FAMILY LAW
CASE SUMMARIES

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I. AGREEMENTS

A. Prenuptial Agreements

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EVIDENCE SUPPORTED TRIAL COURT'S CONCLUSION THAT PRENUPTIAL AGREEMENT WAS NOT REACHED UNDER DURESS, COERCION, OR OVERREACHING; PERIOD OF TEN DAYS PRIOR TO MARRIAGE IS SUFFICIENT TIME FOR ONE TO EXERCISE OPPORTUNITY TO REVIEW AGREEMENT AND SEEK ADVICE OF LEGAL COUNSEL.

The parties entered into a prenuptial agreement ten days prior to their marriage. Neither party had legal counsel but had discussed the agreement for several months. The wife was "an individual with a high level of education and business acumen who, having twice married, understood the significance of the document she was about to sign and chose not to seek the advice of a lawyer." The agreement essentially provided that each party's property at the time of the marriage would remain his or her separate property. The agreement included a section entitled "Pension Benefits" in which each waived his or her right to the other's such benefits. In his financial disclosure, the husband listed various pension accounts but did not specify the pension he would receive from his employer. The trial court found that there was sufficient mention of pension benefits to avoid a finding of fraud, duress or coercion and the District Court affirmed:

1. "We first address whether the agreement was reached under duress, coercion or overreaching. The record before us presents the former wife as an individual with a high level of education and business acumen who, having twice married, understood the significance of the document she was about to sign and chose not to seek the advice of a lawyer. And, while the parties disagreed over the amount of time the former wife had to contemplate the agreement, we hold that a trial court does not abuse its discretion by declaring that a period of ten days prior to the marriage is sufficient time for one to exercise the opportunity to review the agreement, and, if one so chooses, to seek the advice of legal counsel."

2. "We next address whether the former husband's failure to specifically disclose his airline pension plan constitutes fraud, deceit, or misrepresentation. The agreement specifically provided that each party shall retain as separate property all retirement accounts and property listed on the attached schedules."

3. "Additionally, the agreement included a provision specifically addressing pension benefits under its own section heading. The former husband's schedule of property referenced

"Retirement Plans (Keogh, 401(k), etc)" and specifically listed the former husband's 401(k) plan through his employer; however, no mention was made of the airline pension plan of which the former husband was a beneficiary."

4. "In this appeal, the former husband disclosed substantial assets, and the undisclosed pension plan can be understood to constitute only a small fraction of the former husband's total net worth. Moreover, the agreement included, under the section heading "Pension Benefits," a provision that explicitly waived each party's rights to the other party's pension benefits. [W]e consider the prominent mention of pension benefits in the content of the agreement to be similar to the listing of the 'exact value unknown' assets at issue in [an earlier case]. When considering the value of the employer pension in light of the other substantial assets that the former husband fully disclosed, the prominent mention of pension benefits in the body of the agreement is sufficient to provide the former wife with a general and approximate knowledge of the husband's resources."

Gordon v. Gordon, 25 So.3d 615 (Fla. 4th DCA 2009)

Fifth District

HUSBAND'S FINANCIAL DISCLOSURE AT TIME OF EXECUTION OF PRENUPTIAL AGREEMENT WHICH CONTAINED SOME, BUT NOT ALL, OF HIS ASSETS DID NOT INVALIDATE AGREEMENT IN PROBATE CONTEXT.

Prior to the marriage, the parties entered into an antenuptial agreement in which the Wife waived all her right to the Husband's property, including her right to an elective share. Following the Husband's death in 2006, his will was admitted into probate and all the property not devised to his wife was left to his lineal descendants. The Wife filed a notice of her election to take her elective share pursuant to section 732.702(1), Florida Statute (2006), and the antenuptial agreement. The trial court found that the Agreement was valid and enforceable, that the Wife had waived her right to an elective share of the estate and that the Husband's failure to disclose a minor asset did not affect the enforceability of the agreement. The District Court held that Florida law does not require prior disclosure of assets for an antenuptial agreement under the probate rules:

1. "Florida law does not require prior disclosure of assets for an antenuptial agreement. § 732.702(2). Recognizing this, Appellant argues that a disclosure, once made, albeit voluntarily, if inaccurate or fraudulent, invalidates the antenuptial agreement, citing [the dissenting opinion in an earlier Supreme Court decision]."

2. "Unfortunately for Appellant, that dissenting opinion has not generated a consensus either within the Florida Legislature or Florida Courts. We prefer, instead, to rely upon the binding majority opinion."

3. "[T]he law continues to accommodate the desires of older Florida residents to marry again without risking an unwanted disposition of a lifetime's assets due to a partial disclosure."

Foster v. Estate of Edward Gomes, 27 So.3d 145 (Fla. 5th DCA 2010)

B. Marital Settlement Agreements

First District

TRIAL COURT ERRED IN DENYING WIFE'S MOTION TO ENFORCE PARTIES' CONSENT FINAL JUDGMENT; FINAL JUDGMENT DID NOT CONTAIN A RESERVATION OF JURISDICTION THUS TRIAL COURT LACKED AUTHORITY TO CHANGE TERMS OF PARTIES' CONTRACT; EMAILS BETWEEN COUNSEL DID NOT CONSTITUTE A NOVATION OR CREATE A NEW CONTRACT.

The parties entered into a Consent Final Judgment which, in pertinent part, required the Husband to pay to the Wife a total of $65,470 in cash and to also transfer to the Wife 50% of the shares of an Oppenheimer Mutual Fund. The Husband was required to do so by August 1st. Prior to the deadline, the Husband sent the Wife two checks totaling $24,700 and $24,327, thus leaving a balance owed of $16,443 as to the cash payment. On July 31st, the Husband sent a letter authorizing his broker to transfer 100% of the shares in the mutual fund to the Wife. At the time, the Fund had a value of $29,477.84. In other words, the Husband was attempting to apply the cash value of his 50% of the Fund ($14,738.92) toward the outstanding balance due on the required cash payment. Before he authorized the transfer of the Fund, the Husband had advised his counsel that he did not have enough cash to pay the $16,443 owed to the Wife. An exchange of emails then took place between the parties' counsel. The Husband's attorney asked the Wife's attorney if she would accept stock from the Fund toward the outstanding balance and the Wife's attorney replied that it did not matter how the Wife got her money "as long as she got all of it." On August 1st, the Wife wrote to the broker of the Fund accepting only her 50% of the Fund. Since the two authorization letters did not match, the broker did not transfer any shares of the Fund to the Wife. The Wife then filed an enforcement motion which the trial court denied, finding that the Wife could have accepted the Husband's offer to transfer the entire Fund to her. The District Court reversed:

1. "A property settlement agreement that has been incorporated into a final judgment of dissolution of marriage is non-modifiable, regardless of either party's financial position."

2. "Here, the property settlement agreement was incorporated into the Final Judgment. Because the Final Judgment did not contain a reservation of jurisdiction, the trial court lacked authority to change the terms of contract the parties had agreed to and the court had adopted."

3. "The Husband agrees the property settlement agreement cannot be modified by the trial court. He attempts to distinguish the present case from the rule by arguing that the email exchanged between the parties' attorneys formed a novation, or substitute contract. The new agreement or contract, the Husband argues, involved the manner in which he would pay the balance of the Final Judgment. The Husband's argument ignores the fact that the Wife's actions in authorizing a 50% fund transfer in compliance with the terms of the Final Judgment serves as compelling evidence that she did not believe the settlement agreement or contract had changed."

