (2) money lent to him by his father; (3) an Internal Revenue Service refund; and (4) cash that his parents received from a dry cleaning business that they operated out of their home, which monies they deposited into the Father's account because they were not permitted to earn money while collecting Social Security benefits.

After hearing the testimony of the witnesses and reviewing the evidence submitted, the General Magistrate issued a detailed, six-page report. On the issue of the conflicting evidence with respect to the Father's alleged reduction in income, she found for the Father, as follows: "The Court finds that the testimony of the Mother's only witness to be unconvincing and the fact that the Mother met the witness a month before the hearing makes this Court even doubt more the credibility of the witness. The Court finds that even in the event that the witness testimony would have been convincing, the witness testified that the Father had not done any off duty work since June of 2011 which is consistent with the testimony presented by the Father in this case. Furthermore, no testimony was presented by the witness as to how much monies alleged paid by the Father and accordingly the witness had no actual knowledge of what monies were paid to the Father if any for his off duty work before June of 2011." The Magistrate also found that the Father's testimony regarding his income and his assisting his parents by permitting them to deposit funds into his account was credible. The general magistrate recommended the Father's monthly child support obligation should be reduced from $927.00 to $377.24.

The Mother filed exceptions to the general magistrate's report; and the trial court conducted a hearing on April 30, 2012. The Mother asserted error in the general magistrate's order, pointing to alleged inconsistencies in the Father's testimony and his failure to produce witnesses to corroborate his explanation for the deposits. The trial court subsequently issued an order granting the Mother's exceptions to the general magistrate's report in part. The order stated: "The court finds that the testimony and evidence is insufficient to sustain a finding that the monthly child support should be lowered, as the record does not reflect a true reduction in income." The Father appealed. The District Court reversed:

1. "In this case, the record reflects that the magistrate's factual findings were supported by direct testimony."

2. "The only way to conclude there is no 'true reduction in income' here is to discredit the testimony of the Father. The general magistrate, however, fully credited the Father's explanation."

3. "Witness credibility, like all disputed issues of fact, is a determination left to the finder of fact."

4. "While, based upon his years of experience, the trial judge may well have weighed the evidence differently if the testimony had been presented to him, his role in reviewing the general magistrate's report was strictly limited."

5. "Because the general magistrate's report and recommendation was supported by the Father's testimony, it met the competent substantial evidence standard."

Rodriguez v. Reyes, 112 So.3d 671 (Fla. 3d DCA 2013)

WRIT OF PROHIBITION GRANTED WHERE BY ADOPTING ONE OF THE RECOMMENDATIONS OF FATHER'S WITNESS AT HEARING ON HIS MOTION SEEKING TO SUSPEND MOTHER'S TIMESHARING WITHOUT AFFORDING HER AN OPPORTUNITY TO CROSS-EXAMINE THE WITNESS OR PRESENT ANY EVIDENCE, AND BY ORDERING PSYCHOLOGICAL EVALUATION OF MOTHER WITHOUT GIVING HER OPPORTUNITY TO PRESENT EVIDENCE, TRIAL JUDGE DENIED MOTHER RIGHT OF DUE PROCESS AND CAUSED REASONABLE FEAR IN HER THAT SHE WOULD NOT RECEIVE A FAUR AND IMPARTIAL TRIAL.

The Mother filed a sworn motion to for disqualification of the trial judge. The motion set forth the following facts as the basis therefore: A hearing was held on the emergency motion of the Father, which sought to suspend the Mother's timesharing. The Father presented, as his first witness, the parenting coordinator. During his testimony, the parenting coordinator began listing several "recommendations" which he believed should be implemented. The trial judge stopped the witness during his direct testimony and announced that the court was adopting one of these "recommendations." The Mother objected to the court making such a determination without affording her an opportunity to cross-examine the Father's witness or to present her own evidence on the issue. Nevertheless, the Mother was denied this opportunity. At the conclusion of the hearing, the trial court on its own ordered that the Mother undergo a psychological evaluation. The Mother again objected and requested the opportunity to present testimony from her expert witness (a psychiatrist, who was present at the hearing) before the court ordered such an evaluation. This request was also denied. The Mother's motion for disqualification of the trial judge was denied as having been legally insufficient. Subsequently, she sought the issuance of a writ of prohibition. Granting the writ of prohibition, the District Court held:

1. "Having reviewed the petition and the response thereto, we conclude that the facts alleged in the motion to disqualify, which must be taken as true, 'would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.'"

2. "By announcing its ruling, adopting one of the recommendations of the Father's witness before the Mother was afforded an opportunity to cross-examine the witness or present any evidence on the issue, and by ordering a psychological evaluation of the Mother, again without giving the Mother an opportunity to present evidence, the trial judge denied the Mother a most basic right of due process and reasonably caused her to fear that she would not receive a fair and impartial hearing."

3. "We withhold formal issuance of the writ, confident that the trial judge will promptly issue an order of disqualification."

Wade v. Wade, 123 So.3d 697 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADOPTING GENERAL MAGISTRATE'S REPORT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE; HOWEVER, REMAND REQUIRED FOR CLARIFICATION OF FINAL JUDGMENT TO REFLECT WIFE ENTITLED TO CREDIT FOR HER PAYMENT OF HUSBAND'S PORTION OF MORTGAGE INTEREST ON JOINTLY OWNED HOME.

In this dissolution proceeding, the parties' long-term marriage was dissolved by final judgment, in which the trial court adopted the report of the general magistrate for a parenting plan, equitable distribution, the marital home, child support, alimony, and attorneys' fees and costs. Former Wife appealed the various determinations in the final judgment. The District Court affirmed, but remanded the final judgment for clarification regarding Former Wife's ability to receive credits for paying Former Husband's portion of the mortgage on the jointly owned home:

1. "We find that the trial court did not abuse its discretion in making its determinations related to the dissolution of this marriage as the recommendations and findings in the magistrate's report are supported by competent and substantial evidence."

2. "As there is no basis in the record to relieve Former Husband of his responsibility for half of the entire mortgage payment, the final judgment must be clarified to reflect that Former Wife is entitled to receive credit for her payment of Former Husband's portion of the mortgage interest just as with the 'mortgage/equity line principal.'"

Preudhomme v. Gutierrez, 127 So.3d 683 (Fla. 4th DCA 2013)

WHERE PRESIDING JUDGE SENT LETTER TO FORMER HUSBAND'S ATTORNEY DISCLOSING THAT SHE HAD PREVIOUSLY BEEN REPRESENTED BY LAW FIRM REPRESENTING FORMER WIFE, BUT LETTER WAS NOT RECEIVED UNTIL ALMOST TWO WEEKS LATER DUE TO FORMER HUSBAND'S ATTORNEY'S ABSENCE FROM THE JURISDICTION, MOTION TO DISQUALIFY FILED ON THE SAME DAY LETTER WAS RECEIVED WAS TIMELY, AND THUS LEGALLY SUFFICIENT.

In this post-dissolution proceeding regarding timesharing with the parties' minor child, the presiding judge sent a letter to the Former Husband's attorney disclosing the fact that she had been previously represented by one of the partner's of the law firm that represented the Former Wife. The letter was sent on April 19, 2013. Due to an absence from the jurisdiction, however, the Former Husband's attorney did not receive the letter until May 2, 2013. That same day, he moved to disqualify the judge based on fears that the Former Husband would not receive a fair hearing or trial because of the judge's prior representation by the Former Wife's counsel. Citing Florida Rule of Judicial Administration 2.330, the trial court denied the motion to disqualify. Thereafter, the Former Husband sought prohibition. The Former Wife argued the motion was untimely because it was filed more than 10 days from the date of the judge's letter. Finding the motion was in fact timely, the District Court granted the petition for writ of prohibition:

1. "We disagree with [the Former Wife's] position. Florida Rule of Judicial Administration 2.330(e) requires that a motion to disqualify be filed no later than 10 days after

discovery of the facts that constitute grounds for the motion. Here, the judge's letter was not discovered until May 2nd—the same date on which the motion to disqualify was filed."

2. "Furthermore, the term legal sufficiency encompasses more than mere technical compliance with the rule and the statute . . . Courts are also required to assess whether the facts alleged would prompt a reasonably prudent person to fear that he or she could not get a fair and impartial trial . . . ."

3. "This Court's jurisprudence suggests that [the Former Husband's] burden for disqualification was satisfied. The general rule is that disqualification is required if counsel for one of the parties is representing or has recently represented the judge . . . ."

4. "As we emphasized in [an earlier case] we agree that justice must satisfy the appearance of justice. In keeping with this principle, we conclude that [the Former Husband's] motion was sufficient and grant the petition for writ of prohibition."

Ballard v. Campbell, 127 So.3d 693 (Fla. 4th DCA 2013)

Fifth District

FINAL JUDGMENT ON FORMER HUSBAND'S PETITION FOR MODIFICATION ENTERED AFTER JUDGE HAD GRANTED FORMER WIFE'S MOTION TO DISQUALIFY JUDGE WAS VOID WHERE EXCEPTION THAT ALLOWS A TRIAL JUDGE TO RETAIN AUTHORITY TO PERFORM MINISTERIAL ACT OF REDUCING RULING TO WRITING DID NOT APPLY.

