Case Law Summaries*
May 2014 thru August 2014

May 2014

First DCA

Sanford v. Davis, *child support modification & proper pleadings*. Trial court modified an existing administrative child support order without a request for modification and without appropriate findings of fact, so the FJ was reversed.

Sharpe v. Stanley, *time for appeal*. The petitioner requested belated appeal because she was not provided with a copy of the Final Judgment of DOM. However, the appellate court did not have the authority to extend the jurisdictional time limit for the appeal. Rather, the proper remedy was a Rule 1.540(b) motion in the trial court and a request to preserve the right to appeal.

Second DCA

Valenta v. Valenta, *child support modification; private school tuition as basis for deviation*. GM abated mother's child support obligation due to her "extraordinary efforts" which involved her agreement to pay 100% of the child's private school tuition. This portion of the Final Judgment was affirmed, but the Final Judgment did not clarify that father was no longer responsible for the private school tuition, so that portion of the FJ was remanded for clarification.

Rivero v. Leal, *sanctions for frivolous pleadings; child support*. Father (pro se litigant) sought to overturn order establishing child support obligation, including arrears. The court cautioned father against filing further frivolous pleadings and threatened to impose sanctions for additional frivolous challenges to order.

Third DCA

Turnier v. Stockman, *parenting/timesharing/school choice*. Trial court determined that the child should reside with father during the majority of the school year so that she could attend school for the deaf and blind in St. Augustine (child and mother previously resided in Dade County). The parties and the child have all been deaf since birth. Mother wanted the child in mainstream school; father wanted the child to attend a school for deaf children. After the trial the trial court determined that it needed a guardian ad litem to assist it in its determination and the trial was continued. However, the court could not find a GAL who used sign language. Mother asserted that the trial court committed error in rendering its decision without the assistance of a GAL. The Third DCA rejected this argument, and reasoned that the court's statement regarding the necessity of a GAL was akin to an interlocutory order, which can be modified at any time, and mother never filed a motion to appoint a GAL.

Under the statute, the court was not required to appoint a GAL and therefore it was not error for the trial court to not appoint the GAL notwithstanding its prior statement at the conclusion of the initial portion of the trial. Mother also argued that the trial court erred by establishing a parenting plan without considering expert testimony, but this argument was not supported by law, and the final judgment was supported by competent, substantial evidence, and was therefore affirmed.

Sanchez v. Marin, *DVI; due process, notice and admissibility of subsequent events as evidence*. The parties were business partners (and aunt-nephew) in which they operated an auto sales business. The relationship soured and a civil lawsuit ensued. Appellee filed a DVI petition against Appellant because he threatened to "burn all of this" [the business] and later he drove by the business. The temporary petition was denied but a final hearing on the permanent injunction was set. Appellee sought to admit additional subsequent events in support of her petition, which the trial court allowed over Appellant's objection. After a hearing, the trial court entered the permanent injunction against Appellant based upon the subsequent events, which were not included in the initial petition. The Third DCA reversed the entry of the permanent injunction because Appellant did not have proper notice or an opportunity to be heard regarding the subsequent events that was admitted into evidence but not included in the allegations of the initial petition. Appellee should have amended her petition if she wanted the subsequent events to be considered as evidence at the final hearing.

LiFleur v. Webster, *parental responsibility*. Trial court erred by denying natural mother's motion to set aside and vacate temporary order granting sole parental responsibility to father that was entered due to her history of mental illness and ordering that sole parental responsibility remain with stepmother where father was unable to exercise parental responsibility and time sharing due to his incarceration and stepmother took no legal action to intervene in matter.

Fourth DCA

Kozell v. Kozell, *child support modification*. Former wife's motion for rehearing was granted and Fourth DCA affirmed trial court's denial of former husband's petition for downward modification of child support based upon his decrease in income. Former husband was a self-employed entrepreneur who owned several companies. The GM found that he was in "complete control of how much income he receives and when he receives the income" and that former husband was able to "manipulate his income every year." Nonetheless the GM decreased the amount of former husband's child support obligation. On former wife's objections/exceptions, the trial court reversed the GM's findings. Former husband appealed. The Fourth DCA ruled that the trial court correctly determined that the GM misconceived the legal effect of the evidence based upon his findings of fact regarding former husband's ability to manipulate his income, which support the trial court's conclusion that the

change in former husband's income was voluntary. Additional evidence demonstrated that former husband's decrease in income was not unexpected at the time of the entry of the final judgment. Therefore, former husband failed to satisfy his burden of proving a material, unanticipated, substantial change in circumstances not contemplated at the time of the entry of the final judgment. The Fourth DCA also noted that former husband failed to timely file a motion to disqualify the judge and therefore the Fourth DCA did not have jurisdiction to review the order, but concluded that former husband's motion was meritless anyway.