4. "First, there is no competent, substantial evidence in the record to show the parties intended to form a new contract. Parties form a novation or new contract, only where there is mutual agreement to substitute an existing valid obligation with a new obligation."

5. "Four factors are necessary to prove the parties intended to create a novation: (1) the existence of a previously valid contract; (2) the agreement of all the parties to a new contract; (3) the extinguishment of the original contractual obligation; and (4) the validity of the new contract."

6. "[A] novation requires that a party show there is agreement to form a new contract. Here, the judge found a misunderstanding. A misunderstanding cannot result in agreement or to a 'meeting of the minds' required to form a contract."

7. "Second, the email - taken in the light most favorable to the Husband - consisted of the Wife demanding to be paid the amount owed. Due to transaction costs, the Fund's cash value would not equal its market value on any given day. If the Wife had agreed to accept the remaining 50% of the Fund, instead of cash, she would have incurred the transaction cost in converting the Fund to cash. This point is illustrated by the Husband's effort to transfer, instead of liquidate, the Fund."

8. "Nothing prevented the Husband from instructing his broker to transfer the 50% he was obligated to transfer to the Wife, to liquidate the remaining 50% of the Fund and to tender the proceeds to the Wife. If the Husband had proceeded in this manner, he would have succeeded in dispensing with 100% of the Fund and also satisfied his obligations under the Final Judgment. Instead, he hoped to transfer the entire fund, shifting the transaction costs to the Wife. This would not result in the Wife getting 'all of it.'"

Seawell v. Hargarten, 28 So.3d 152 (Fla. 1st DCA 2010)

TRIAL COURT ERRED IN DENYING WIFE'S MOTION TO ENFORCE PARTIES' CONSENT FINAL JUDGMENT; WHERE FINAL JUDGMENT OF DISSOLUTION PROVIDES FOR THE TRANSFER OF ASSETS, IT IS THE RESPONSIBILITY OF THE SPOUSE IN POSSESSION OF THOSE ASSETS TO EFFECTUATE THE TRANSFER.

The parties entered into a Consent Final Judgment which, in pertinent part, required the Husband to pay to the Wife a total of $65,470 in cash and to also transfer to the Wife 50% of the shares of an Oppenheimer Mutual Fund. The Husband was required to do so by August 1st. Prior to the deadline, the Husband sent the Wife two checks totaling $24,700 and $24,327, thus leaving a balance owed of $16,443 as to the cash payment. On July 31st, the Husband sent a letter authorizing his broker to transfer 100% of the shares in the mutual fund to the Wife. At the time, the Fund had a value of $29,477.84. In other words, the Husband was attempting to apply the cash value of his 50% of the Fund ($14,738.92) toward the outstanding balance due on the required cash payment. Before he authorized the transfer of the Fund, the Husband had advised his counsel that he did not have enough cash to pay the $16,443 owed to the Wife. An exchange of emails then took place between the parties' counsel. The Husband's attorney asked the Wife's attorney if she would accept stock from the Fund toward the outstanding balance and the Wife's attorney replied that it did not matter how the Wife got her money "as long as she got all of it." On August 1st, the Wife wrote to the broker of the Fund accepting only her 50% of the Fund. Since the two authorization letters did not match, the broker did not transfer any shares of the Fund to the Wife. The Wife then filed an enforcement motion which the trial court denied, finding that the Wife could have accepted the Husband's offer to transfer the entire Fund to her. The District Court reversed:

1. "First, the authorization letter sent by the Husband, unlike the one sent by the Wife, did not comply with the terms of the Final Judgment. Second, the Husband made no further effort to assure the Fund assets were transferred."

2. "Clearly, to avoid responsibility, an individual must be able to demonstrate that the failure of the transfer to occur was due to factors beyond their control. In essence, the Husband would be able to show, that in spite of his efforts, it was impossible to transfer the assets. Certainly, this is not the case here."

Seawell v. Hargarten, 28 So.3d 152 (Fla. 1st DCA 2010)

ERROR TO FAIL TO GIVE WIFE CREDIT FOR DEBTS WHICH SHE WAS ASSIGNED TO PAY WHERE THE DEBTS HAD EITHER BEEN SATISFIED, OR THE WIFE WAS STILL SOLELY OBLIGATED TO PAY THE DEBTS.

In a case apparently involving enforcement of the parties' settlement agreement, the District Court held:

1. "We affirm the trial court's interpretation of the debt provisions of the marital settlement agreement except for the court's failure to give the former wife credit for the debts totaling the amount of $8,307.62 which she was assigned to pay."

2. "It is undisputed that either these debts have been satisfied or the former wife is still solely obligated to pay the debts. In either event, she should have received appropriate credit."

Brown v. Holmes, 31 So.3d 955 (Fla. 1st DCA 2010)

Second District

WHERE CANADIAN DIVORCE DECREE AWARDED ALIMONY TO WIFE AND PARTIES RESOLVED A SUBSEQUENT ENFORCEMENT ACTION THROUGH A SETTLEMENT AGREEMENT WHICH PROVIDED FOR PREVAILING PARTY ATTORNEY'S FEES IN ANY FUTURE ENFORCEMENT ACTION, CANADIAN COURT'S SUBSEQUENT GRANT OF ANNULMENT BUT DETERMINATION THAT BECAUSE OF THE PARTIES' SIX-YEAR PUTATIVE MARRIAGE, THE PARTIES "SHALL BENEFIT FROM THE EFFECT OF THE JUDGMENT OF DIVORCE," TRIAL COURT ERRED IN DENYING WIFE ATTORNEY'S FEES WHEN IT FOUND HUSBAND IN CONTEMPT FOR NON-PAYMENT OF ALIMONY.

The trial court found the former husband in contempt for non-payment of alimony, set a purge amount, and entered a money judgment in the former wife's favor for the arrears. The trial court, however, denied former wife's request for prevailing party attorney's fees, reasoning the provision entitling her to prevailing party attorney's fees in the parties' 2004 settlement agreement did not apply because it had been based on the premise of a valid marriage. The District Court reversed:

1. "The request for fees does not require us to explore the equitable principles apparently at play in [an earlier case]. Rather, the real issue is the deference owed to the Canadian decree."

2. "In handling [the Wife's] motion for contempt and enforcement, the trial court was called upon to enforce a domesticated Canadian decree that specifically retained all accessory measures, despite the grant of annulment. Accordingly, [the Wife] is entitled to prevailing party

attorney's fees as an accessory measure that survived the annulment of her marriage to [the Husband]."
Deegan v. Taylor, 28 So.3d 227 (Fla. 2nd DCA 2010)

TRIAL COURT ERRED IN REQUIRING FORMER WIFE TO EXECUTE A RELEASE OF HER RIGHTS IN AN ANNUITY UPON THE DEATH OF THE HUSBAND; NOTHING IN THE PARTIES; PROPERTY SETTLEMENT AGREEMENT ALTERED HER VESTED RIGHT TO THE ANNUITY.