The parties were divorced in 2008. Part of the final judgment was a contact and access schedule, and the trial court specifically reserved jurisdiction to revise the Former Husband's contact schedule upon the parties' child starting school. Two years later, the Former Husband filed a supplemental petition to modify the contact schedule. The matter proceeded to trial and at its conclusion, the judge made various findings of fact, issued an oral ruling on the petition, and noted that the parties had stipulated to most of the holiday schedule during the course of the trial. The judge further directed the parties to "figure out" the remaining holiday and summer break schedule issues and work together to prepare a proposed order. Six days later, the Former Wife filed a motion to disqualify the trial judge, alleging among other accusations that the judge had made "inappropriate, disparaging statements about her attorneys and improperly used profane language during the case." Based upon those allegations, the trial judge granted the motion, recusing himself from all future cases involving the Former Wife's counsel and/or the associates within the firm. Two months later, however, the same judge entered a final judgment on the Former Husband's petition for modification. The Former Wife appealed. The District Court reversed:

1. "In the instant case, while the trial court ruled on many of the issues raised and the parties stipulated as to others, there remained issues left for the parties to 'figure out.'"

2. "Nothing within the record on appeal reflects a meeting of the minds on those issues, and the parties contested whether the judgment entered complied with the oral pronouncements and whether it contained provisions not pronounced at the conclusion of the trial."

3. "The judgment provided details not articulated in the trial court's oral pronouncement, and, in family law cases where the parents are unable to resolve issues without court

intervention, the devil is often in the details."

4. "As such, the ministerial act exception to the disqualification rule does not apply."

Parnell v. Parnell, 113 So.3d 989 (Fla. 5th DCA 2013)

MOTION TO DISQUALIFY FILED WITHIN TEN DAYS OF DISCOVERING JUDGE WAS ASSIGNED TO CASE WAS TIMELY AND CLEARLY SET FORTH HOSTILITY BETWEEN JUDGE AND PARTY'S COUNSEL; JUDGE SHOULD HAVE GRANTED MOTION IN LIGHT OF PRIOR ORDERS DISQUALIFYING HIMSELF IN TWO OTHER CASES IN WHICH COUNSEL WAS ATTORNEY OF RECORD.

The Wife filed a motion to disqualify the judge from further proceedings in her dissolution of marriage because of hostility between the judge and the Wife's attorney. Although this judge had previously granted two motions to disqualify in unrelated cases in which the Wife's attorney was of record, he denied the motion herein as being untimely and legally insufficient. The Wife then sought a writ of prohibition, which petition set forth that there was an obvious and apparent personal bias by the judge against her attorney that dated back to well before the judge took the bench. The District Court granted the petition:

1. "[W]e find that the motion was timely filed within ten days of [the Wife's attorney] discovering that Judge Craig was assigned to this case."

2. "A judge's antipathy or hostility toward a party's counsel can provide grounds for disqualification."

3. "Here, the petition clearly sets forth that there is hostility between Judge Craig and [the Wife's attorney]."

4. "In light of Judge Craig's prior orders disqualifying himself in two other cases where [the Wife's attorney] was an attorney of record, Judge Craig should have likewise granted [the Wife's] motion to disqualify."

5. "As a result, we grant the writ of prohibition, and Judge Craig is disqualified from hearing this case."

Raphael v. Raphael, 118 So.3d 834 (Fla. 5th DCA 2013)

G. Miscellaneous

First District

ORDER AWARDING ATTORNEY'S FEES AND COSTS TO WIFE PREMATURELY ENTERED BEFORE EXPIRATION OF PERIOD PROVIDED FOR HUSBAND'S RESPONSE TO SUPPORTING MATERIALS SUBMITTED BY WIFE'S COUNSEL; CALCULATION OF TIME UNDER PROCEDURAL RULES.

After granting the Former Wife's motion for rehearing to further consider the issue of her attorney's fees, the trial court stated that it would allow her counsel ten days from the date of the rehearing in which to file documentation as to his hourly rate, hours expended on the case, as well as an affidavit from an expert attesting to the reasonableness of the requested fees. The trial

court provided that after the Former Wife's materials were filed, the Former Husband would be provided ten days to respond.

The Former Wife subsequently filed the referenced documentation and furnished copies to counsel for the Former Husband on September 25, 2012. On October 4, 2012, the trial court issued two judgments, one granting the Former Wife $2,500 for trial level attorney's fees and the other granting her $5,034 for appellate level fees and costs incurred as a result of an earlier appeal of the trial level fees award. The trial court denied the Former Husband's subsequent motion for relief from judgment and for rehearing, which argued, in part, that the trial court erred by entering the judgments before his time to respond had expired. The Former Husband appealed. The District Court reversed:

1. "Under Florida law, when computing a length of time, measured in days, specified by court order, the day triggering the term must be excluded and every day of the term should be counted, including Saturdays, Sundays, legal holidays, and the last day of the term."

2. "Five days are added… when a party must act after being served and service is executed by mail or e-mail."

3. "Applying Rule 2.514(a)(1), ten days from September 25, 2012 would be October 5, 2012. Adding an additional five days, pursuant to Rule 2.514(b), establishes the last day the Former Husband could respond as October 10, 2012."

4. "While the date stamps on the judgments reflect that they were filed with the clerk of court on October 5, 2012, the orders were signed by the trial court on October 4, 2012. Whether the Former Husband's opportunity to respond ran until October 5 or October 10, the trial court's judgments executed on October 4 were plainly premature and contradict its own directive."

Ingram v. Ingram, 113 So.3d 1037 (Fla. 1st DCA 2013)

TRIAL COURT ERRED IN CATEGORICALLY EXCLUDING FROM EVIDENCE POLICE REPORTS ON GROUND THAT THEY WERE HEARSAY, AND CERTAIN WRITTEN STATEMENTS WITHOUT FIRST INQUIRING WHETHER THEY WERE ADMISSIBLE AS AFFIDAVITS.

S.L.W., the minor child herein, was born to the parties in 2008. The Mother has never denied that the Father is the child's biological father, but the parties are not now and never have been married. In January 2012, the Father filed a petition to establish paternity and other relief, seeking sole physical custody of the child and only supervised visitation for the Mother. The Father alleged that the Mother had engaged in criminal activity, was financially unable to support the child as she rarely worked, and had a transient lifestyle. At the subsequent hearing on the petition, both parties appeared pro se. The Father offered police reports detailing the acts of violence committed by the Mother, including against him. However, the trial court, without objection from the Mother, refused to consider these reports, classifying them as hearsay. The court also refused to consider certain written statements without first inquiring as to whether they were admissible as affidavits. Thereafter, the trial court ordered rotating custody on a weekly basis. The Father appealed. Finding that the trial court erred in excluding certain evidence, the District Court reversed:

1. "The trial court erred in categorically excluding the police reports, as such records may have been admissible pursuant to section 90.803(8), Florida Statutes (2012)."

2. "Similarly, concerning the statements offered by [the Father], the trial court erred in failing to even consider their admissibility, especially in view of the lack of objection from [the Mother]."

3. "Domestic violence and other forms of violent behavior are probative matters in a child custody case."

4. "In establishing residential placement of a child, the trial court is to consider at least twenty factors pertaining to the best interests of a child listed in section 61.13(3), even when the parents are unmarried."

Waybright v. Johnson-Smith, 115 So.3d 445 (Fla. 1st DCA 2013)

Second District

Third District

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN SUA SPONTE ORDERING MOTHER TO SUBMIT TO PSYCHOLOGICAL EXAMINATION WITH A FOCUS ON ANGER CONTROL AND TO PARTICIPATE IN OLDEST CHILD'S THERAPY DURING HER TIMESHARING WHERE HER MENTAL CONDITION WAS NOT "IN CONTROVERSY" AND THERE WAS NO SHOWING OF "GOOD CAUSE," AS REQUIRED BY FLORIDA RULE OF CIVIL PROCEDURE 1.360

In 2010, an Illinois court dissolved the parties' marriage, subsequently entering a final custody judgment awarding sole custody of the two minor children to the Father in 2011. The trial court also granted the Father's motion to remove the children to Florida. Thereafter, in 2012, the Illinois final custody judgment was registered and domesticated in Florida.

On July 22, 2013, the Father filed in the Florida court an emergency motion to suspend the Mother's timesharing ("Emergency Motion"), requesting that the Mother's timesharing be suspended or, in the alternative, be supervised pending the results of a psychological examination. The primary support for the Emergency Motion was the Mother's behavior during court proceedings in Illinois on July 18 and 19, 2013, including her attempt to discharge her attorney, and her behavior outside of the courthouse in Illinois on July 19, 2013, which involved her sitting outside of the courthouse beneath a sign that stated: "NBA Miami Heat Star Mother of his Children on the Streets." The Father asserted that based on this behavior, he feared that she "may do something drastic to the children or herself." The Mother filed a response, asserting, in part, that the Father's unverified Emergency Motion was not only factually and legally deficient, but it also was "another improper attempt to modify the Mother's timesharing rights without due process."

At the emergency hearing, the only witness who testified was Howard Rosenberg, a licensed Illinois attorney who was the appointed Parent Coordinator. Over a hearsay objection, he testified that he was concerned with the Mother's above-described behavior. He acknowledged that he had not personally observed the Mother's behavior, but later received video of the incident. Over the Mother's counsel's objections based on hearsay, relevance, and lack of authentication, the trial court allowed the Father's counsel to play the video so that Mr. Rosenberg could ascertain whether this was the YouTube video he viewed and identify the Mother. Thereafter, the YouTube video was admitted into evidence.

The trial court then viewed the video in its entirety, which depicted the Mother speaking to who appeared to be reporters in front of the Illinois courthouse. During the video, she discussed the following: First, she stated that the Father's counsel filed a motion to enforce a settlement, which she had not agreed to or signed. During the court proceeding earlier that day, she was allegedly told that her counsel had agreed and therefore, the court would later decide whether to force the Mother to accept the agreement. Second, the Mother explained that when she arrived in Florida for her timesharing, she learned that the oldest child would be attending a basketball tournament during her time. Also, when the children were in Chicago for her timesharing, the Father informed her that someone would pick up the children on two of her three days so they could play basketball for eight or nine hours each day. The Mother explained that during her timesharing, she should be able to plan the children's activities, such as visiting the children's grandparents and grandmother. In addition, the Mother stated that Mr. Rosenberg told her that if she did not allow the above, he would recommend to the Florida court that she not be able to see her children. Finally, the Mother stated that she filed a separate lawsuit against the Father and one of her attorneys withdrew the lawsuit without her knowledge.