Aquilina v. Aquilina, *alimony*. The parties agreed that former husband was entitled to permanent alimony but disagreed upon the amount. They agreed on ED but not the manner of distribution, as former husband sought to have the marital home and its associated debt allocated to him, and to have the monthly mortgage payment considered by the court when fashioning an alimony award. The trial court granted former husband's request but also determined that if the mortgage payment no longer existed, such would not be considered a determination that such a change in circumstance was not anticipated. Former wife argued that it was error to allocate the debt to husband and consider the payment in his alimony award because the payment was scheduled to be paid off soon. She also argued that the language regarding the change in circumstances set forth a standard contrary to law. The Fourth DCA affirmed the ED allocation but reversed the language regarding the standard for modification, which prohibited former wife from seeking to modify the alimony award when former husband paid off the mortgage or other large expense because it was anticipated. The Fourth DCA ruled that this language was patently inequitable, and that the trial court erred by failing to consider the likely reduction of his expenses once the loans/mortgage were paid off.

Fichtel v. Fichtel, *alimony; attorneys fees*. Parties were married for 19 years. Wife left teaching position due to health reasons but husband did not agree that she would not return to work. Wife challenged trial court's decision to award durational, as opposed to permanent alimony, but the Fourth DCA affirmed the trial court's decision to award durational alimony based upon the factual findings. However, the trial court did not include sufficient findings on the issue of attorneys' fees in which it only ordered husband to pay 50% of wife's attorneys' fees and therefore the judgment was reversed on this issue. (Wife challenged this issue given the disparity in the parties' incomes, which was a factor that the trial court should have considered).

Garvey v. Garvey, *post judgment modification of support and attorneys fees*. Motion for re-clarification was granted and the opinion of March 26, 2014 was substituted. The only substantive change between the opinions appears to be the change related to the Fourth DCA's ruling as it relates to attorneys fees and the need/ability to pay analysis. Former husband entered into an MSA in which he agreed to pay permanent alimony. At the time, he had multiple sclerosis (MS) but this was not mentioned in the MSA. Former husband filed a supp petition to modify the alimony because he could no

longer work due to his MS. After an evidentiary hearing, the trial court denied former husband's SP because it was contemplated at the time of the entry of the MSA/FJ that his MS would deteriorate such that he was no longer able to work. It also ordered former husband to pay former wife's attorneys fees. The Fourth DCA ruled that generally a deterioration in health can support a reduction of an alimony obligation. It further ruled that "predictability of the occurrence is the cornerstone to any analysis." Knowledge of a possibility, standing alone, is insufficient to preclude a modification of alimony when the possibility materializes or otherwise comes to fruition. The trial court also erred in denying the SP because it ruled that former husband had a heavier burden to meet given that the parties entered into a settlement agreement to establish the support obligation as opposed to a court order because it ignored the statutory amendment in which the burden is the same on a modification of support whether the modification is of a settlement agreement or a court order. Additionally, the Fourth DCA determined that, with respect to attorneys' fees, to the extent the trial court ordered former husband to pay former wife's attorneys' fees based upon the prevailing party clause of the parties' MSA, the attorneys fee award was reversed. However to the extent that it was based upon need and ability to pay, it was upheld, and former husband did not establish reversible error.

Horowitz v. Horowitz, *jurisdiction over post-judgment matter pending appeal.* Former wife filed petition for writ of prohibition to prevent the trial court from exercising jurisdiction over former husband's modification of support matter while appeal was pending. The Fourth DCA denied former wife's writ, and ruled that the trial court could exercise jurisdiction pursuant to Florida Rule of Appellate Procedure 9.600(c) on certain matters. However, the trial court could not enter a final judgment adjudicating the post-judgment supplemental petition until the former wife's appeal was final. It could only enter temporary orders.

Kunkel v. Stanford, *DVI.* Appellant had a DVI entered against him on behalf of his granddaughter based on testimony of his former wife that he tried to enter their gated community, the child cried hysterically in his presence, he had committed "verbal abuse" in the past, and he was not "not well" and needed psychiatric help. The DVI was reversed because the trial court did not find that there was an act of domestic violence or that there was a reasonable fear of imminent bodily harm by Appellant against the child.

Fifth DCA

In re the Adoption of DPP (GP v. CP), *same sex adoption; subject matter jurisdiction; estoppel.* Appellant challenged trial court's order vacating adoption on the grounds that it did not have subject matter jurisdiction to render the final judgment of adoption to the two unmarried women involved in a committed relationship. They jointly agreed that they would have Appellee conceive a child and therefore Appellee was the natural parent. They both raised the child during the first 4 years of the child's life. They later jointly petitioned to have Appellant adopt the child, which was characterized as a step-parent uncontested adoption.

Later, the women separated but continued to co-parent. Then the Appellee (natural mother) sought to have the final judgment of adoption set aside for lack of SMJ because the Appellant was not qualified to seek a step-parent adoption. The trial court agreed and determined that the final judgment was void.