During the parties' marriage, the Husband was involved in a motor vehicle accident. He filed a personal injury claim and the Wife filed a loss of consortium claim which they settled against the driver. The settlement was funded through an annuity which consisted of six scheduled lump sum payments to be paid to the parties jointly through 2010 and thereafter a minimum of 240 monthly payments commencing in 2011. The annuity provided that if the Husband died, the Wife would receive payment for her consortium settlement at a rate of fifty percent of the originally scheduled payments for the remainder of her life. If the Wife died before the Husband, however, the payment amount would remain the same and he would receive payments for the rest of his life. If both the Husband and Wife were to die before the 240 installment payments were made, the estate of the last person to die would receive the remaining payments. In 1993, the parties began dissolution proceedings. As part of their property settlement, the Husband agreed to waive his interests in the Wife's pension and stocks and the Wife agreed to give up her interest in the annuity during the Husband's lifetime. The Wife's attorney prepared an agreement stating that the Wife waived her claim to the annuity but which also stated in relevant part, "Wife shall remain the irrevocable beneficiary and shall be entitled to receive by the existing annuity contract any remaining benefits payable upon the Husband's death." The Husband's attorney struck this language and later tried to get the Wife to sign a release, giving up her right to annuity payments after the Husband's death. The Wife refused, explaining that she understood that the agreement would be read as if the stricken language never existed. The District Court held:

1. "[The Wife] testified that her intent with regard to the stricken portion of the property settlement agreement was that the document would simply be read as if that sentence did not exist. [The Husband] likewise testified that the meaning of the strikeout was that the sentence was to be deleted from the document. [The Husband] argued that by agreeing to remove that sentence, [the Wife] had waived her right to receive payments from the annuity after his death."

2. "We reverse the order requiring [the Wife] to relinquish her rights in the annuity upon [the Husband's] death as well as the order sanctioning her for refusing to do so. The parties' property settlement agreement included a provision addressing the disposition of the parties' rights under the annuity. In that provision, [the Wife] expressly waived her interest in the annuity payment during [the Husband's] lifetime, nothing more . . . ."

3. "Absent a similar provision waiving her right to payments after [the Husband's] death, that right remained intact. When [the Wife] entered into the property settlement agreement she had a vested right to those payments by virtue of the annuity, and nothing in the property settlement agreement altered that right."

Stollmack v. Stollmack, 32 So.3d 756 (Fla. 2nd DCA 2010)

Third District

ERROR FOR LOWER COURT TO REWRITE PARTIES' SETTLEMENT AGREEMENT IN RULING THAT WIFE WAS ENTITLED TO IMMEDIATE ACCESS TO THE FUNDS OF FORMER HUSBAND'S RETIREMENT PLAN WHERE AGREEMENT ONLY REQUIRED TRANSFER BY QDRO AND THE RULES OF THE PLAN DID NOT PROVIDE FOR IMMEDIATE ACCESS TO THE FUNDS.

The parties entered into a Settlement Agreement pursuant to which the Wife was entitled to $270,000 by way of Qualified Domestic Relations Order ("QDRO") from the Husband's retirement plan. The Wife was also entitled to $140,000 by way of QDRO from Husband's 401(k). The agreement further stated that the marital house was to be sold but up until such time as the Wife received "the first funds" from either of the retirement plans, the Husband would pay the utilities on the home. Thereafter, once the Wife received "the first funds," she would be responsible for the utilities until the house was sold. The exact language of the Agreement was: "Upon transfer to the Wife of the first funds in either paragraph a [the retirement plan] or b [the 401(k)], the Wife shall be responsible for the payment of all utilities…." Some months later, the Wife petitioned the court after learning that access to the retirement plan was contingent upon a triggering event (retirement, disability, and separation from service). Although she had received full payment from the 401(k), she was not allowed to access the $270,000 because of the plan's rules. The Wife argued that the parties intended for her to receive all of the funds immediately. The Husband explained that per the rules of the Retirement Plan, the Wife would not be able to access the money until the triggering event and a portion of the plan was not even transferable through a QDRO. The trial court relied heavily on the above quoted language regarding the payment of utilities to find that the parties expected the Wife to receive all of the funds immediately. The court granted the Wife, among other things, the remaining balance of the 401(k), to satisfy the remaining debt. The District Court reversed:

1. "We review questions of law, including those pertaining to contract interpretation, de novo."

2. "We agree with [the Husband] that the Motion for Enforcement/Contempt should have been denied as there was nothing in this case to enforce."

3. "The Marital Settlement Agreement called for [the Wife] to receive $270,000 by way of a QDRO and that is what the Retirement Plan QDRO will accomplish. The trial court instead gave [the Wife] relief not contemplated under the marital settlement agreement, such as $20,800 of [the Husband's] post-dissolution 401(k) contributions and the accrued earnings on her unpaid portion of the Retirement Plan."

4. "Although a trial court may be motivated to do what it considers to be fair and equitable, it retains no jurisdiction to rewrite the terms of a marital settlement agreement. Under the guise of enforcing the agreement, the trial court here impermissibly modified it."

5. "It is undisputed that both the 401(k) and the Retirement Plan QDROs would transfer their specified amounts from [the Husband's] accounts to [the Wife], but there is nothing in that definition that can be read as containing a time limitation. Both parties approved the QDRO dealing with [the Husband's] retirement plan after reviewing the retirement plan rules. The QDRO clearly indicated that payment was conditioned upon Rocha reaching his 'earliest retirement age.'"

6. "We thus conclude that the trial court's interpretation of the marital settlement agreement and the two QDROs is not supported by the language of the agreement or the orders." ***Rocha v. Mendonca***, 35 So.3d 973 (Fla. 3rd DCA 2010)

Fourth District

WIFE'S CLAIM THAT TRIAL COURT ERRED IN ADMITTING PAROL EVIDENCE REGARDING WHEN THE HUSBAND WAS TO MAKE EQUITABLE DISTRIBUTION PAYMENT TO WIFE WAS NOT PRESERVED FOR APPEAL WHERE WIFE FAILED TO OBJECT TO ANY OF THE EVIDENCE OR TO HAVING AN EVIDENTIARY HEARING; PAROL EVIDENCE IS ADMISSIBLE TO CLARIFY THE INTENT OF THE PARTIES AS TO AN AMBIGUOUS PROVISION.

The parties' Marital Settlement Agreement required the Husband to pay the sum of $145,000.00 (less certain debt) to the Wife but did not specify a date for such payment to be made. The Agreement also recited that a certain building would remain the property of the Husband "in recognition and exchange for the funds" to be received by the Wife from the Husband. The building was the only asset of the Husband who had no income because of a disability. Several months after the execution of the Agreement, the Wife filed a motion to enforce, claiming that the funds were to have been paid to her immediately. The Husband argued that it was understood that the funds would come from his sale of the building which was listed for sale and had been since the execution of the Agreement. The trial court permitted parol evidence to be introduced to clarify the intention of the parties and ultimately ruled that the payment to the Wife was to have come from the sale proceeds of the building. The District Court affirmed:

1. "As to the admission of parol evidence about the intent of parties regarding the time for payment, she failed to object to any of the evidence or even to having a hearing. Apart from failing to preserve the issue, we also conclude that the evidence was not improper. The MSA failed to specify a time for payment and was thus ambiguous as to the intent of the parties in that regard."

2. "A latent ambiguity arises 'where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings."

3. "Where the language of a contract is ambiguous or unclear as to a particular right or duty, the court may receive evidence extrinsic to the contract for the purpose of determining the intent of the parties at the time of the contract."

4. "Generally, where a contract fails to specify the rights or duties of the parties, 'extrinsic evidence is necessary for interpretation' and the court may consider parol evidence."

5. "The evidence was that both knew he had no cash or income to make such a payment when the MSA was being negotiated. Both knew the New York building was the only source of such funds. Both facts support the trial judge's finding that the real intent of the parties was that payment would be due from the proceeds of the sale. The factual resolution of such ambiguity as to the due date of the payment does not modify their agreement; it merely clarifies the inherent ambiguity therein."