Over hearsay objection, the trial court also permitted Mr. Rosenberg to testify as to an alleged telephone conversation initiated by the parties' oldest child regarding the YouTube video. He further testified that he spoke to the Mother on the morning of July 22, 2013 and she assured him that she had no intention of being vocal around the children, so he then wrote a letter to the parties' Illinois counsel recommending that her parenting time should go forward. Mr. Rosenberg made the following recommendations: (1) the Mother's summer visitation should be shortened from two week periods to four night periods; (2) the oldest child should remain in therapy with his current therapist; (3) the Mother should participate in his therapy sessions in Miami; (4) she should attend individual therapy; (5) both parties should begin to communicate directly with each other; (6) the Mother should stop making disparaging comments about the Father in public; and (7) the Mother's two-hour window to return the oldest child's phone calls should be shortened to half an hour. Mr. Rosenberg clarified that he was not recommending that the Mother's timesharing be suspended, or that she submit to a psychological evaluation because that "is not [his] job" as the Parenting Coordinator. In essence, he testified, he was recommending modifications to the final custody judgment.

At the conclusion of the hearing, the Mother's counsel moved for a "directed finding" that the Father failed to establish that her timesharing should be suspended. The trial court ruled that, based on the YouTube video and Mr. Rosenberg's testimony, there was insufficient evidence to support the Father's claim; however, it *sua sponte* ordered the Mother to (1) undergo a psychological evaluation with a focus on anger control under Florida Rule of Civil Procedure 1.360, and (2) participate in the oldest child's therapy sessions while in Miami for her parenting time. Meanwhile, the Father's motion to suspend the Mother's timesharing was denied, and the children were ordered to go home with her that same day. While the trial court found that it had "a degree of concern about the Mother's recent behavior, which is erratic at best and irresponsible at worst," the order did not specify the behavior providing the basis for such concern; although, it did express concern about her actions in front of the courthouse which brought "her feelings regarding this litigation into the public domain." Based on the "totality of the circumstances," the trial court found that "good cause" existed to require the Mother to submit to a compulsory psychological evaluation with a focus on anger control. The trial court also sua sponte ordered that she participate in the oldest child's therapy during her parenting time

in Florida. The Mother's petition for writ of certiorari followed. Granting the petition and quashing the relevant portions of the order, the District Court held:

1. "Florida Rule of Civil Procedure 1.360(a)(1) provides that '[a] party may request any other party to submit to… examination by a qualified expert when the condition that is the subject of the requested examination is in controversy.'"

2. "Further, an examination under rule 1.360(a) 'is authorized only when the party submitting the request has good cause for the examination.' Fla. R. Civ. P. 1.360(a)(2)."

3. "At any hearing on the request for compulsory examination, the party submitting the request has the burden of showing that both the 'in controversy' and 'good cause' prongs have been satisfied."

4. "There is a heightened burden of proof when the party subject to the forced examination has not voluntarily placed that issue in controversy."

5. "Thus, the trial court's sua sponte order requiring the Mother to submit to a compulsory mental examination is a departure from the essential requirements of law unless both prongs of rule 1.360 were adequately established."

6. "In addressing whether the Mother's mental condition was 'in controversy,' we note that the trial court's written order completely fails to address this 'essential prerequisite.' This alone may be sufficient to overturn the trial court's order."

7. "While a parent's emotional state is certainly relevant in making a custody determination, 'the fact that custody is at issue should not alone create a reason to order a psychological evaluation.' A parent's mental state is typically at issue in a custody hearing only when there are verified allegations that the parent in question is having mental problems that could substantially impact his or her ability to properly raise children."

8. "In support of his 'fear,' the Father relied primarily on the Mother's interaction with her attorney during the Illinois court proceedings and the Mother's actions outside of the Illinois courthouse…. The video merely depicts a woman who is passionately voicing her views as to several matters that allegedly occurred during her divorce action. This video is insufficient to place the Mother's mental condition 'in controversy.' While the Father may disapprove of this behavior, he has not properly alleged or explained how this behavior makes the Mother unfit to exercise her parenting time with the children."

9. "Moreover, on the very day that it ordered the Mother to submit to a compulsory psychological examination, the trial court also ruled that the Mother's scheduled parenting time would take place. Thus, it appears that the trial court did not 'genuinely' believe that the Mother's mental condition was 'in controversy' or that the children would be at risk if the scheduled visitation took place."

10. "Although we acknowledge that the sign erroneously suggests that the Father is allowing the mother of his children to be homeless, we conclude that the sign, in conjunction with her behavior during the Illinois court proceedings, did not demonstrate that the Mother's mental condition was 'in controversy' because it has little to do with her parental fitness."

11. "There has been no evidence, other than the Father's conclusory allegations in his Emergency Motion, that any of the Mother's behavior has had, or will have, an adverse effect on the children, or that the Mother cannot meet the needs of the children."

12. "To reiterate, the trial court ordered that the children should go home with the Mother for visitation *the very same afternoon* that it ordered her to undergo a mental evaluation. Thus, the trial court clearly did not think there was 'good cause' to believe that the Mother's mental status jeopardized the children's well-being."

13. "We agree that the Mother's actions in front of the Illinois courthouse erroneously suggested that she was homeless, but this is insufficient to satisfy the 'good cause' prerequisite under rule 1.360."

14. "We conclude that the pleadings and the admissible evidence presented at the hearing do not demonstrate that the Mother's mental condition is 'in controversy' or that 'good cause' exists to subject her to a compulsory mental examination, and thus, the trial court's order departs from the essential requirements of law."

16. "Accordingly, we grant the petition for writ of certiorari and quash the portions of the order relating to the compulsory psychological examination of the Mother and the Mother's participation in the oldest child's therapy."

Wade v. Wade, 124 So.3d 369 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT ERRED IN STRIKING WIFE'S PLEADINGS AND ENTERING FINAL JUDGMENT AS SANCTION FOR HER REFUSAL TO COMPLY WITH DISCOVERY ORDERS AND FAILURE TO ATTEND COURT-ORDERED VIDEO DEPOSITION WITHOUT FIRST AFFORDING HER AN OPPORTUNITY TO BE HEARD AND TO OFFER MITIGATING OR EXTENUATING EVIDENCE.

The Husband herein was arrested and charged with aggravated assault for allegedly threatening the Wife with a wine bottle. She obtained a Temporary Injunction for Protection Against Domestic Violence and later an Agreed Permanent Injunction Against Domestic Violence. Shortly thereafter, the Wife relocated outside of Florida. The Husband filed a petition for dissolution of marriage. He then served the Wife with interrogatories, which she failed to timely comply with and the trial court compelled her to respond. She requested a protective order allowing her to omit her current home and work addresses, asserting as grounds her fear of further abuse from her Husband. As to the other requested information, she was willing to comply. The trial court denied her motion.

Immediately thereafter, the Wife's counsel moved to have the Husband's counsel barred from providing the Husband with her current home or work addresses. Counsel for the Husband agreed as to the Wife's current home address, but argued that his client needed access to her current work address. The trial court then entered an agreed order as to the Wife's home address, but denied the request to have her work address omitted.

When the Wife failed to respond to the interrogatories, the trial court held another hearing and warned her that her pleadings would be stricken and a default entered against her if she failed to comply with the discovery request. The trial court also ordered the Wife to attend a scheduled video deposition to take place in Washington D.C. Counsel for the husband was to attend telephonically, and the Husband would not be attending. Minutes after the trial court's deadline for complying, the Wife's counsel provided a partial response to the interrogatories, still refusing to provide her current home or work addresses. The Wife also failed to attend the deposition after learning that her Husband could have been aware of the location where she would be.

A hearing was held on the Husband's subsequent Motion to Strike Wife's Pleadings Based on Wife's Refusal to Comply with Order on Husband's Motion for Contempt, and Wife's Refusal to Attend Court Ordered Deposition. The Wife's counsel asked the trial court not to

strike her pleadings without first conducting an evidentiary hearing. She argued that her client suffered from grave paranoia as a result of the domestic violence she'd suffered. The trial court denied the request and granted the Husband's motion, stating: "The Wife acted and continues to act in a deliberate, willful, and contumacious manner, whereby she continues to act in defiance and disobedience of numerous orders issued by this court." All of the Wife's pleadings were stricken and as a sanction, she was ordered to pay the Husband's attorney's fees and costs. Thereafter, a trial was conducted and a final judgment of dissolution of marriage entered. The Wife appealed. The District Court reversed:

1. "We reverse, because the trial court erred by striking the Wife's pleadings and entering a final judgment without affording the Wife an opportunity to be heard and [to] offer mitigating or extenuating evidence."

2. "The Wife argues that the trial court erred by striking her pleadings without a hearing to determine if her conduct warranted such an extreme sanction. We agree."

3. "Sanctions imposed pursuant to Florida Rule of Civil Procedure 1.380 are reviewed for an abuse of discretion, and a trial court may exercise its discretion by striking a party's pleadings 'where evidence shows deliberate and contumacious disregard of the court's discovery orders.'"

4. "However, the striking of pleadings is the severest of penalties and should only be exercised under 'extreme circumstances….' If the trial court can impose a less severe sanction as a viable alternative, then it should use the alternative."

5. "In any case, the trial court should have granted the request by the Wife's counsel to hold an evidentiary hearing before striking the Wife's pleadings."