The Fifth DCA reversed, and held that trial court had SMJ over the case based upon its authority over a general class of cases, rather than on the particular facts of an individual case. A challenge to SMJ is proper only when the trial court lacks authority to hear a class of cases, and not that it lacks authority to grant the relief requested in a particular case. The trial court had authority to adjudicate the adoption case. Thus, the judgment of adoption was not void. Moreover, the trial court's focus on the parties' status as unmarried adults and the erroneous caption/title of the petition was misplaced because these were pleading and procedural deficiencies, and not jurisdictional defects. The trial court had the inherent authority to determine issues related to child custody and enter orders appropriate to the child's welfare and therefore it was erroneous for the trial court to determine it did not have SMJ.

Finally, the Fifth DCA held that the Appellee was estopped from challenging the validity of the adoption that she helped procure, particularly after co-parenting with Appellant. The Fifth DCA ruled that it would be unconscionable to allow the Appellee from invoking the jurisdiction of the court for the sole purpose of creating a parent-child relationship band then allow her to destroy it because her relationship with Appellant ended. The Fifth DCA remanded the case to the circuit court with instructions to establish a parenting plan and child support.

Smith v. Manno, *DVI dismissal.* Trial court erred by dismissing Petitioner/Appellant's petition for protection against domestic violence without holding an evidentiary hearing. The basis of the trial court's dismissal was that the respondent had a pending criminal case in which the conditions of his bond prohibited contact with the petitioner, and there was "no good reason to have these two at the same time." The Fifth DCA reversed, noting that the trial court was required to hold an evidentiary hearing if a petitioner alleges facts sufficient to establish a reasonable fear of imminent bodily harm.

Wilks v. Cronin, *modification of timesharing/parenting.* Former husband filed motion to modify parenting plan, and former wife filed a motion to dismiss, which was granted. Former husband appealed. The Fifth DCA ruled that there was no competent, substantial evidence to support the trial court's conclusion that there was no substantial change in circumstances because the trial court failed to consider all of the factors of Section 61.13(2)(c), F.S. The Court further noted that involuntariness of the change is not a requirement to support a substantial change in circumstances under the statute – thus, the former husband's shift change through his employer

might be sufficient to warrant a modification provided that the trial court analyzed the factors of Section 61.13 and considered the best interests of the child.

DOR v. Garmon, *child support modification*. Trial court abused its discretion by decreasing payor's child support obligation because payor failed to establish a substantial change in circumstances.

Alls v. DOR, *paternity*. Father appealed order directing him to submit to a paternity test. Mother was married to someone else at the time, and therefore the trial court erred in entering its order without first conducting a Privette hearing/analysis.

Nettles v. Hoyos, *stalking injunction and discovery*. Trial court granted a motion for protective order, preventing a party from conducting any discovery before an evidentiary hearing. The Fifth DCA reversed, noting that the trial court must balance the need for an expedited hearing and the need to ensure a party's DP rights are protected, including discovery. The trial court has the discretion to limit the scope of discovery on a case-by-case basis.

June 2014

First DCA

Mitchell v. Mitchell, *attorneys fees*. Award of attorneys fees reversed because final judgment failed to make specific findings as to the number of hours expended by former wife's attorney or whether the hours were reasonable. Generalized findings in this regard are inadequate.

Berry v. Berry, *recusal; writ of prohibition*. Court entered writ of prohibition based upon recusal filed by party due to ex parte communication by judge, even though the Court "ascribe absolutely no improper motive to the trial judge's actions…"

Second DCA

Grove v. Grove, *compliance with admin order; proper notice*. Trial court erred by ordering husband to comply with what appears to be a standing administrative temporary order that wife's counsel served upon husband via a notice. The Second DCA ruled that the husband "was not on notice that the trial court was going to mandate compliance with the Notice that concerned his financial affairs and the minor children, including contact, parenting, and other aspects of his relationship with the child."

Alderman v. Thomas, *DVI*. Although the victim presented evidence that she had been a victim of dating violence at her house on one occasion, she failed to present evidence that she had reasonable cause to believe that she was in imminent danger of

becoming a victim of dating violence in the future. There was no evidence that the Appellant had threatened her or done anything that would support an objective fear of imminent danger based upon the specific facts of the case. Although the victim claimed that the Appellant stalked her, because most of the acts of stalking occurred when they were dating "on and off" and because the victim did not testify as to the nature of the communications or how she reacted to them, it cannot be said that the Appellant's behavior constituted stalking or would reasonably cause the victim to fear that she would be a stalking victim in the future. She also failed to show that his actions caused her "substantial emotional distress, that they served no legitimate purpose, that they were done willfully or maliciously, and that she had an objective fear that they would continue in the future." Her testimony was insufficient because it was too "vague to demonstrate that she had a reasonable cause to believe she was in imminent danger of becoming the victim of future stalking." Thus the trial court erred in entering the DVI. The Second DCA also noted that the form for the DVI (Form 12.980(n)) does not provide a section in which to explain how the petitioner fears imminent danger of becoming the victim of an act of dating violence as required under Section 784.046(2)(b). The Second DCA suggested that the Family Law Rules Committee examine the form and determine whether an amendment was necessary. Be sure to include the reasons why in any Petition that you file for your client!