Crespo v. Crespo, 28 So.3d 125 (Fla. 4th DCA 2010)

Fifth District

TRIAL COURT ERRED IN TERMINATING HUSBAND'S CHILD SUPPORT OBLIGATION BECAUSE CHILD WOULD NOT GRADUATE FROM HIGH SCHOOL BEFORE ATTAINING THE AGE OF 19 WHERE THE PARTIES' AGREEMENT REQUIRED CHILD SUPPORT TO CONTINUE UNTIL CHILD GRADUATED FROM HIGH SCHOOL, NOT TO EXCEED THE AGE OF 19.

The Final Judgment of Dissolution incorporated an Agreement between the parties pursuant to which the Husband agreed to pay child support for each of the parties' three children until each child "graduates from high school, but not to exceed age 19." The Husband moved to terminate his child support obligation as to the parties' two oldest children but the youngest child was still in high school. A Hearing Officer determined that child support should terminate immediately because the youngest child, although 18 years old and although still in high school, would not be able to complete high school before his 19th birthday. The Hearing Officer relied on section 743.07(2), Florida Statutes (2009) which refers to a courts ability to assign child support beyond the age of 18 for reasons of physical or mental incapacity. The District Court reversed:

1. "In the matter before us section 743.07(2) should have played no role in the disposition. This case involved only the implementation of an agreement of the parties and the final judgment of dissolution. It was not about a court ordering child support beyond the age of 18 based on incapacity of the child."

2. "Here, by an unambiguous written agreement [the Husband] was to pay child support for [the child at issue] until the child graduated from high school, but not beyond the child's nineteenth birthday. [The child] was still in high school and had not yet reached 19 when the court terminated child support for him."

3. "Because the trial court failed to order [the Husband] to pay child support for [the child] in accordance with the agreement and as required by the final judgment, it erred."

Neville v. Neville, 34 So.3d 779 (Fla. 5th DCA 2010)

C. Miscellaneous

First District

TRIAL COURT ERRED IN DENYING WIFE'S MOTION TO ENFORCE PARTIES' CONSENT FINAL JUDGMENT; FINAL JUDGMENT DID NOT CONTAIN A RESERVATION OF JURISDICTION THUS TRIAL COURT LACKED AUTHORITY TO CHANGE TERMS OF PARTIES' CONTRACT; EMAILS BETWEEN COUNSEL DID NOT CONSTITUTE A NOVATION OR CREATE A NEW CONTRACT.

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leaving a balance owed of $16,443 as to the cash payment. On July 31st, the Husband sent a letter authorizing his broker to transfer 100% of the shares in the mutual fund to the Wife. At the time, the Fund had a value of $29,477.84. In other words, the Husband was attempting to apply the cash value of his 50% of the Fund ($14,738.92) toward the outstanding balance due on the required cash payment. Before he authorized the transfer of the Fund, the Husband had advised his counsel that he did not have enough cash to pay the $16,443 owed to the Wife. An exchange of emails then took place between the parties' counsel. The Husband's attorney asked the Wife's attorney if she would accept stock from the Fund toward the outstanding balance and the Wife's attorney replied that it did not matter how the Wife got her money "as long as she got all of it." On August 1st, the Wife wrote to the broker of the Fund accepting only her 50% of the Fund. Since the two authorization letters did not match, the broker did not transfer any shares of the Fund to the Wife. The Wife then filed an enforcement motion which the trial court denied, finding that the Wife could have accepted the Husband's offer to transfer the entire Fund to her. The District Court reversed:

1. "A property settlement agreement that has been incorporated into a final judgment of dissolution of marriage is non-modifiable, regardless of either party's financial position."

2. "Here, the property settlement agreement was incorporated into the Final Judgment. Because the Final Judgment did not contain a reservation of jurisdiction, the trial court lacked authority to change the terms of contract the parties had agreed to and the court had adopted."

3. "The Husband agrees the property settlement agreement cannot be modified by the trial court. He attempts to distinguish the present case from the rule by arguing that the email exchanged between the parties' attorneys formed a novation, or substitute contract. The new agreement or contract, the Husband argues, involved the manner in which he would pay the balance of the Final Judgment. The Husband's argument ignores the fact that the Wife's actions in authorizing a 50% fund transfer in compliance with the terms of the Final Judgment serves as compelling evidence that she did not believe the settlement agreement or contract had changed."

4. "First, there is no competent, substantial evidence in the record to show the parties intended to form a new contract. Parties form a novation or new contract, only where there is mutual agreement to substitute an existing valid obligation with a new obligation."

5. "Four factors are necessary to prove the parties intended to create a novation: (1) the existence of a previously valid contract; (2) the agreement of all the parties to a new contract; (3) the extinguishment of the original contractual obligation; and (4) the validity of the new contract."

6. "[A] novation requires that a party show there is agreement to form a new contract. Here, the judge found a misunderstanding. A misunderstanding cannot result in agreement or to a 'meeting of the minds' required to form a contract."

7. "Second, the email - taken in the light most favorable to the Husband - consisted of the Wife demanding to be paid the amount owed. Due to transaction costs, the Fund's cash value would not equal its market value on any given day. If the Wife had agreed to accept the remaining 50% of the Fund, instead of cash, she would have incurred the transaction cost in converting the Fund to cash. This point is illustrated by the Husband's effort to transfer, instead of liquidate, the Fund."

8. "Nothing prevented the Husband from instructing his broker to transfer the 50% he was obligated to transfer to the Wife, to liquidate the remaining 50% of the Fund and to tender the proceeds to the Wife. If the Husband had proceeded in this manner, he would have succeeded in dispensing with 100% of the Fund and also satisfied his obligations under the Final Judgment.

Instead, he hoped to transfer the entire fund, shifting the transaction costs to the Wife. This would not result in the Wife getting 'all of it.'"
Seawell v. Hargarten, 28 So.3d 152 (Fla. 1st DCA 2010)

Second District

Third District

WIFE'S CLAIM THAT AGREEMENT SHOULD BE RESCINDED BECAUSE OF UNILATERAL MISTAKE PROPERLY DENIED WHERE WIFE DID NOT ESTABLISH THE LEGAL BASIS FOR SUCH RELIEF.

The husband and wife were married in 1978 and entered into a prenuptial agreement which provided that the past, present and future property of each spouse would remain the separate property of the respective spouse. In 2006 the husband died while divorce proceedings were pending. The wife sought an elective share of the estate along with other property. The trial court ordered mediation, the parties settled the case and the trial court approved the agreement. When the wife later failed to comply with the terms of the agreement, the personal representative of the estate moved to enforce the settlement. The wife appeared at the hearing and testified that she wanted more time to consult with an attorney and to investigate the settlement and the prenuptial agreement. The court granted the motion to enforce. The wife did not appeal. Instead, she retained new counsel who filed an emergency motion to stay the proceedings, a motion for rehearing and a motion to set aside the order of enforcement. The motions were denied and the wife appeal, seeking rescission of the settlement agreement. The District Court held:

1. "[The wife's] argument is without merit as the record does not support the legal remedy of rescission on the basis that the settlement agreement was the product of unilateral mistake."

2. "Under Florida law, the party seeking rescission based on unilateral mistake must establish that: (1) the mistake was induced by the party seeking to benefit from the mistake, (2) there is no negligence or want of due care on the part of the party seeking a return to the status quo; (3) denial of release from the agreement would be inequitable; and (4) the position of the opposing party has not so changed that granting the relief would be unjust."