6. "Accordingly, we reverse the order striking the Wife's pleadings and remand for an evidentiary hearing to determine whether the Wife's failure to obey the discovery orders rose to the level of disobedience which would justify the severe sanction of striking pleadings or whether some lesser sanction would suffice."

Tobin v. Tobin, 117 So.3d 893 (Fla. 4th DCA 2013)

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT MOTHER TO INTRODUCE HER DIARY INTO EVIDENCE AS A PRIOR CONSISTENT STATEMENT.

The parties were never married. Their child was born in 2009 and they all lived in Florida until January 19, 2012, when the Mother moved out of the parties' home while the Father was out of town, not having advised him prior to leaving. The Mother moved to Illinois and immediately filed a petition for emergency order of protection, alleging abuse of both her and the child by the Father. The Illinois court granted the ex parte request.

Several days later, the Father filed a petition for establishment of paternity in Florida, including a request for custody and/or time-sharing with the child. He also moved for an order requiring the child's return. Multiple jurisdiction hearings occurred and the Illinois court ultimately dismissed the proceedings in favor of Florida, the child's home state. Because of the delays that resulted from the competing proceedings, the hearing on the Father's requests did not commence until nearly eleven months after the child's removal from the state. Because of limited time, the hearing was not concluded; and the continuation was set for March, giving the parties five months notice.

Although she had notice of the March hearing, the Mother did not attempt to secure the testimony of Illinois witnesses until the end of February. She then moved to continue the March proceedings, but the Father vehemently objected. The court denied the Mother's motion and the matter proceeded. The parties stipulated that the successor judge could review the transcript of the first hearing and consider the previous testimony of the Father and the maternal grandmother. At the second hearing, the Mother and Father testified, as well as the child's Florida pediatrician. The evidence presented revolved around three main themes: 1) the Mother's removal of the child from the state, and the Father's good relationship with and ability to provide for the child in Florida; 2) the Mother's claim of extreme abuse by the Father towards both her and the child, supported by her and her mother's testimony, but denied by the Father; and 3) the child's diagnosis and treatment in Illinois for several medical problems, testified to only by the Mother while the Florida physician testified to not having observed any disorders or evidence of abuse.

At the close of the evidence, the judge specifically noted that he had considered the factors contained in section 61.13, as well as the relocation statute. The trial court determined that its ruling was in the best interests of the child, stating "I'm not concerned about [the mother's and father's] feelings, and what's in their best interest. I'm just not." The trial court ultimately ordered the immediate return of the child to Florida and set a temporary timesharing schedule, which required a 50/50 split if the mother remained in Florida; if she did not, she would be entitled to a weekend visitation every month. The Mother appealed and argued, in part, that the trial court abused its discretion in refusing to permit the introduction in evidence of her diary. The District Court affirmed:

1. "The trial court denied [the Mother's diary's] admission, which we uphold. In general, 'prior consistent statements of a witness are hearsay and not admissible to corroborate or augment the witness's trial testimony.'"

2. "However, a statement 'is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive or recent fabrication.'"

3. "Nevertheless, 'a prior consistent statement is not admissible merely because the opposing lawyer has attacked the credibility of the witness or challenged the truthfulmess of the statement given by the witness at trial."

4. "The mere fact that the Father contested the truth of the Mother's statements, under cross-examination by the Mother's counsel, does not render admissible [her] prior consistent statements."

5. "[A]ll that occurred in this case is that the father contested the credibility of the mother, as occurs in any adversarial proceeding. This father's counsel did not cross-examine the mother as to any motive to lie or fabricate the allegations of abuse. It appears that the mother's counsel tailored her examination of the father, using words such as 'recent fabrication' solely to try to establish a predicate to admit the otherwise inadmissible hearsay (i.e., the diary). The court did not abuse its discretion in denying admission."

Shiba v. Gabay, 120 So.3d 80 (Fla. 4th DCA 2013)

Fifth District

XI. MISCELLANEOUS MATTERS

A. Tax Considerations

First District

Second District

ERROR TO FAIL TO CONSIDER INCOME TAX CONSEQUENCES OF ALIMONY AWARD IN CALCULATING WIFE'S NEED.

The Former Husband sought modification of permanent alimony alleging a significant reduction in his income and that the Former Wife was in a supportive relationship. The case was referred to the general magistrate, who granted the Former Husband's modification petition, reducing the monthly amount of alimony to $1,294.06.

The GM had before her a "Chart on Lifestyles Expenditures" submitted by the Former Wife, listing her annual living expenses averaged over the four calendar years preceding the hearing. The GM used this chart to calculate the amount of the Former Wife's current living expenses. Included in that chart was $13,497 for income taxes, thus the Former Wife's monthly need calculation included the payment of said taxes. The GM found the Former Wife's current monthly need to be $5330.19, excluding the payment of income taxes, and calculated the Former Wife's current monthly income from investments and retirement accounts to be $4036.16, arriving at a negative balance of $1294.06, which is the amount to which the GM recommended the monthly alimony payment to be reduced.

In her exceptions, the Former Wife raised the issue that the GM's calculations failed to consider the effect of federal and state income taxes on her needs. The Former Wife also raised the income tax issue in her motion for rehearing. The circuit court did not address the issue of the Former Wife's expenses for income taxes in its order approving and ratifying the Recommended Order, or in its order denying the motion for rehearing. The District Court held:

1. "Section 61.08(2)(h) requires that 'in determining the . . . amount of alimony . . ., the court shall consider all relevant factors, including, but not limited to: [t]he tax treatment and consequences to both parties of any alimony award.' 'It is error for the trial court to fail to consider tax implications of any alimony award when such evidence is presented.'"

2. "Here, the Former Wife presented appropriate evidence to the GM and to the circuit court concerning the income tax implications of the alimony award and her need for continued support in an amount sufficient to enable her to pay her obligations for federal and state income taxes. In calculating the Former Wife's current needs, both the GM an the circuit court failed to account for the income tax consequences of the award to the Former Wife and the Former Wife's expenses for the payment of income taxes."

3. "By failing to consider the Former Wife's expenses for federal and state income taxes and her current investment income, the GM recommended an alimony award to the Former Wife in an amount that was less than necessary to meet her needs. The circuit court overruled the

Former Wife's exceptions and approved the recommended amount without addressing these issues. This constituted error."

4. "Accordingly, on the Former Wife's appeal, we reverse the amount of the reduction in the alimony award to the Former Wife. On remand, the circuit court shall reconsider the reduction in the amount of the alimony award to the Former Wife in light of the Former Wife's income tax obligations and her current investment income. Upon such reconsideration, the circuit court shall adjust the amount of the reduction in alimony so that the Former Husband's alimony obligation is sufficient to meet the Former Wife's needs."

Tarkow v. Tarkow, 128 So.3d 82 (Fla. 2d DCA 2013)

Third District

TRIAL COURT ERRED IN ALLOCATING TO FORMER HUSBAND THE RIGHT TO CLAIM CHILD AS DEPENDENT ON INCOME TAX RETURNS WHERE TRIAL COURT CAN ONLY REQUIRE THE CUSTODIAL PARENT TO TRANSFER THE DEPENDENCY EXEMPTION TO THE NON-CUSTODIAL PARENT THROUGH THE EXECUTION OF A WAIVER ON CONDITION THAT NON-CUSTODIAL PARENT IS CURRENT WITH SUPPORT PAYMENTS.

The parties have a seven-year-old son. In the underlying dissolution proceedings, the final judgment granted the Former Wife's petition for relocation and ordered the Former Husband to pay child support in an amount that was to continue for three months and then be recalculated. Several months later, the Former Husband filed a motion to establish child support and enforce the final judgment. This motion was served on the Former Wife's counsel, but no response was filed on her behalf and neither she nor her attorney appeared at the hearing thereon. The trial court ultimately entered an order granting the Former Husband's motion, which indicated that it had been served on the Former Wife's former counsel, but not the Former Wife, herself. Ultimately, the trial court denied the Former Wife's motion for reconsideration and the Former Wife thereafter appealed. With regard to the trial court's decision to grant the Former Husband the right to claim the child as a dependent on his tax returns, the District Court reversed:

1. "As counsel for the Former Husband conceded at oral argument, the trial court did not have the power to allocate the exemption directly."

2. "The trial court can only 'require the custodial parent to transfer the exemption to the non-custodial parent through the execution of a waiver. However, the transfer of the dependency exemption to the non-custodial parent is conditioned on that parent being current with support payments.'"

3. "The trial court did not require the Former Wife, as the custodial parent, to execute a waiver transferring the exemption to the Former Husband, and also did not condition the waiver on the Former Husband being current with his child support payments. We therefore find that the trial court erred by not structuring the transfer of the exemption in accordance with the requirements of section 61.30(11)(a)(8), Florida Statutes (2012)."

Pullis v. Pullis, 118 So.3d 937 (Fla. 3d DCA 2013)

Fourth District

ERROR FOR TRIAL COURT TO DECLINE TO CHARACTERIZE PAYMENTS DUE TO WIFE UNDER PROVISION OF MSA TITLED "LUMP SUM ALIMONY AND EQUITABLE DISTRIBUTION" AS TO WHETHER SAID PAYMENTS ARE TAXABLE TO WIFE AND DEDUCTIBLE BY HUSBAND.

The parties' MSA contained a provision titled "Lump Sum Alimony and Equitable Distribution" requiring the former husband to pay the former wife one-half of his salary after payment of child support for ten years, followed by yearly payments of $10,000. The parties agreed that the payments would be non-modifiable. The MSA was silent as to whether the payments would be taxable/deductible. The parties' accountants differed in their opinions and the trial court expressly declined to characterize the payments for tax purposes, subject to any future IRS or tax court ruling. The District Court held:

1. '"The usual treatment of alimony is to make the alimony taxable to the recipient and deductible by the payer.' However, payments are not deductible by the payer as alimony if they are 'part of a property settlement agreement.'"