Gonzalez del Real v. Gonzalez del Real, *credits for payments on marital home during exclusive use and possession.* The final judgment was silent as it relates to the application of Section 61.077, Florida Statutes (party's entitlement to setoffs and credits for maintenance of home). Former Wife was awarded exclusive use and possession of the marital home, and she was required to pay for the maintenance of the home, including taxes, insurance, etc. until the children reached the age of majority. The trial court did not address credits or setoffs, and, therefore, the Second DCA remanded the case to the trial court to consider credits and the factors of Section 61.077.

Third DCA

Sepich v. Papadopoulos, *contempt.* The trial court erred by imposing a fine in a contempt order because the contempt order and the underlying order in which the Appellant was found to be in contempt was stayed pending the appeal of the orders. However, because the underlying order was affirmed, the Appellant was required to now comply with the underlying order of which she was found to be in contempt. The fine imposed in the contempt was reversed because of the stay.

Sanchez v. Suasti, *child abduction under HAGUE.* Father petitioned for the return of his children to the US from Brazil under the HAGUE. Parties lived in Brazil and had 2 daughters. They entered into an agreement regarding custody that was approved by the Brazilian court that granted mother custody and father timesharing/visitation. At some point in 2012 Mother took the children to Miami and stayed there after father

had signed an authorization permitting her to relocate to Ecuador through December 2012. Father filed a petition in Brazil to have them returned, which was denied based upon the authorization. He also filed a petition to have them returned in Miami, which the trial court denied and which was the subject of the appeal.

The Third DCA reversed. If children are wrongfully removed or retained within the meaning of the HAGUE, the child must be promptly returned to child's country of habitual residence unless certain exceptions apply. To demonstrate a wrongful removal, three elements must be satisfied: (1) the child has been retained outside the child's country of residence; (2) the wrongful removal must be a violation of the petitioner's "rights of custody" including the right to determine the child's place of residence; and (3) the rights of custody were actually being exercised but for the removal. The trial court determined that father did not have rights of custody but only rights of access. However, the Third DCA determined that the trial court erred in its determination because it overlooked the Brazilian appellate court's ruling that recognized father's right to prohibit mother from changing the children's country of residence without his consent. This constituted a "right of custody." The Third DCA noted that nothing in its opinion should be construed as a comment on underlying custody claims, which were properly determined by the Brazilian court.

Fourth DCA

Kershaw v. Kershaw, *temporary relocation order and return of child.* Mother filed a petition to relocate and a motion for a temporary order permitting her to relocate. Father filed a motion for return of the child on an emergency basis. He alleged that the mother unilaterally relocated and he requested temporary sole timesharing and a protective plan to address mother's actions. After a hearing the trial court denied mother's motion and granted father's motion. Mother appealed, arguing that the trial court improperly modified the parties' existing parenting plan without the appropriate findings of fact. The Fourth DCA ruled that the temporary order did not modify the parenting plan because it simply ordered that the child be returned to the county in which he previously resided and be enrolled in school there, which is consistent with the existing parenting plan.

White v. White, *enforcement of ED in MSA; contract interpretation*. Former wife filed a motion for entry of judgment against former husband as a result of his failure to assume and pay credit card debts consistent with the terms of their MSA. The trial court denied the former wife's motion, ruling that she had to pay the debts before former husband was required to pay her back even though the MSA did not require her to do so, and she appealed. The Fourth DCA ruled that because there was no requirement in the terms of the MSA that former wife first pay the debts and seek reimbursement before seeking relief from the court, the trial court erred by ordering such. The Fourth DCA remanded with instructions to pay the debts consistent with the terms of the MSA.

Toubail v. White, *DVI.* The victim failed to present evidence that she had an objectively reasonable fear of imminent harm after he yelled at her in a car, refused to let her out of the car, and took her phone away from her when she tried to call 911. Appellant was not arrested after the police arrived. One week later she contacted him so that they could exchange personal possessions. Then she obtained an *ex parte* injunction one week later. She testified that she filed it because her law enforcement friends encouraged her to do so. After a hearing, where it was determined that there was no prior history of violence, there were no threats, assaults, or batteries, and in which the victim never testified to being in fear of the Appellant aside from the incident described above, the trial court entered the injunction. The Fourth DCA reversed because there was no competent, substantial evidence to support a finding that the victim had a reasonable cause to believe that she was in imminent danger of becoming a victim of dating violence.