3. "Here, [the wife] does not claim that any party misled or induced her to enter into the settlement agreement. Rather, she contends that her attorney misled or induced her. Thus, her claim fails as a matter of law. [The wife] also cannot demonstrate that there was 'no negligence or want of due care' on her part because she had an obligation to read and know the legal parameters regarding the validity and application of the prenuptial agreement prior to mediation."

4. "Additionally, [the wife] was represented by counsel at mediation, and she failed to demonstrate that denial of rescission would be inequitable or that granting relief would be unjust. Thus, we conclude that even if [the wife] had properly preserved her claim of unilateral mistake, on appellate review her claim would have failed on the merits."

Rachid v. Perez, 26 So.3d 70 (Fla. 3rd DCA 2010)

Fourth District

Fifth District

TRIAL COURT ABUSED DISCRETION BY EXTENDING REHABILITATIVE ALIMONY WHERE PARTIES HAD ENTERED INTO STIPULATION BY WHICH WIFE WITHDREW HER CLAIM FOR SUCH A REMEDY; COURT ERRED IN FAILING TO HONOR STIPULATION.

In 2003 the former trial judge ordered the Husband to pay rehabilitative alimony to the Wife for 36 months during which time she was to enter into and complete a dental hygienist program. The original judge also specifically denied permanent alimony because he considered the parties' ten year marriage to have been short-term. The Wife enrolled in the program and was advancing until the Husband undertook a series of actions specifically designed to undermine her progress (which were never explained in the opinion), which forced her to drop out of the program. The Wife then sought to have the rehabilitative alimony either extended or converted into an award of permanent alimony. Before the matter came to trial however, the parties stipulated that the Wife would not seek the extension; instead she would seek only the conversion to permanent alimony. Neither party, however, told the trial judge about their stipulation. At the conclusion of the trial, the successor judge awarded an extension of rehabilitative alimony and specifically denied a conversion to permanent based on res judicata (i.e., the original trial judge had denied the award). Both parties then moved for rehearing and explained that neither wanted the extension. The judge denied rehearing and the District Court held:

1. "This is a troubling case. It is troubling because the trial judge fashioned a fair and equitable result after carefully considering the evidence presented to him. Unfortunately, it appears that the relief fashioned was not what either party wanted, and neither seems to have told the court during the course of the trial that the request for the relief that was granted had been withdrawn by stipulation. Thus, we are compelled to reverse."

2. "We begin by noting that in every case the issues in a cause are made solely by the pleadings…. [T]he parties here had a clear procedural foundation allowing them to amend the former wife's claim by a written stipulation, even without leave of court."

3. "Furthermore, stipulations narrowing the issues, or as in this case, modifying the former wife's supplemental counter-petition so as to drop her alternative request to extend her rehabilitative alimony plan, are of value to the legal system as they simplify the issues, limit or shorten litigation, save costs to the parties, and preserve judicial economy and resources."

4. "Accordingly, we conclude that the trial court erred in failing to grant the motions for rehearing to the extent that he did so on the basis that he had to approve this particular stipulation for it to be effective."

5. "We reiterate, however, that the parties should unquestionably have called the trial court's attention to the existence of the stipulation during the course of the trial. Nevertheless, once the court was made aware of the removal of the request for extended rehabilitative alimony from the pleadings, the rehearing should have been granted."

Rickenbach v. Rickenbach, 32 So.3d 732 (Fla. 5th DCA 2010)

II. ALIMONY (SPOUSAL SUPPORT)

A. Permanent Alimony

First District

ABUSE OF DISCRETION TO PROSPECTIVELY MODIFY AN ALIMONY AWARD BY FINDING THAT THE AWARD SHOULD CEASE WHEN EQUITABLE DISTRIBUTION IS DISPERSED.

The trial court awarded alimony to the Wife but ruled that the award would cease once she began receiving her share of the Husband's retirement benefits. The District Court reversed:

1. "In the [final] order, the trial court prospectively determined that Appellant's alimony award would cease once she began receiving her share of Appellee's retirement benefit."

2. "This prospective modification was an abuse of discretion because the retirement benefit was awarded to Appellant as part of her equitable distribution."

Pombrio v. Pombrio, 29 So.3d 1208 (Fla. 1st DCA 2010)

TRIAL COURT ABUSED ITS DISCRETION IN DENYING PERMANENT ALIMONY TO WIFE FOLLOWING A FIFTEEN YEAR MARRIAGE, GIVEN THE PARTIES' DISPARATE EARNING CAPACITIES; REMAND FOR NOMINAL AWARD.

The Wife worked only sporadically outside the home during the parties marriage due, in part, to the Husband's career, which required them to relocate several times. At the time of the trial, the Wife was 59 years old and owned a home-based commercial sewing/embroidery business. She testified that her gross income from the business was between $750 and $1,200 per month. The Husband was 48 years old and had been employed as director of human resources for a boat company since 2001. He had gross earnings greater than $80,000 per year from 2005 to 2007. However, in November, 2008, his salary was reduced by 20 percent to $67,000 per year or $5,599 per month. The Wife sought permanent alimony but the trial court concluded that there was "simply no ability to pay" and instead awarded her a one-time lump sum, non-modifiable, bridge-the-gap payment of $5,000. The District Court held:

1. "The trial court referred to the parties' 15 year marriage as a long-term marriage. Generally, a 15 year marriage falls somewhere between a short-term and a long-term marriage, in the 'gray' area. As a result, there is no presumption in favor or against permanent alimony."

2. "In a 'gray' area marriage, disparate earning capacity becomes a significant factor for the trial court to consider in deciding whether permanent alimony is appropriate."

3. "At the time of trial, the wife was 59 years old, approximately 11 years older than the husband, and earned considerably less than the husband. With a few exceptions, the wife has little work experience outside the home due to supporting the husband's career. The wife does own a business that has potential to grow; however, there is no record indication that she could support herself in a manner commensurate with the marital standard of living."

4. "As to the husband's inability to pay, it appears that the trial court based its finding on the parties' significant debt, nearly all of which was distributed to the husband. However, the debt was primarily short-term and will presumably be satisfied at some point in the future. Furthermore, the husband testified that he expected his salary to rebound in the future."

5. "In the instant case, an award of nominal permanent alimony could serve to accomplish two goals. First, it would permit the wife to petition the trial court to pursue an increase in permanent alimony should the husband's income rebound. Second, it would preserve the jurisdiction of the trial court to revisit the matter if the parties' respective financial situations change."

Biskie v. Biskie, 37 So.3d 970 (Fla. 1st DCA 2010)

Second District

AWARD OF RETROACTIVE ALIMONY APPROPRIATE WHERE SPOUSE WITH ABILITY TO PAY DOES NOT DO SO AND THUS THE OTHER PARTY MUST USE CAPITAL ASSETS FOR SUPPORT BUT, COURT MUST ACCOUNT FOR USE OF OTHER PARTY'S SHARE OF ASSETS SO UTILIZED.

Prior to the dissolution hearing, husband and wife resolved the majority of issues between them. The trial court was asked to consider only the wife's claim for permanent and retroactive alimony and her claim that the liquid marital assets should be distributed unequally due to the husband's dissipation of certain marital assets during the marriage. At the close of the dissolution proceedings, the trial court awarded the wife permanent alimony payable as lump sum as well as retroactive alimony. It also found that the husband had dissipated marital assets, and it charged those dissipated assets to the Husband in its equitable distribution scheme. The husband first contended that the trial court abused its discretion by awarding the wife $261,240 in permanent alimony payable as a lump sum. The argument has two components: first, whether the wife was entitled to permanent alimony, payable as a lump sum; and second, whether the amount of the award was supported by evidence. As to the retroactive award, the District Court held:

1. "When one spouse has sufficient income to pay alimony during the pendency of dissolution proceedings but instead decides to provide only nominal support, thus requiring the other spouse to invade marital assets for support, an award of retroactive alimony may be proper."