2. "Lump sum alimony 'is a fixed and certain amount, the right to which is vested in the recipient and which is not therefore subject to increase, reduction, or termination in the event of any contingency, specifically including those of death or remarriage.'"

3. "If the payments qualify as lump sum alimony, they remain payable to the former wife's estate in the event of her death, and consequently, generally will not be deductible by the former husband under the relevant Internal Revenue Code provisions."

4. "In the present case, the opinions of the parties' accountants conflicted as to whether the former husband could deduct the payments. The trial court stated that 'the better part of discretion [was] to do nothing' and expressly 'decline[d] to characterize the payments for federal tax purposes, subject to any future ruling by the Internal Revenue Service or the Tax Courts.' We find this was error, and direct the trial court to amend its final judgment to indicate whether or not the payments shall be deductible by the former husband and taxable to the former wife, after analyzing the pertinent provisions of the MSA."

Kuchera v. Kuchera, 123 So.3d 631 (Fla. 4th DCA 2013)

TRIAL COURT ERRED IN ENTERING ORDER FINDING FATHER ENTITLED TO TAKE FEDERAL TAX EXEMPTION FOR MINOR CHILD WHERE FINAL JUDGMENT PROVIDED THAT PARTIES WERE TO ALTERNATE INCOME TAX EXEMPTION FOR MINOR CHILD, FATHER'S ENTITLEMENT TO DO SO WAS CONDITIONED ON BEING CURRENT IN HIS SUPPORT PAYMENTS, AND CLERK'S LEDGER RELIED UPON BY TRIAL COURT SHOWED THAT FATHER WAS NOT CURRENT AT THE END OF THE ONLY ODD-NUMBERED YEAR AT ISSUE.

The minor child herein was born on August 29, 2008. On September 29, 2010, the trial court entered a final judgment of paternity, pursuant to which the parties were to alternate the Income Tax exemption for the minor child, with the Father being entitled to the exemption on odd-numbered years, and the Mother being entitled to the exemption on even-numbered years.

The final judgment also provided that the Father was obligated to pay $226 per month in regular child support payments, plus an arrearage of $6,593 to be repaid at the rate of $100 per month.

Following an appeal by both parties of the final judgment of paternity, the District Court affirmed the paternity judgment in most respects, but reversed the trial court's failure to give the Father credit for $850 in child support payments. The case was also remanded with instructions that the final judgment of paternity be amended to require the Mother to execute a waiver of the dependency exemption only if the father "is current in support payments."

Thereafter, the trial court entered an amendment to the final judgment of paternity which gave the father the child support credit and added the following language to the final judgment: "The Mother, the custodial parent, is required to execute a waiver of the dependency exemption in the odd calendar years, only if the Father is current in his support payments."

In June 2012, the Father filed his Second Amended Motion for Contempt, claiming, among other things, that he was denied the IRS tax exemption for the minor child for the year 2011. At the November 2012 hearing thereon, the Father claimed he was entitled to the IRS tax exemption for 2011, testifying that he "faithfully paid" child support of $226 plus $100 in arrearages every month since he received the final judgment. After hearing conflicting testimony from both parties regarding whether the Father was in fact current in his child support, the trial judge stated that she would take judicial notice of the clerk's child support ledger, which revealed that the Father was never current on his child support payments throughout the entire year of 2011 and was only current by the time of the November 2012 hearing.

The trial court subsequently entered an order stating the following: "The Court finds that Respondent/Father is current in his child support and will therefore be entitled to the Federal Income Tax Deduction for the minor child effective immediately. The Petitioner/Mother shall not take the deduction beginning in 2012." The Mother cross-appealed the trial court's ruling in this regard. The District Court reversed:

1. "At the time of the November 2012 hearing, the only odd numbered year for which the Father would have been entitled to the tax exemption was the year 2011…. The Clerk's child support ledger, which the trial court judicially noticed, clearly shows that [he] was not current in his child support at the end of the year 2011. In fact, the Father was never current in his child support throughout the entire year of 2011."

2. "To be sure, the Father's child support was brought current by the time of the November 2012 hearing. This presumably explains why the trial court found that the Father was 'current' in his child support."

3. "[T]he relevant question is not whether the Father was current in his child support at the time of the contempt hearing, but rather whether the Father was current in his child support at the end of the relevant tax year so as to be entitled to the dependency tax exemption under section 61.30(11)(a)(8)."

4. "The Mother cannot be held in contempt for taking the exemption for a tax year during which the Father was never current in his support payments, even though the Father later became current on his payments."

5. "Accordingly, because the Father was not current in support payments at the end of the year 2011, the Mother was not required to execute a waiver of the dependency exemption for that tax year."

6. "Accordingly, we reverse the order in part and remand with directions for the trial court to delete the following language from the order on appeal: 'The Court finds that Respondent/Father is current in his child support and will therefore be entitled to the Federal

Income Tax Deduction for the minor child effective immediately. The Petitioner/Mother shall not take the deduction beginning in 2012.'"
Williams v. Lutrario, 131 So.3d 801 (Fla. 4th DCA 2013)

Fifth District

B. Injunctions

First District

Second District

Third District

Fourth District

Fifth District

TRIAL COURT ERRED IN REFUSING TO DISSOLVE EX PARTE INJUNCTIVE ORDER AWARDING TEMPORARY CUSTODY TO FATHER WHERE FATHER'S VERIFIED PETITION ALLEGING MOTHER WAS DANGEROUS TO THE CHILD ARGUABLY ESTABLISHED AN EMERGENCY SUFFICIENT TO SUPPORT THE INITIAL EX PARTE ORDER, BUT AT THE HEARING ON MOTHER'S MOTION TO DISSOLVE THE EX PARTE ORDER, FATHER FAILED TO PRESENT COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER.

On February 15, 2005, the trial court entered a final judgment, which adjudicated Father as the natural father of the child, awarded Mother sole custody, and awarded Father supervised visitation. The final judgment also set forth Father's child support obligations. Father was not present at the trial.

Three years later, the Father moved to set aside the final judgment for fraud upon the court. On November 5, 2010, the trial court entered a written order setting aside the final judgment and suspending child support until it could be recalculated at a subsequent trial. The Mother was found in contempt and the Father was given temporary custody until November 12, 2010. The parties were ordered to return to court on November 12th for a review hearing, at which time the case would be set for another trial to resolve the issues in the original petition and counter-petition.

The Mother was not present at the November 12th review hearing because she was still in custody. At that time, Father indicated he had information from the child's maternal uncle that Mother had previously threatened to commit suicide and kill the child. Later that day, the Father filed a verified motion to transfer temporary custody of the child to him until the Mother underwent a psychological evaluation. On November 15, 2010, the trial court entered an order awarding the Father temporary custody of the child during the pendency of the proceedings and gave Mother supervised contact with the child. Father was allowed to remove the child from Florida to his home in Virginia. Mother had not seen the child since November 15, 2010.

On March 8, 2011, the Mother filed a motion to dissolve the ex parte temporary order transferring custody of the minor child to the Father. A hearing was held on April 4, 2011, at which time Mother, Father, and the child's maternal grandmother testified. The Mother denied having suicidal ideations and filed a psychological report indicating same with the trial court. She also explained that she was living and working in Orlando and capable of taking care of the child. The maternal grandmother testified that the child was happy, healthy and cheerful with the Mother. She also testified that Mother never indicated to her that she wanted to commit suicide or otherwise harm the child. The Father testified regarding positive changes in the child's health and academics and provided a transcript of the November 5, 2010 hearing as evidence of proof of Mother's erratic behavior. At the conclusion of the hearing, the trial court indicated it would not disturb the status quo because it appeared the child was thriving with Father. No written order was entered.

A second hearing was held on September 20, 2011. Father offered no testimony at the hearing. At that time, Mother asked the trial court to determine whether or not Father proved the verified motion he filed on November 12, 2010. On September 22, 2011, the trial court entered an order denying Mother's motion to dissolve the ex parte temporary order without further comment. Mother appealed. The District Court reversed:

1. "Father's verified petition alleging Mother was a flight risk and had threatened to kill herself and the child, arguably, established an emergency sufficient to support the trial court's issuance of the initial ex parte order."

2. "The issue we must now resolve is whether the trial court erred when it refused to dissolve the ex parte order after the April and September hearings on Mother's motions. We find that it did."

3. "Where a party 'challenges the entry of an ex parte order or injunction by a motion to dissolve, at the hearing on the motion the burden is on the party who obtained such a ruling to show that the complaint and supporting affidavits are sufficient to support the injunction…. [The party] who has obtained ex parte relief based simply on allegations in its complaint cannot shift the burden to the [opposing party] until it has established an evidentiary basis to support such relief.'"

4. "Here, Father failed to meet his burden when the only evidence he presented was his own testimony and a transcript of the November 5, 2010 hearing where Mother was held in contempt."

5. "Because Father presented insufficient evidence to keep the emergency ex parte order in place at the hearing on Mother's motion to dissolve, we reverse."

6. "However, because the minor child has been living with Father for an extended period of time, the child shall remain with Father until the trial court can conduct a full and proper hearing on the issues of custody and visitation."

Ashby v. Murray, 113 So.3d 951 (Fla. 5th DCA 2013)

TRIAL COURT IMPROPERLY ENTERED EMERGENCY INJUNCTION PROHIBITING FATHER FROM MOVING TO NEW RESIDENCE WITH MINOR CHILD WITHOUT FINDINGS OF FACT CONFIRMING THAT EACH OF THE REQUIREMENTS FOR ENTRY HAD BEEN SATISFIED.