Elbaum v. Elbaum, *modification/termination of alimony; contract interpretation.* Former husband sought to modify or terminate his alimony obligation based upon former wife's supportive relationship. Pursuant to the parties' MSA, former husband was required to pay permanent alimony until age 62, or until former wife remarried or either party's death. The terms of the MSA also limited the circumstances under which former husband could modify his alimony obligation, including an unforeseen circumstance involving former husband's business or his health. Former wife moved to dismiss former husband's supplemental petition because the terms of the parties' MSA limited his ability to modify, and did not include a supportive relationship, and the trial court granted former wife's motion. Former husband appealed, claiming that the portion of the agreement stating that the alimony was sufficient to meet former wife's needs suggested that a change in such circumstances might enable a modification. The Fourth DCA noted that the MSA was subject to interpretation like any other contract. It noted that the parties may waive the statutory right to seek modification of alimony in a settlement agreement if the language of the agreement clearly and unambiguously expresses waiver or if the interpretation of the agreement as a whole can lead to no other conclusion but waiver. It further ruled that a party may not invoke the supportive relationship statute in order to modify or terminate alimony where such an action is prohibited under the terms of the parties' agreement. In interpreting the MSA, the Fourth DCA determined that the former husband clearly and unambiguously limited modification to certain situations set forth in the MSA, and waived his right to modify under the statute.

Baker v. Pucket, *motion to vacate DVI.* Appellant appealed the entry of an order denying her motion to vacate DVI entered against her without a hearing. The Fourth DCA reversed, and ruled that based on her allegations that she has had no contact with Appellee, that she has had no contact with Appellee, that she was incarcerated, and that she could not qualify for a work release program due to the injunction, she was entitled to an evidentiary hearing.

Kilnapp v. Kilnapp, *temporary injunction freezing assets; due process*. Trial court violated husband's due process rights by entering a temporary injunction freezing assets without affording him an opportunity to present evidence at an evidentiary hearing. He intended to call the wife and a forensic accountant at the 3 hour hearing. He testified that he unilaterally moved $3.5M in funds and paid off liabilities. The judge terminated the hearing early (after about 1 hour), stating that he was "going to happy hour." (Yes, it is in the record). One week later the judge entered an order requiring husband to repay the nearly $3.5M that he removed. The Fourth DCA reversed, holding that the trial court erred when it denied husband his basic and fundamental right to due process (the right to be heard and present evidence). Notably, the husband filed a motion to recuse the judge, which was granted.

Nathanson v. Rishyko, *contempt, appellate review*. Mother appealed an order finding her in contempt based on her assertion that the evidence failed to support a finding that her conduct related to parenting was intentional. However, the final judgment adjudicating her in contempt did not include any purge provisions and the trial court reserved ruling on sanctions. Therefore, the judicial labor on the contempt issue was not complete and consequently the appellate court did not have jurisdiction to review the contempt order.

Adelberg v. Adelberg, *imputation of income for purposes of alimony*. The parties met and retired when husband was terminated by his employer. Former wife owned and operated her own public relations/marketing business, which she closed after former husband's termination, from which he received a substantial severance. They agreed that they would both retire. Later former husband began a consulting business. The parties enjoyed a comfortable lifestyle and lived on investment income. When the parties separated former wife was 60 years old. A vocational rehabilitator testified about her earning capacity and identified jobs for which she was qualified. The trial court found that she lacked the skills necessary for the jobs identified by the vocational rehabilitator, and awarded her permanent alimony. Former husband appealed and the Fourth DCA reversed, holding that the trial court erred by not imputing income to her because her unemployment was self-imposed based upon her testimony that she was not looking for jobs and the expert vocational rehabilitator's testimony.

Former husband also claimed that the trial court erred by not imputing income to former wife generated from the sale proceeds of the parties' former home, along with other assets. The Fourth DCA remanded to the trial court to consider whether she used the proceeds from the sale of the former home to purchase a new home to assess her need for alimony. It also held that the trial court should have considered retirement funds available to former wife when determining and calculating her need for support. The trial court also should have considered her interest-generating bank

account in determining her need for support (and the same applied to husband when determining his ability to pay support).

Fifth DCA

Carnicella v. Carnicella, *delay of entry of final judgment, motion for new trial; ED.* A trial was held, at which the trial court ruled that neither party was entitled to attorneys' fees but not on other issues. Nothing happened for 3 months, then the parties both submitted proposed final judgments to the court. Another 6 months passed, after which the trial court adopted, verbatim, wife's proposed final judgment. In this FJ, the court included attorneys fees as a liability in the equitable distribution schedule (despite its oral pronouncement at trial to the contrary) and included other liabilities that contradicted the evidence at trial. The Fifth DCA reversed, holding that, based upon the content and effect of the final judgment and combined with the time between the trial and its entry, the trial court "either forgot or confused the central issues at trial." In addition, the trial court's failure to attribute any premarital equity in a premarital asset was error due to the undisputed and express testimony to the contrary.

Barfield v. Kay, *motion to vacate/modify DVI.* Due process required that Appellant was entitled to an evidentiary hearing on her motion.

K.S. & R.G. v. E.S. & T.S., *temporary custody by extended family pursuant to Section 751.02.* Natural mother and putative father appealed an order of the trial court granting the maternal grandparents temporary custody of the Appellants' minor child pursuant to Section 751.02, Fla. Stat. The Fifth DCA reversed because the Appellants were entitled to notice and an evidentiary hearing on the motion.