2. "However… the amount of retroactive alimony awarded is not supported by the evidence because it does not account for the Wife's use of the Husband's share of certain marital assets to support herself…. The Final Judgment on its face does not account for the Wife's use of the Husband's one-half share of [such] marital funds."

Buoniconti v. Buoniconti, 36 So.3d 154 (Fla. 2nd DCA 2010)

TRIAL COURT ERRED IN DENYING WIFE'S REQUEST FOR PERMANENT ALIMONY BASED ON HUSBAND'S SUPPOSED LACK OF ABILITY TO PAY WHERE COURT FAILED TO TAKE INTO CONSIDERATION ALL OF HUSBAND'S INCOME.

The trial court found that the Husband's income was double that of the Wife but nevertheless found that the Husband lacked the ability to pay alimony. Instead, the court

awarded the Wife $10,000 as lump sum alimony to be paid from the proceeds to be obtained from a refinance of the parties' former residence and re-characterized payments that the Husband had made on the mortgage on the home during the parties' separation as "transitional alimony." The District Court held:

1. "[I]t appears that the trial court failed to consider all sources of the Husband's income when it found that the Husband did not have the ability to pay the Wife permanent, periodic alimony. Although the final judgment states that the court was considering the Husband's actual overtime pay, the gross monthly income figure cited in the final judgment from the Husband's financial affidavit…does not appear to be from his most recent affidavit and does not include the Husband's stipulated overtime…."

2. "In addition, the trial court did not make any factual findings with respect to the income the Husband historically earned in secondary employment."

3. "Further, the evidence reflects that the Husband is making monthly payments of $200 on an investment property that he purchased after the parties' separation. The trial court did not address this investment expense or the value of the property as an asset that could provide a means for making support payments. Similarly, it did not address the Husband's voluntary contributions to an AARP 401(k) plan…."

4. "In addressing alimony on remand, the trial court must consider all sources of income available to the Husband, including actual overtime pay and actual income from part-time employment at secondary jobs. In addition, it must consider the Husband's voluntary contributions to his investment property and 401(k) plan in making its 'ability to pay' alimony calculation."

Martinez v. Abinader, 37 So.3d 944 (Fla. 2nd DCA 2010)

Third District

STATEMENT IN FINAL JUDGMENT REGARDING ALIMONY AWARD BEING "LIFETIME ALIMONY UNTIL SHE MARRIES, DIES OR THERE ARE OTHER CIRCUMSTANCES" ALLOWS AT LEAST A THEORETICAL ARGUMENT THAT A CIRCUMSTANCE COULD ARISE AT SOME FUTURE DATE IN WHICH FORMER HUSBAND MIGHT BE REQUIRED TO PAY ALIMONY EVEN AFTER WIFE'S REMARRIAGE; TRIAL COURT DIRECTED TO CLARIFY ACCORDINGLY.

The Third District agreed with the former husband that, the trial court's statement in the final judgment, regarding alimony allows for a "circumstance" to arise in the future requiring the former husband to pay alimony even if the former wife remarries: "the trial court's statement in the final judgment regarding the alimony award being 'lifetime alimony until she remarries, dies or there are other circumstances' allows at least a theoretical argument that a 'circumstance' may arise at some future date in which the former husband may be required to pay alimony ceases upon the re-marriage of the recipient spouse."

Zarate v. Zarate, 28 So.3d 935 (Fla. 3rd DCA 2010)

ERROR TO REFUSE TO AWARD WIFE PERMANENT PERIODIC ALIMONY IN A NOMINAL AMOUNT, WHERE, AT THE TIME OF THE FINAL HEARING, HUSBAND WAS INVOLUNTARILY TEMPORARILY UNEMPLOYED, BUT HAD AN EXPECTATION OF SECURING A POSITION SHORTLY THEREAFTER.

The parties' only substantial asset was a family home, which was severely under water and was awarded, by agreement, to the Wife. During the marriage, both parties worked, with the Husband earning substantially more than the Wife. At the time of the final hearing, the Husband was involuntarily, temporarily unemployed but had the expectation of securing a position shortly thereafter. The trial court refused to award alimony in any form and the Wife appealed. The District Court held:

1. "Under these circumstances, we agree with the [Wife's] sole contention on appeal: that the trial court erred and abused its discretion by failing to award her alimony in any form."

2. "In recognition of the desirability of providing for the real likelihood that such an award, although not now appropriate because of the husband's inability to pay, may become so in the future, we remand the case with directions to award her permanent periodic alimony in a nominal amount."

Purrinos v. Purrinos, 34 So.3d 244 (Fla. 3rd DCA 2010)

Fourth District

NO ABUSE OF DISCRETION IN AWARDING PERMANENT ALIMONY TO HUSBAND WHERE WIFE WAS IN SUPERIOR FINANCIAL POSITION OR IN THE AMOUNT OF ALIMONY AWARDED WHERE TRIAL COURT REJECTED WIFE'S CLAIMED EXPENSES AS INFLATED.

The trial court awarded the husband $500 per month in permanent alimony. On appeal, the Fourth District found no abuse of discretion:

1. "The wife works as a paralegal for a law firm. The husband, who has little education, worked as a cook at the beginning of the marriage. Later, he and the wife opened a deli, which continues to be his main source of income. At the time of the dissolution, the wife earned approximately $2,000 more per month than the husband."

2. "The trial court carefully considered the factors for awarding alimony under section 61.08, Florida Statutes. Based upon the wife's greater earnings and earning ability, as well as the husband's limited education and prospects, the trial court awarded the husband permanent alimony of $500 per month."

3. "The trial court rejected the wife's contention that she had an inability to pay alimony, finding that some of her expenses were inflated and some could be eliminated. Indeed, the wife's own testimony, in which she acknowledged a significant increase in her expenses since the filing of the divorce, supports the trial court's findings. In addition, for other expenses related to child support, the trial court also noted that the wife would be receiving child support from the husband."

Leonardis v. Leonardis, 30 So.3d 568 (Fla. 4th DCA 2010)

Fifth District

PROVISIONS OF JUDGMENT RELATING TO ALIMONY AWARDED TO WIFE WERE INADEQUATE; COURT'S FINDING THAT HUSBAND'S INCOME RANGED FROM $7,000 TO $12,000 PER MONTH WAS UNCERTAIN AND INADEQUATE; FINDINGS AS TO WIFE'S NEED INADEQUATE; REMAND FOR NEW TRIAL BECAUSE OF EXCESSIVE LAPSE IN TIME BETWEEN TRIAL AND ENTRY OF JUDGMENT.

The parties were married for eleven years. The Husband was self-employed in his own business; the Wife was not employed. The parties settled all issues in their divorce case except alimony and attorney's fees. The evidence at trial showed that that the parties lived a comfortable life during the marriage. The Wife did not work during the marriage, and Husband acknowledged that Wife had been a good mother and homemaker until, at the end of the marriage, Wife engaged in numerous adulterous affairs. More than two years after the trial, the court entered an order awarding the Wife $1,800.00 per month in alimony, finding that the $1,000 per month in temporary alimony the wife had been receiving was inadequate. The District Court held:

1. "The final judgment is sparse. On the issue of need and ability to pay, there are only three findings: the Husband's net income was between $7,000 and $12,000 per month; that Wife has illnesses that prevent her from working full time and that she has 'substantial' medical and drug expenses."