The trial court entered an oral order prohibiting the Father from moving with the minor child to a new residence forty-two miles away from his current residence, which he was required

to vacate due to the termination of his lease. The District Court ordered the trial court to enter a written order concerning same. The written order was subsequently entered; however, the trial court did not make any of the requisite findings necessary for a temporary injunction. The Father sought certiorari review. The District Court granted the petition for certiorari:

1. "It is well-settled that a party seeking a temporary injunction must demonstrate that: (1) there is a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) the petitioner has a substantial likelihood of success on the merits; (3) the threatened injury to the petitioner outweighs any possible harm to the respondent; and (4) the granting of the temporary injunction will not disserve the public interest."

2. "In the present case, the trial court made no findings of fact confirming that the respondent satisfied each of the temporary injunction requirements."

3. "Accordingly, we grant the petition for certiorari, and vacate the May 26, 2013 order that prohibits [the Father] from moving to a new residence with his minor child."

Switzer v. Switzer, 113 So.3d 1036 (Fla. 5th DCA 2013)

C. Privilege and Work Product

First District

Second District

Third District

Fourth District

FATHER LACKED STANDING TO ASSERT CHILD'S PSYCHOTHERAPIST-PATIENT PRIVILEGE AS BASIS FOR STRIKING SOCIAL INVESTIGATION REPORT WHERE FATHER SOUGHT TO STRIKE REPORT DUE TO HIS PERCEPTION THAT CONFIDENTIAL INFORMATION THEREIN WOULD BE TO HIS DISADVANTAGE IN ONGOING CUSTODY ASPECTS OF DISSOLUTION PROCEEDINGS.

The Father petitioned the District Court to issue a writ of certiorari quashing a trial court order that denied his amended motion to strike a social investigation report prepared in the dissolution of marriage proceedings below. He alleged that in preparation of this report, confidential communications between his children and their psychotherapist were improperly disclosed by the psychotherapist to the report's author without the consent of the minor children, for whom no guardian ad litem was appointed by the trial court, in violation of section 90.503, Florida Statutes (2010). The Father claimed irreparable harm in the trial court's future consideration of the report's contents, including the privileged information that would disadvantage him in the proceedings. The District Court denied the petition for writ of certiorari:

1. "We deny the petition based on *Hughes v. Schatzberg*, . . . where we held that a parent lacked standing to assert the statutory privilege found in section 90.503 on behalf of his or her

minor child, where the parent is involved in litigation seeking to pursue his or her own interests, and the child is not a party to the underlying action."

2. "As [the Father] seeks to strike the social investigation report due to his perception that the confidential information placed in the report by its author is to his disadvantage in the ongoing custody aspect of this dissolution proceeding, he falls squarely within the rationale for the holding in *Hughes*."

Carrillo-Jimenez v. Carrillo, 110 So.3d 490 (Fla. 4th DCA 2013)

Fifth District

D. Contempt and Sanctions

First District

TRIAL COURT ERRED IN HOLDING FORMER WIFE IN CONTEMPT FOR PREVENTING FORMER HUSBAND FROM HAVING NORMAL AND USUAL ROUTINE CONTACT WITH PARTIES' SONS WHERE THERE WAS NO COURT ORDER REQUIRING HER TO DO SO; ERROR TO, IN ADDITION, REQUIRE FORMER WIFE TO PAY ATTORNEY'S FEES FORMER HUSBAND INCURRED IN CONTEMPT PROCEEDINGS WITHOUT A DETERMINATION OF NEED AND ABILITY TO PAY.

The final judgment of dissolution was entered in this case in October 2004. The parties continued to litigate thereafter. In addition to numerous post-dissolution motions and petitions filed by both parties, a dependency action was initiated by the Florida Department of Children and Families ("DCF"), which twice resulted in temporary orders severely limiting Former Husband's contact with his sons. Further, Former Wife and her current husband have been named the eldest son's guardians in a separate guardianship proceeding in the State of Washington due to the son's severe medical conditions.

On July 9, 2010, the circuit court entered an order on various motions and addressed contact between two of the sons and Former Husband. The order provided that Former Husband was entitled to a minimum of four days per month of unsupervised "visitation" with the youngest son (then still a minor) during daytime hours of each day, and "visitation" with the eldest son under "the same parameters" as for the youngest son. The contact was to take place in the Seattle, Washington area, where the sons resided. That order was affirmed on direct appeal.

Former Husband visited his sons pursuant to the July 9, 2010 order during October 2010 and April 2011. Thereafter, he filed his motion for contempt against Former Wife and amended the motion twice. Former Husband alleged that Former Wife was in contempt of court because she had refused to agree to more than the minimum time provided in the order, including overnight visits, as was encouraged in the order. He sought "expanded and extended visitation" with his sons and sought sanctions against Former Wife for her failure to negotiate such additional time with his sons.

After an evidentiary hearing on Former Husband's motion, the circuit court found Former Wife in contempt because she "prevented the Former Husband from having normal and usual

routine contact with both" the eldest and youngest son. In addition, the court granted Former Husband's request to sanction Former Wife by requiring her to pay his attorneys' fees incurred in the contempt proceedings, in the amount of $1325.00. The court did not conduct any inquiry of the parties' current financial situations, needs or abilities. Former Wife appealed. The District Court reversed:

1. "It is well settled that '[o]ne may not be held in contempt for violating something that an order does not say.' *Keitel v. Keitel*, ... The order entered July 9, 2010 does not require [Former Wife] to provide [Former Husband] with 'normal and usual routine contact' with his sons."

2. "The provisions of the order regarding contact between [Former Husband] and sons entitle [Former Husband] to 'unsupervised visitation' to be located 'in the Seattle area' during daytime hours for a minimum of 'once per month for a minimum of four days.' No other directive about [Former Husband's] contact with his sons is contained in the July 9, 2010 order."

3. "There was no evidence of Former Wife's violation of any specific provision of the July 9, 2010 order."

4. "Although the July 9, 2010 order contained aspirational goals encouraging the parties to agree to additional contact without court involvement, 'implied or inherent provisions of a final judgment cannot serve as a basis for an order of contempt.' *Keitel v. Keitel*, ... "

5. "While reversal of the contempt order necessarily results in reversal of the sanction, we also note that the lack of a purge provision in the order on appeal indicates that the court found a criminal contempt. Because the contempt action arose in the context of a dissolution action, the trial court was required to determine need and ability to pay before imposing this monetary sanction . . . The failure to make this determination was reversible error." ***Hardman v. Koslowski***, 107 So.3d 1246 (Fla. 1st DCA 2013)

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY ORDERING FATHER TO RETURN TO MOTHER A VEHICLE THAT WAS NOT TITLED IN HIS NAME WHERE BECAUSE VEHICLE WAS NOT TITLED IN HIS NAME, THE FATHER DID NOT HAVE THE ABILITY TO PURGE THE CONTEMPT; COMPLIANCE WITH CONTEMPT ORDER DOES NOT RENDER THE ISSUE MOOT FOR APPELLATE PURPOSES.

In a paternity action, Ms. Hernandez (the Mother) filed an emergency motion seeking the return of a Toyota 4Runner that she had been using previously. Although the 4Runner was titled in the name of a company by the name of Camaguey Auto Sales ("Camaguey Auto") since October 2010, Ms. Hernandez drove the 4Runner until Camaguey Auto towed it from her home a few weeks after she filed the petition to determine paternity in 2013. Mr. Carmenates (the Father) was Camaguey Auto's registered agent until August 20, 2013.

Without any notice to Camaguey Auto, the trial court granted the Mother's motion for return of the 4Runner, ordering the Father - who did not own the car - to return it "or a vehicle of like and similar quality" by 5:00 p.m. that evening. The following day, the Mother filed a motion for contempt against the Father, asserting that he had failed to comply with the trial court's order.

Following a hearing, the trial court granted the Mother's motion for contempt, providing that the Father could purge the contempt by returning the 4Runner to the Mother before 2:00 p.m. that day, and if he failed to do so, he was to turn himself in the following day at 9:00 a.m..

Thereafter, Camaguey Auto returned the 4Runner to the Mother to avoid the Father's incarceration. The Father's petition, which was treated as a petition for writ of certiorari, followed. Finding that the trial court departed from the essential requirements of law by ordering the Father to either return the 4Runner, which was not titled in his name, or face incarceration for contempt, the District Court quashed the relevant portions of the Order:

1. "The instant contempt order does contain a specific purge provision that adequately informs [the Father] what he needs to do to purge the contempt. However, as the purge provision wrongfully requires [the Father] to take control over the 4Runner, which is not titled in his name, and the record does not demonstrate that he is in complete control of the entity that does own the 4Runner, Camaguey Auto, we find that [he] did not have the ability to purge the contempt, and therefore, he did not 'carr[y] the keys of his prison in his own pocket.'"

2. "Although we have quashed the contempt order, [the Mother] is not left without a meaningful remedy to her inability to transport her children to school or herself to different locations as a home healthcare nurse so that she may support her children. Upon a proper motion, the trial court may award temporary child support to [the Mother] under section 742.031(1) of the Florida Statutes…."

3. In a footnote, the District Court added, "Although Camaguey Auto returned the 4Runner to [the Mother] to avoid [the Father's] incarceration, the contempt issues is not rendered moot. *See Marconi v. Walther*, 819 So.2d 936, 938 (Fla. 2d DCA 2002) ("[T]he husband's payment of insurance premiums to purge himself from jail did not render the contempt issue moot.... [I]t would be unfair to allow an order in the court file to continue to show that the husband has been found in contempt ....")."