July 2014

First DCA

Parker v. Parker, *child support modification; contempt.* The trial court erred in calculating child support because the court used mother's gross income as reported in her bi-weekly pay stub. The First DCA noted that the definition of "gross income" under Section 61.30 included "allowances." Because of the miscalculation, the trial court was required to reconsider father's arrearages and was reminded by the First DCA that it must comply with Rule 12.615(d) regarding the contempt request.

Pryor v. Pryor, *appeal of order for temporary extension of DVI.* The First DCA vacated the order for a temporary extension of a DVI and dismissed the appeal because the temporary injunction had expired. Therefore, the issue was moot and the appeal was dismissed.

Holland v. Holland, *temporary modification of parenting plan*. The former wife filed two supplemental petitions to modify the parties' parenting plan, which was based upon the parties' agreed parenting plan ratified by court order. The trial court held a non-evidentiary hearing during which it indicated that it intended to enter a temporary order to modify because it found there was "no final order in place" because "no prior orders of court had used 'magical words of final judgment of parenting.'" The First DCA reversed, holding that (1) the record did not support the trial court's determination that there was no final order in place; (2) the trial court erred by modifying the parties' timesharing agreement without evidence to show a substantial change in circumstances; and (3) the trial court abused its discretion by modifying the timesharing agreement without findings or evidence that a modification is in the best interests of the children.

Second DCA

Mills v. Mills, *alimony; holiday timesharing*. The GM failed to make specific findings regarding wife's need for and husband's ability to pay alimony. Husband's financial affidavit reflected a monthly deficit. The alimony award was based primarily on the disparity in the parties' income. The Second DCA noted that the trial court is not requires to equalize a parties' income, and further noted that the parties lived beyond their means during the marriage and consequently incurred debts. Thus both parties were in a situation in which their incomes could not cover their expenses. The alimony award was reversed. The Second DCA also ruled that the trial court also erred by adopting a parenting plan that failed to include a holiday timesharing schedule.

Branson v. Rodriguez-Linares, *DVI for cyberstalking*. The trial court entered an injunction based upon its conclusion that the Appellant stalked the Appellee via email. Although the Appellant did not threaten the Appellee, he sent about 300 emails in a month and a half. Appellant argued that the injunction should be reversed because he did not threaten the Appellee. The Second DCA disagreed and affirmed the entry of the injunction. The Second DCA analyzed the stalking statute and concluded that the statute plainly permitted the entry of an injunction against a person who stalked a victim, and proof of recent stalking can be sufficient to establish an act of violence required for the issuance of a DVI under Section 741.30(1)(a).

Egle v. Krinsk, *durational alimony*. The trial court entered a final judgment awarding durational alimony for a period that exceeded the length of a marriage, which was improper pursuant to the statute and contrary to the court's intent.

Third DCA

Futernick v. Trushina, *enforcement of sale of former marital home*. Trial court entered final judgment in favor of appellee, which ordered the appellants to specifically perform on their obligations under a contract with the appellee for the sale of a former marital home. Apparently one of the appellants had a right of first refusal pursuant to a marital settlement agreement. The Third DCA affirmed the judgment because the

contract for sale did not incorporate the marital settlement agreement, and because the appellants failed to comply with the conditions required to exercise the right of first refusal.

Fourth DCA

Steele v. Love, *imputation of income- gifts from parents*. The trial court imputed income to husband that consisted of money received from him by his parents. The Fourth DCA affirmed the imputation of this income because it qualified as "reimbursed expenses or in kind payments to the extent that they reduce living expenses" pursuant to the statute. Although gifts from parents were generally irrelevant for child support purposes, regular, periodic payments to a child by a parent are considered income for child support determination. In this case husband's parents paid for his living expenses for 19 months between the time of filing the petition for DOM and the trial while husband was starting his own business and was unemployed. The husband's father testified that it would continue to ensure that he and his granddaughter were healthy and happy and had a safe and secure environment in which to live. The Fourth DCA also affirmed the decision not to impute income to the wife because the husband failed to establish that she was voluntarily underemployed even though she was employed part-time (every other week), because she had custody of their son every other week.

Napoli v. Napoli, *contempt of temporary order*. The trial court held husband in contempt for failing to pay temporary support. The Fourth DCA reversed because the contempt order did not include written findings regarding husband's ability to pay and his willful refusal to comply with the order, which are required pursuant to Rule 12.615. The contempt order also imposed incarceration as a sanction but did not include a separate, affirmative finding that he had the present ability to pay the purge.