2. "We find the judgment to be inadequate in several respects. The finding of such a wide range for Husband's income is too uncertain, and is not warranted by the evidence. There is a lack of findings on Wife's need, an issue greatly disputed at trial, making it impossible for this Court to make any meaningful review. These deficiencies are combined with a twenty-eight month delay between the trial and entry of the judgment and appear to be related."

3. "Even though the trial court was eventually provided a transcript, it is doubtful, with the passage of so much time, that issues of credibility and weight of evidence could accurately be recalled. Loath as we are to require parties to incur the cost and delay of a retrial, it is necessary in this case, and the parties are partly responsible for the delay. A new hearing of all alimony issues, including whether the Wife's adultery should affect the amount of alimony awarded is required."

Eckert v. Eckert, 29 So.3d 381 (Fla. 5th DCA 2010)

B. Rehabilitative Alimony

1. Nature/Award of Rehabilitative Alimony

First District

Second District

Third District

Fourth District

Fifth District

2. Extension/Modification

First District

Second District

Third District

Fourth District

Fifth District

TRIAL COURT ABUSED ITS DISCRETION BY EXTENDING REHABILITATIVE ALIMONY WHERE PARTIES HAD ENTERED INTO STIPULATION BY WHICH WIFE WITHDREW HER CLAIM FOR SUCH A REMEDY; COURT ERRED IN FAILING TO HONOR STIPULATION.

In 2003 the former trial judge ordered the Husband to pay rehabilitative alimony to the Wife for 36 months during which time she was to enter into and complete a dental hygienist program. The original judge also specifically denied permanent alimony because he considered the parties' ten year marriage to have been short-term. The Wife enrolled in the program and was advancing until the Husband undertook a series of actions specifically designed to undermine her progress (which were never explained in the opinion), which forced her to drop out of the program. The Wife then sought to have the rehabilitative alimony either extended or converted into an award of permanent alimony. Before the matter came to trial however, the parties stipulated that the Wife would not seek the extension; instead she would seek only the conversion to permanent alimony. Neither party, however, told the trial judge about their stipulation. At the conclusion of the trial, the successor judge awarded an extension of rehabilitative alimony and specifically denied a conversion to permanent based on res judicata (i.e., the original trial judge had denied the award). Both parties then moved for rehearing and explained that neither wanted the extension. The judge denied rehearing and the District Court held:

1. "This is a troubling case. It is troubling because the trial judge fashioned a fair and equitable result after carefully considering the evidence presented to him. Unfortunately, it appears that the relief fashioned was not what either party wanted, and neither seems to have told the court during the course of the trial that the request for the relief that was granted had been withdrawn by stipulation. Thus, we are compelled to reverse."

2. "We begin by noting that in every case the issues in a cause are made solely by the pleadings…. [T]he parties here had a clear procedural foundation allowing them to amend the former wife's claim by a written stipulation, even without leave of court."

3. "Furthermore, stipulations narrowing the issues, or as in this case, modifying the former wife's supplemental counter-petition so as to drop her alternative request to extend her

rehabilitative alimony plan, are of value to the legal system as they simplify the issues, limit or shorten litigation, save costs to the parties, and preserve judicial economy and resources."

4. "Accordingly, we conclude that the trial court erred in failing to grant the motions for rehearing to the extent that he did so on the basis that he had to approve this particular stipulation for it to be effective."

5. "We reiterate, however, that the parties should unquestionably have called the trial court's attention to the existence of the stipulation during the course of the trial. Nevertheless, once the court was made aware of the removal of the request for extended rehabilitative alimony from the pleadings, the rehearing should have been granted."

Rickenbach v. Rickenbach, 32 So.3d 732 (Fla. 5th DCA 2010)

TRIAL COURT ERRED IN FINDING THAT IT COULD NOT CONVERT REHABILITATIVE ALIMONY TO PERMANENT ALIMONY BECAUSE INITIAL JUDGE IN THE CASE HAD DECLINED TO GRANT PERMANENT ALIMONY; CORRECT STANDARD IS WHETHER THE RECIPIENT HAS NOT BEEN REHABILITATED DESPITE REASONABLE AND DILIGENT EFFORTS.

In 2003 the former trial judge ordered the Husband to pay rehabilitative alimony to the Wife for 36 months during which time she was to enter into and complete a dental hygienist program. The original judge also specifically denied permanent alimony because he considered the parties' ten year marriage to have been short-term. The Wife enrolled in the program and was advancing until the Husband undertook a series of actions specifically designed to undermine her progress (which were never explained in the opinion), which forced her to drop out of the program. The Wife then sought to have the rehabilitative alimony either extended or converted into an award of permanent alimony. Before the matter came to trial however, the parties stipulated that the Wife would not seek the extension; instead she would seek only the conversion to permanent alimony. Neither party, however, told the trial judge about their stipulation. At the conclusion of the trial, the successor judge awarded an extension of rehabilitative alimony and specifically denied a conversion to permanent based on res judicata (i.e., the original trial judge had denied the award). Both parties then moved for rehearing and explained that neither wanted the extension. The judge denied rehearing and the District Court held:

1. "We also conclude that to the extent the trial court held that it could not as a matter of law convert rehabilitative alimony to permanent alimony because the initial trial judge in the case declined to grant it, the court erred in this respect as well."

2. "Rehabilitative alimony is essentially a projection based upon certain assumptions and probabilities. If these assumptions and probabilities develop as predicted within the projected term, the spouse should be able to support himself or herself when the alimony ends. The key issue becomes whether the former spouse who is seeking further alimony has become self-supporting, or whether that former spouse instead must continue to depend upon the support of the former husband or wife."

3. "In order to be entitled to a modification, either to extend the rehabilitative period or to convert the rehabilitative alimony to permanent alimony, the petitioner must show why the original plan of rehabilitation did not work out. This court has held that the standard to be applied is that a party seeking an extension or conversion of rehabilitative alimony must show only that he or she had not been rehabilitated despite reasonable and diligent efforts."

4. "Thus, when presented with a request to convert rehabilitative alimony into permanent alimony, the trial court must first evaluate the efforts of the petitioner to determine whether the goal for the rehabilitative alimony award has not been met despite the petitioner's diligent effort."

5. "While a trial court may unquestionably consider any factors established at the time of the final judgment, the entitlement to conversion is based primarily on events and actions that occurred after the initial award of rehabilitative alimony that kept the former dependant spouse from becoming rehabilitated as envisioned by the trial court at the time the final judgment was entered."

6. "We cannot tell from the record before us how the trial court would have applied these principles at the time it declined to grant permanent alimony, as it appears that the court did not believe that it had the discretion to make that call. Accordingly, we remand with instructions for the trial court to make a determination on conversion in light of this opinion."

Rickenbach v. Rickenbach, 32 So.3d 732 (Fla. 5th DCA 2010)

3. Miscellaneous

First District

Second District

Third District

Fourth District

Fifth District

C. Temporary Alimony

First District

Second District

ABSENCE OF TRANSCRIPT PREVENTS HUSBAND FROM DEMONSTRATING REVERSIBLE ERROR WITH REGARD TO AWARD OF TEMPORARY SUPPORT TO WIFE.

The Husband appealed from the trial court's non-final order, directing him to pay temporary support and attorneys fees to the Wife. The record however, did not contain a transcript of the proceedings below. With regard to the award for temporary relief the District Court held:

1. "Without a record of the trial proceedings, the appellate court can not [sic] properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory."