Carmenates v. Hernandez, 38 FLW D2395 (Fla. 3d DCA 2013)

Second District

TRIAL COURT ERRED IN HOLDING HUSBAND IN CIVIL CONTEMPT WHERE HUSBAND HAD NOT RECEIVED PROPER NOTICE OF MOTION AND HEARING DATE; ERROR TO SET PURGE AMOUNT WITHOUT IMPOSING COERCIVE SANCTION THAT PURGE WOULD REMOVE AND WITHOUT SUFFICIENT EVIDENCE OF ABILITY TO COMPLY; GROSS RECEIPTS OF BUSINESS WAS INSUFFICIENT BASIS FOR VALUATION.

The trial court's order below, based on a magistrate's report and recommendation, held the Former Husband in indirect civil contempt for failing to pay substantial child support arrearages to the Former Wife. At the hearing on the contempt motion, it was agreed that the Former Husband had not received proper notice of the Former Wife's motion or of the hearing date. Nevertheless, the trial court proceeded and found him in contempt. The Former Husband owned a roughly thirty-three percent interest in Park Edge Enterprises. Per the entity's 2010 receipts, the value of the business was under $5 million. Over the Former Husband's objection, the trial court valued his interest in the entity based on the gross receipts, and set a $25,000 purge amount to be paid within four weeks. No coercive sanction that the purge would remove was imposed. The Former Husband appealed. The District Court reversed:

1. "[The trial court] made no finding as to notice, either orally or in the written order, as rule 12.615(c) requires. This was error."

2. "The trial court also erred in requiring [the Former Husband] to pay a purge amount without a sufficient evidentiary basis to demonstrate his ability to comply."

3. "Gross receipts . . . are an insufficient basis for valuation; the trial court must determine the value of corporate stock."

Mansour v. Mansour, 118 So.3d 978 (Fla. 2d DCA 2013)

TRIAL COURT DID NOT ERR IN FINDING THAT FORMER HUSBAND HAD PRESENT ABILITY TO PAY ALIMONY AND IN HOLDING HIM IN CONTEMPT FOR FAILING TO DO SO ALTHOUGH FINDING THAT HIS PRIOR PAYMENT OF PURGE AMOUNTS SUGGESTED THE EXISTENCE OF HIDDEN INCOME.

In the supplemental final judgment entered in the dissolution of marriage proceedings, the Former Husband was ordered to pay monthly permanent alimony. Subsequent to the final judgment, the Former Husband filed a petition to reduce the alimony amount. At the hearing thereon, he testified that since the entry of that order, he ended his relationship with the law firm at which he was a partner, and that while the firm had previously been determined to have a value between $1 and $3 million, he received only $46,000 and an automobile valued at $29,000 upon leaving. Instead of seeking employment as an attorney, the Former Husband opened a mediation practice, and asserted that this new venture resulted in a significant reduction in his income and he no longer had the ability to pay the required alimony. The petition was denied based on a finding that the Former Husband was voluntarily underemployed and that he had failed to show an involuntary and permanent change in circumstance. Additionally, the trial court found the Former Husband in contempt for willfully failing to pay his alimony obligation.

The Former Wife ultimately filed three subsequent motions for contempt against the Former Husband as he continuously failed to comply with the court order. On the first motion, the trial court denied the contempt request, but continued the alimony obligation. On the second, the trial court found the Former Husband in contempt and found he had the present ability to pay. Later, on the Former Wife's third motion, the court again found the Former Husband in contempt and concluded that he presented no evidence to show a material change in circumstances since the prior hearing regarding his ability to pay. The order also included the following finding: "It is evident to this Court that the Former Husband has purposely shielded his income. Although the Former Husband has habitually paid less than a quarter of the current alimony owed this past year, he is able to come up with the purge amount when found in contempt. The Court finds the Former Husband has been generating regular income and misrepresenting his ability to pay in order to avoid and frustrate the orders of this Court." The Husband appealed from this third Order, arguing that the trial court erred in finding he had hidden sources of income and the present ability to pay. The District Court affirmed the finding of contempt, but reversed as to the finding that the Former Husband had hidden income:

1. "After reviewing the record, we affirm without further comment the trial court's finding that the Former Husband had the present ability to pay the required sums and its holding him in contempt for failing to do so."

2. "Our review of the record reveals that [the] specific issue of hiding income was not argued below."

3. "Furthermore, the only evidence to support such a finding is the fact that the Former Husband has been capable of paying the purge amount when previously held in contempt. But

that fact alone is not enough to create an inference that the Former Husband has hidden sources of income."

4. "We therefore reverse the trial court's order to the extent that it includes [such] factual finding… and we remand with instructions to strike this paragraph. We affirm the order in all other respects."

Fuller v. Fuller, 129 So.3d 394 (Fla. 2d DCA 2013)

ALTHOUGH TRIAL COURT PROPERLY FOUND HUSBAND IN CONTEMPT FOR FAILURE TO MAKE REASONABLE EFFORT TO FIND EMPLOYMENT, ERROR TO IMPOSE INCARCERATION WHERE NO EVIDENCE THAT HE HAD THE ABILITY TO PAY PURGE AMOUNT EXISTED.

The Former Husband was found in contempt for failing to pay alimony to the Former Wife and sentenced to ten days in jail. The trial court found that the Former Husband willfully failed to comply with the alimony provision in the final judgment by not making a reasonable effort to find employment. He was ordered to spend ten days in jail as a sanction. In addition, the trial court found that he had the ability to purge his contempt by paying $5,000 to the Former Wife's attorney, and further found that he had "the present ability to pay the purge amount because, as noted in this Court's September 14, 2011 Order, he has a $40,000.00 retirement account, from which he can take an advance." The Former Husband appealed this amended order, arguing that there was no indication in the order or at the two hearings that he has a retirement account, a fact which the Former Wife conceded. The District Court affirmed the finding of contempt, reversed the part of the order imposing incarceration:

1. "Because there was no evidence that the Former Husband had the present ability to pay the purge amount, the trial court erred in ordering that he be incarcerated…. Therefore, that portion of the order imposing incarceration upon the Former Husband is reversed."

2. "On remand, it should be noted that the trial court has yet to consider the Former Husband's petition to modify alimony which has been pending since December 18, 2009…. [H]e should have the opportunity to have his motion heard."

Arias v. Arias. 38 FLW D2473 (Fla. 2d DCA 2013)

Third District

TRIAL COURT ERRED IN HOLDING HUSBAND IN INDIRECT CRIMINAL CONTEMPT WHERE COURT DID NOT ISSUE SHOW CAUSE ORDER, AND NEITHER NOTICE OF HEARING ON WIFE'S CONTEMPT MOTIONS NOR MOTIONS SHE FILED PLACED HUSBAND ON NOTICE THAT HE POTENTIALLY FACED CRIMINAL PENALTY AT CONTEMPT HEARING

The Former Wife, initiated the contempt proceeding below in this dissolution of marriage case. She filed numerous motions for contempt seeking compliance with a court order that prohibited the Former Husband from having any direct or indirect contact with any of the tenants of a multi-unit residential apartment building, which was a marital asset. The Former Husband appeared at the contempt hearing at which he admitted that he had violated the terms of the court's order. However, the trial court did not issue a show cause order. In addition, neither the notice of hearing on the Former Wife's various contempt motions nor the motions she filed

placed the Former Husband on notice that he potentially faced a criminal penalty at the contempt hearing. The Former Husband appealed the finding of indirect criminal contempt and order of commitment, alleging that the trial court failed to comply with the requirements set forth in Florida Rule of Criminal Procedure 3.840. The District Court agreed and reversed:

1. "Rule 3.840 sets forth the procedural safeguards that a court must enforce prior to the imposition of a sentence for indirect criminal contempt. The defendant must receive notice of the essential facts that constitute the criminal contempt and have an opportunity to show cause why the sentence should not be imposed."

2. "The court . . . did not issue a show cause order, and neither the notice of hearing on the wife's various contempt motions nor the motions she filed placed the husband on notice that he potentially faced a criminal penalty at that contempt hearing. Thus, the court's finding of indirect criminal contempt constituted fundamental error."

Anton v. Anton, 106 So.3d 34 (Fla. 3d DCA 2013)

Fourth District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT PROVISION OF FINAL JUDGMENT REQUIRING FORMER HUSBAND TO MAINTAIN CERTAIN AMOUNT OF LIFE INSURANCE WAS A SUPPORT OBLIGATION ENFORCEABLE BY CONTEMPT.

The trial court found the Former Husband in contempt for failing to maintain the amount of life insurance required per the parties' property settlement agreement and final judgment of dissolution of marriage. The trial court then ordered the Former Husband to either secure the insurance or deposit cash of an equivalent amount in an account for the Former Wife's benefit, should he predecease her. The Former Husband appealed, contending that the final judgment did not provide for alimony or other support for the Former Wife; thus, he argued, the life insurance was part of the equitable distribution of property and a breach of that obligation was not enforceable by contempt. At trial, however, the Former Wife argued to the contrary, stating that the provision of life insurance was in the nature of support. The District Court affirmed:

1. "Based upon the evidence presented, the trial court did not abuse its discretion in determining that the life insurance provision was a support obligation enforceable by contempt."

2. In a footnote, the Court added: "Of course, as the former husband pointed out at the final hearing, if it is an obligation of support, then it is modifiable. Earlier in the proceeding, the former husband petitioned for modification to end the life insurance premiums because of his total disability. The wife defended, claiming the life insurance was part of an equitable distribution scheme and thus not modifiable. The husband then voluntarily dismissed his petition, and the former wife began these contempt proceedings, taking the contrary position that the insurance was a support provision and thus enforceable by contempt. Principles of judicial estoppel would preclude the former wife from maintaining in any subsequent proceedings that the insurance provision was part of equitable distribution of property and thus not modifiable."