Sorgen v. Sorgen, *equitable distribution; characterization of inherited asset*. Before the parties were married, wife inherited a one-third interest in a home with her other 2 sisters. They rented the home and deposited the rental monies into a separate account. After the parties were married, the wife's sisters sold their interests in the home to wife. The parties renovated the home during the marriage and generated rental income, which was deposited into a joint account. The taxes and expenses for the home were paid from the joint account. The home was ultimately sold and the proceeds were placed into a joint account. After a trial, the trial court did not include wife's one-third interest in the proceeds from the sale of the home as a marital asset subject to equitable distribution. The Fourth DCA reversed, holding that because the proceeds from the sale of the asset was commingled into the parties' joint account, the asset became marital and subject to equitable distribution.

Fifth DCA

Maddox v. Bullard, *compulsory psychological exam*. This is not a family law case but it may apply to many cases and was interesting, so I included it. Appellant filed a petition for writ of cert with the Fifth DCA to quash an order compelling her to undergo a psychological exam. The Fifth DCA quashed a portion of the order because it failed to comport with Fla. Rule of Civil Procedure 1.360. The trial court failed to define the boundaries of the psychologist's exam as required by the rule.

Johnson v. Johnson, *attorneys fees*. The trial court held that it did not have jurisdiction to award fees for a motion filed by wife pertaining to her petition to relocate. The Fifth DCA reversed, holding that the trial court did have jurisdiction.

August 2014

First DCA

Chadbourne v. Chadbourne, *attorneys fees*. Husband left the 26 year marriage with a net worth of $17M, while she had just under $1M. To require her to pay her the remaining balance of her attorneys fees and costs would require an "inequitable diminution" of her equitable distribution award. The trial court abused its discretion by denying her request for attorneys fees.

Christensen v. Christensen, *child support*. Trial court failed to include alimony in its award of child support. It also improperly adjusted based on the assumption that the wife would exercise substantial timesharing.

Anderson v. Durham, *alimony modification*. Both parties filed supplemental petitions to modify wife's permanent alimony. The trial court denied both parties' supplemental petitions. The First DCA reversed the trial court's denial of former husband's alimony modification request. The trial court found that former husband satisfied the Pimm criteria for retirement and that former wife's request did not even support keeping the alimony at its current level. Despite this finding, the trial court denied former husband's request without explanation. The First DCA remanded with instructions to the trial court to explain the rationale for its denial.

Pierson v. Pierson, *decision making authority on religion*. Trial court gave the mother ultimate decision making authority over the children's religious upbringing and prohibited father from doing anything that conflicted with the Catholic religion. During the marriage the children were raised Catholic until the parties separated, at which time father became a Jehovah's Witness. The trial court found that the parties' eldest son was beginning to experience a substantial emotional problem due to being immersed in 2 religions simultaneously. The First DCA reversed and remanded, noting that parents have the right to direct the religious upbringing of their children, and that restrictions upon a parent's right to expose his or her child to his or her religious beliefs are consistently overturned absent a clear, affirmative showing that the religious activities at issue will be harmful to the child. IN this case, there was only the testimony of the children's Sunday school teacher regarding comments father had made. The First DCA ruled that this was insufficient evidence to meet

the requisite showing of harm to the child. Nor did the evidence support granting mother ultimate decision making authority regarding the children's religion.

Ballard v. Ballard, *equitable distribution; imputation of income based on involuntary retirement*. The trial court abused its discretion by including furniture that belonged to husband before the marriage in the equitable distribution schedule. It also abused its discretion by including a bank account in the EDS that had been depleted by the time of trial without any finding that husband had used the account improperly. In fact, husband had used the funds to pay for attorneys fees. Additionally, the trial court erred as a matter of law in construing Kaaa by excluding amounts the parties paid down on the mortgage as a marital asset. When marital assets are used during the marriage to reduce the mortgage on non-marital property, the increase in equity is a marital asset subject to equitable distribution. This includes passive appreciation during the marriage.

As for alimony, the trial court was not required to make findings of fact supporting the determination that husband's retirement was voluntary and that he had a higher earning capacity than wife in his denial of husband's request for alimony.

The trial court abused its discretion in awarding retroactive child support to wife without taking into account that husband paid some of the children's health insurance premiums. The trial court also abused its discretion by determining the amount of child support without imputing income to husband because it found that his retirement was voluntary.

Rolison v. Rolison, *relocation*. Father filed a petition for DOM and an emergency motion to compel mother to return the children to FL in Feb 2014. In Jan 2014 mother had moved with the children to GA. Father claimed that mother violated Section 61.13001, Florida's relocation statute. The trial court denied father's motion because the relocation statute only applied to a child's relocation or proposed relocation during a pending proceeding. In this case, mother had relocated with the children before the DOM case was filed. The First DCA affirmed the trial court's ruling because the plain language of the relocation statute applies only where a parent's principal place of residence changes at the time of the last order establishing or modifying timesharing or at the time of filing the pending action. Therefore, the mother did not have to seek father's permission before relocating to GA. Although the First DCA noted that the result was "troubling" it also noted that Legislature addressed the issue of a parent relocating before a pending action in Section 61.13(2)(a), which states in part that the court could enter a parenting plan even if a child was not physically present in the state at the time of filing a petition if it appears that the child was removed for the primary purpose of removing the child from the court's jurisdiction.