Morrell v. Morrell, 103 So.3d 985 (Fla. 4th DCA 2013)

CONTEMPT ORDER SUFFICIENTLY DETAILED MOTHER'S NONCOMPLIANCE WITH TIME-SHARING PROVISION OF FINAL JUDGMENT BY QUOTING PORTION OF AGREEMENT STATING THAT FATHER HAD TIME-SHARING FOR SUMMER AND EXPLICITLY STATING THAT MOTHER WILLFULLY FAILED TO COMPLY WITH ORDER THROUGH HER OWN "FAULT AND NEGLECT."

The parties were married and had a child. In June 2010, the trial court entered a final judgment of dissolution of marriage incorporating a marital settlement agreement (MSA), which provided that the Mother could relocate outside Florida, and that if she did "the [Father's] time sharing shall consist of Spring Break ... and four consecutive weeks each summer." The Mother relocated to Texas with the child. Subsequently, the Father filed a motion for contempt, alleging that the Mother failed to make the child available for summer timesharing. He requested that the Mother be found in willful contempt and that he be awarded "makeup time-sharing" and attorneys' fees. On August 13, 2012, the Father's attorney sent a notice of hearing to the Mother in Texas, advising her that a contempt proceeding would be conducted on August 28th. That hearing was later cancelled. On August 31, another notice of hearing was sent to the Mother informing her that the contempt hearing would be held on September 12. According to the Mother, however, she did not learn of the rescheduled hearing until September 6th. She claimed that she sent an email to the Father's counsel on September 11th informing him that she could not attend the hearing. The court held the contempt hearing on September 12th. The Father was present with his attorney, but the Mother was not. Thereafter, on September 21st, the court entered an order finding the mother in civil contempt of court, and ordering her to pay the Father's attorneys' fees. The Mother filed a notice of appeal. She then filed a motion to stay the order adjudicating her in contempt, which the trial court denied, and later a motion for rehearing on the motion to stay. On appeal, the Mother argued that she had insufficient notice of the contempt hearing. Finding that she had not preserved her objection to the issue of notice, the District Court affirmed:

1. "We determine that the time-sharing provision was clear in its dictates and left no doubt as to the Mother's responsibilities in that regard. [It] laid out a specific procedure and timeline for the Father to inform the Mother of the summer time-sharing schedule and the Father presented sufficient evidence that he had complied with the requirements applicable to him. The FAther alleged that the Mother failed to make the child available for time-sharing and the court found that she willfully failed to comply."

2. "We find that the trial court's contempt order sufficiently detailed the Mother's noncompliance with the time-sharing provision of the final judgment. The trial court quoted the portion of the marital settlement agreement stating that the Father had time-sharing for the summer and the order of contempt explicitly stated that the Mother willfully failed to comply with the order through her own 'fault and neglect.'"

3. "Even if the written order failed to adequately describe the Mother's noncompliance, we would affirm the trial court because the Mother has failed to provide a transcript of the hearing. We will not assume that the trial court committed reversible error during the course of a hearing that we cannot review…. The trial court very well may have orally pronounced its findings regarding the Mother's noncompliance at the contempt hearing. We will not speculate to the contrary."

Nunes v. Nunes, 112 So.3d 696 (Fla. 4th DCA 2013)

WHERE AWARD OF ALIMONY AND CHILD SUPPORT IS REVERSED, DETERMINATION THAT FORMER HUSBAND WAS IN CONTEMPT FOR FAILURE TO PAY SAME MUST ALSO BE REVERSED.

Reversing the determination that the Former Husband was in contempt, the District Court held:

1. "This court has previously found that where an award is improper and requires reversal, a finding of contempt based upon such award must also be reversed."

2. "Because we reverse the award of alimony and child support, we reverse the determination that Former Husband is in contempt."

3. "On remand, we note that the trial court needs to identify the source of payment for the purge amount only if a coercive sanction is imposed."

Brennan v. Brennan, 122 So.3d 923 (Fla. 4th DCA 2013)

TRIAL COURT DID NOT ERR IN DENYING FATHER'S SECOND AMENDED MOTION FOR CONTEMPT AND ENFORCEMENT OF TIMESHARING AGREEMENT WHERE MOTION WAS BASED ON CLAIM THAT FATHER WAS DENIED SUMMER BREAK TIMESHARING, BUT LANGUAGE OF FINAL JUDGMENT STATED THAT SUMMER TIMESHARING WAS TO OCCUR AFTER MINOR CHILD STARTED SCHOOL, A CIRCUMSTANCE WHICH HAD NOT YET OCCURRED.

The minor child herein was born on August 29, 2008. On September 29, 2010, the trial court entered a final judgment of paternity, which incorporated a parenting plan. Under the plan, the Father had timesharing of the parties' child on weekends. And although the Father disputes this point, the plan provided that summer timesharing was to begin after the minor child started school. The final judgment was later amended in some respects following an appeal and remand.

The parenting plan set forth in the original final judgment included the following section regarding scheduling: 5. Summer Break (Choose only one) [X] The parents shall divide the child's Summer Break. During [X] even numbered years, the [ ] Mother [X] Father shall have the child(ren) from ___ one day _____ after school is out for 4 consecutive weeks. The other parent shall have the child(ren) for the remainder of the summer break. The parents shall alternate the first and second portions of the Summer Break in this fashion each year unless otherwise agreed in writing.

In June 2012, the Father filed his Second Amended Motion for Contempt, claiming, among other things, that he was denied summer break timesharing. Without warning, and without waiting for a hearing on his motion, the Father took the three-year-old child in July 2012 and kept her for four consecutive weeks, asserting that the parenting plan gave him the right to do so. The Mother maintained that the Father was not entitled to four consecutive weeks of visitation time in the summer until the child started school. Consequently, she filed a verified emergency motion for return of the child. The trial court, however, denied the request for an emergency hearing.

In November 2012, the trial court held a hearing on the Father's Second Amended Motion for Contempt. The Father stipulated that the child was not yet in school and would not begin kindergarten until August 2013. After reviewing the language of the final judgment, the trial court noted that it "plainly states that summer timesharing is to occur after the minor child starts

school." The trial court found that the Mother was not in contempt "for failing to provide the child to the [father] for summer timesharing" in its Order on Respondent's Second Amended Motion for Contempt and Enforcement. Thereafter, the Father appealed. In this regard, the District Court reversed:

1. "We agree with the trial court's interpretation of the summer break provision of the parenting plan and affirm the court's ruling on this issue."

2. "By referring to the child's summer break and stating that the Father shall have the child in even numbered years from one day after school is out, the Summer Break provision is necessarily referring to a time when the child is of school age and is on break from school."

3. "We conclude that the Summer Break provision is unambiguous even without the additional language: '*BEGINS ONCE CHILD STARTS GRADE K*.'"

Williams v. Lutrario, 131 So.3d 801 (Fla. 4th DCA 2013)

Fifth District

TRIAL COURT DID NOT ERR IN HOLDING HUSBAND IN CONTEMPT FOR FAILING TO PRODUCE FINANCIAL RECORDS RELATING TO 401(k) ACCOUNT NECESSARY FOR WIFE'S PREPARATION OF QDRO.

The parties were divorced on April 28, 2009. The final judgment gave a portion of the Former Husband's 401(k) to the Former Wife and required her to prepare the Qualified Domestic Relations Order ("QDRO"). The Former Husband was required to execute and provide all the documents necessary to facilitate the preparation of the QDRO, including monthly and year-end statements for his 401(k) account if he had access to them. In the over three years since the final judgment, the Former Husband still had not provided any records so that the QDRO could be completed. So, the Former Wife filed a motion for contempt. At the contempt hearing, the Former Wife's counsel explained the posture of the case and what she was seeking. The Former Husband appeared by phone and was unsworn. He testified, albeit not under oath, that he did not have the records, that he only had access to the 401(k) records through a computer link, and that they went back only two years. The trial court held him in contempt for failure to comply with the final judgment and awarded the former wife $2,500 in attorney's fees, an award that was not based on evidence presented at the hearing, rather solely on the Former Wife's attorney's response of how much he wanted. The Former Husband appealed. The District Court affirmed the finding of contempt, but reversed as to the attorney's fees award:

1. "Although the procedure was somewhat unconventional, we find that the lower court's finding was not unwarranted in light of the fact that the Former Husband has failed to comply with the final judgment entered more than three years prior."

2. "Although the Former Husband indicates the 401(k) account records are only available online, it is hard to imagine that [he] is unable to gain access to these records. We are quite certain that his employer can provide him with the necessary documentation relating to his 401(k) so that the QDRO can be completed."

3. "We find no issue with the court's order of the court as it relates to the obligation of the Former Husband to provide the necessary documents."

Ingram v. Ingram, 115 So.3d 1107 (Fla. 5th DCA 2013)

TRIAL COURT DID NOT ERR IN DENYING CONTEMPT MOTION ALLEGING VIOLATIONS OF A SUPERSEDED CHILD CUSTODY AND CONTACT ORDER.

The Former Wife appealed from an order denying her motion for contempt alleging violations of a superseded 2005 child custody and contact order by the Former Husband. The District Court affirmed and held:

1. "Because the order which [the Former Wife] alleges [the] Former Husband violated was modified in 2010 to give [him] sole custody because of [the Former Wife's] incarceration, the trial court properly denied the contempt motion."

2. "The issues that [the Former Wife] seeks to argue on appeal will necessarily be addressed when the trial court hears [her] petition to modify the 2010 order, which is currently pending below."

Smiley v. Smiley, 123 So.3d 140 (Fla. 5th DCA 2013)