Antonacci v. Antonacci, *written order versus oral pronouncement at hearing*. The written order on rehearing failed to conform to the oral pronouncement at the hearing on the issue of the parties' pensions, which was error.

Second DCA

Fuller v. Fuller, *motion for contempt; oral versus written ruling*. The trial court orally denied the motion for contempt for lack of proof of a purge after a hearing. However, in a

subsequently entered written order, the husband was found to be in contempt and a money judgment was entered against husband. The request for incarceration was denied due to lack of proof of a purge. Husband argued that the trial court erred because it failed to find that he had the present ability to pay the court ordered alimony and because the trial court orally denied wife's motion for contempt. The Second DCA found that the trial court's oral ruling denying the motion for contempt was inconsistent with its written finding that husband was in contempt. It also noted that the record supported a finding of contempt because wife satisfied her burden and husband failed to dispel the presumption that he had the ability to pay. It appeared that the parties and trial court were only concerned with whether husband had the ability to pay the substantial purge and did not follow the procedure in Bowen.

Parrish v. Parrish, *Dismissal of DVI*. Appellant/Wife challenged the trial court's dismissal of her third temporary petition for DVI against her husband during their DOM proceeding. Wife filed a temporary DVI, which was granted. However, she dismissed the DVI after the parties reached a settlement on temporary issues and timesharing issues. She filed a second DVI that was dismissed because the court ruled that the events predated the parties' settlement agreement. She then filed a third DVI petition but the trial court again concluded that everything alleged in the third DVI petition predated the settlement agreement. This was error. The Second DCA ruled that the trial court erred by dismissing the petition without giving Wife the preliminary procedural due process required under the circumstances, as she was entitled to an opportunity to be heard. The Second DCA made it clear that it did not make any determinations regarding whether the third petition filed by Wife was sufficient, nor did it preclude either party from seeking alternative forms of relief in the DOM case.

Asterberg v. Russell, *psychological exam*. The trial court ordered former wife to submit to a psychological evaluation after it was discovered during a hearing on her motion for leave to amend her petition that the former husband had not seen the parties' daughter for several months despite a parenting plan giving him timesharing. He wanted to see the child but didn't want to force her to see him. The trial court surmised that if former wife was supportive of the relationship between the child and the father, he would have seen the child. The trial court emphasized that former wife was required to promote the relationship with father and *sua sponte* ordered wife to submit to a psychological exam, without any findings to support its ruling. The Second DCA reversed, noting that former wife's mental condition was not a material element of her motions set for hearing. There were no allegations regarding her mental state, nor was there any good cause established to warrant a psychological exam. Former wife was also not afforded notice that her mental state was at issue before it ordered the psychological exam. These errors were departures from the essential requirements of law.

Third DCA

Fourth DCA

Goff v. Goff, *child support modification*. Former husband filed a petition to modify his child support obligation based on an MSA in which he agreed to pay child support beyond the age of 18. Specifically, the parties' MSA stated that former husband's

obligation to pay child support would extend to the age of 21 if the child were enrolled in college and still living with former wife. The evidence at trial demonstrated that the child was attending UF (Go Gators!) in Gainesville but living in former wife's home during summers and breaks from school. The trial court denied former husband's supplemental petition because the child used mother's address for residency purposes. The Fourth DCA reversed and held that the trial court's interpretation of the parties' MSA was contrary to the plain language of the agreement. It noted that a person's residency is not necessary to show where a person was living, and that it was error to require former husband to pay child support for child beyond the age of 18 and after graduating from high school under the circumstances.

Selph v. Selph, *DVI*. Wife claimed that husband's dog attacked her when he told the dog to "get him." Wife filed a petition based on this incident approximately 6 months later, 3 of which involved no contact between the parties immediately preceding the filing of the petition. She did not seek medical attention for the attack. She testified that husband also threatened her immigration status and forced her to work long hours at his donut shop. The trial court took all these facts together and entered the injunction against husband. The Fourth DCA reversed, holding that the DVI was not supported by competent, substantial evidence.

Johnson v. McCullough, *child support*. Parties had two children and a parenting plan established in West Virginia. The parties both moved to FL but continued to follow the WV order. Mother filed a petition to relocate. After a trial, the trial court granted the relocation orally at the hearing. After the oral pronouncement, father's attorney raised the issue of child support and requested that the cost of any expenses for travel be deducted from his child support obligation. Apparently the trial court did not rule on child support until after it received a guidelines worksheet from mother. The trial court used all the figures on mother's worksheet, which contradicted the figures in father's financial affidavit. The Fourth DCA reversed the child support award, holding that the child support award failed to comply with the requirements of Section 61.30 and was not supported by competent, substantial evidence.

Fifth DCA

Bower v. Hansman, *child support in paternity*. The trial court erroneously included as income child support the mother received on behalf of a child from a prior relationship. The trial court was required to also determine the parties respective responsibilities for the child's medical expenses and child care costs.

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