2. "Because we cannot provide a meaningful review of the trial court's order awarding

temporary relief to the Wife, we affirm that award."
Macarty v. Macarty, 29 So.3d 434 (Fla. 2nd DCA 2010)

NO ABUSE OF DISCRETION IN INCREASING TEMPORARY ALIMONY AWARD BECAUSE WIFE WAS UNDERGOING TREATMENT FOR SERIOUS ILLNESS THAT AFFECTED HER ABILITY TO WORK.

The trial court entered a retroactive order increasing wife's temporary alimony award from $2,000 to $3786.56 per month and awarded temporary attorney's fees in the amount of $29,450. The District Court affirmed, finding payments likely necessary for the few months in which they were needed:

1. "Although the issue is very close and [the husband] will have difficulty making these payments even for the few months that they are likely to be necessary, we affirm the trial court."

2. "We encourage the trial court to take all reasonable steps to bring this case to a final hearing because if this temporary award proves to have been unnecessary or too high, the trial court will have limited options to make an equitable adjustment in the final order."

3. "Assuming that events have played out over the last eight months as predicted at this hearing. Mrs. George has been required to take a temporary leave of absence from her employment, and that leave of absence should have come, or will soon be coming, to an end. If her treatment has been successful, it is likely that the temporary alimony could be reduced to a lesser amount for a short period before this case is resolved at final hearing."

George v. George, 32 So.3d 651 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

D. Lump Sum Alimony

First District

Second District

NO ABUSE OF DISCRETION IN AWARDING PERMANENT ALIMONY AS A LUMP SUM UPON FINDING THAT HUSBAND HAD A HISTORY OF UNFAIR UNILATERAL FINANCIAL DECISIONS, WASTE, AND A CURRENT RELUCTANCE TO WORK.

Prior to the dissolution hearing, husband and wife resolved the majority of issues between them. The trial court was asked to consider only the wife's claim for permanent and retroactive alimony and her claim that the liquid marital assets should be distributed unequally due to the husband's dissipation of certain marital assets during the marriage. At the close of the dissolution

proceedings, the trial court awarded the wife permanent alimony payable as lump sum as well as retroactive alimony. It also found that the husband had dissipated marital assets, and it charged those dissipated assets to the Husband in its equitable distribution scheme. The husband first contended that the trial court abused its discretion by awarding the wife $261,240 in permanent alimony payable as a lump sum. The argument has two components: first, whether the wife was entitled to permanent alimony, payable as a lump sum; and second, whether the amount of the award was supported by evidence. With regard to the wife's entitlement, the District Court held:

1. "The seminal case regarding permanent alimony payable as a lump sum is *Yandell v. Yandell*…. In that case, the supreme court recognized that permanent alimony could be awarded 'either in gross or by periodical payments.' However, the court also noted that 'the better practice is to direct periodic payments of permanent alimony and a lump award should be made only in those instances where some special equities might require it or make it advisable.'"

2. "Since *Yandell*, courts have generally held that permanent alimony payable as a lump sum is appropriate only when there are special circumstances between the parties that make such an award advisable. However, the question of whether permanent alimony payable as a lump sum is appropriate in any given case falls within the broad discretion of the trial judge."

3. "Here, the parties agree that the Wife is entitled to some form of permanent alimony based on the length of the marriage and the parties' decision that the Wife would not work full-time during the marriage."

4. "In deciding to award permanent alimony payable as a lump sum, the trial court found that the Husband had a 'history of some unfair unilateral financial decisions, waste, and what appears to be a current reluctance to work. Contrary to the Husband's arguments, these findings are supported by the record."

5. "Based on these facts, it was not unreasonable for the trial court to suspect that the Husband might find ways to avoid the payment of any permanent periodic alimony it would award. Indeed, the Husband relied on his current unemployment to argue that his Wife of thirty-eight years was not entitled to any permanent alimony, or at best a nominal sum, because he had no ability to pay. However, the Husband had substantial liquid assets from which he could easily pay an award of permanent alimony as a lump sum. The availability of these liquid assets coupled with the Husband's lack of current income constitute exactly the type of 'special circumstances' necessary to support the trial court's discretionary decision to award permanent alimony payable as a lump sum."

Buoniconti v. Buoniconti, 36 So.3d 154 (Fla. 2nd DCA 2010)

TRIAL COURT'S AWARD OF PERMANENT ALIMONY BY WAY OF A LUMP SUM AWARD TO THE WIFE WAS NOT "UNFAIR" SIMPLY BECAUSE LUMP SUM ALIMONY IS A VESTED RIGHT THAT WOULD SURVIVE REMARRIAGE.

Prior to the dissolution hearing, husband and wife resolved the majority of issues between them. The trial court was asked to consider only the wife's claim for permanent and retroactive alimony and her claim that the liquid marital assets should be distributed unequally due to the husband's dissipation of certain marital assets during the marriage. At the close of the dissolution proceedings, the trial court awarded the wife permanent alimony payable as lump sum as well as retroactive alimony. It also found that the husband had dissipated marital assets, and it charged those dissipated assets to the Husband in its equitable distribution scheme. The husband first contended that the trial court abused its discretion by awarding the wife $261,240 in permanent

alimony payable as a lump sum. The argument has two components: first, whether the wife was entitled to permanent alimony, payable as a lump sum; and second, whether the amount of the award was supported by evidence. With regard to the Husband's argument that the award was "unfair," the District Court held:

1. "At oral argument, counsel for the Husband argued that it was 'unfair' to award permanent alimony as a lump sum because the Wife would get to keep the entire award even if she chooses to remarry or cohabit."

2. "We reject this 'unfairness' argument for three reasons. First, there was no evidence that the Wife sought permanent alimony payable as a lump sum because she was planning to remarry or cohabit…. Second, there is nothing 'unfair' about a court of equity exercising its discretion to select from the range of available options, provided that the option chosen is supported by the evidence and can withstand the applicable standard of review. Third, the Husband cannot be heard to complain simply because his chosen financial strategy did not produce the desired result. The Husband's course of conduct forced the trial court to choose between awarding the Wife nominal permanent periodic alimony or a reasonable amount of permanent alimony payable as a lump sum. The fact that the Husband's apparent strategy to avoid paying permanent alimony backfired is the risk he took when he chose that course of action. Absent legal error, a party's failed strategy is not rectifiable on appeal."

Buoniconti v. Buoniconti, 36 So.3d 154 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

E. Enforcement

First District

Second District

Third District

Fourth District

Fifth District

F. Security/Insurance

First District

WHERE TRIAL COURT IMPOSED A LIEN UPON HUSBAND'S PREMARITAL PROPERTY TO SECURE ALIMONY AND CHILD SUPPORT, COURT ERRED IN FAILING TO MAKE SPECIFIC FINDINGS CONCERNING WHETHER THE LIEN ONLY SECURES ARREARAGES AT THE TIME OF HUSBAND'S DEATH OR IF IT WAS ALSO INTENDED TO SECURE FUTURE PAYMENTS IN ORDER TO MINIMIZE FUTURE ECONOMIC HARM TO THE FAMILY.

The Husband appealed from a final judgment of dissolution of marriage which imposed a lien on his premarital real property to secure the payment of child support and permanent periodic alimony, because the order did not specify whether the lien was to secure arrearages at the time of his death or if it is also intended to secure future payments to minimize economic harm to the surviving family. The District Court held:

1. "Here, the record supports the trial court's imposition of a lien to secure the payment of alimony and child support. The Former Husband is 77 years old and in poor health. The Former Husband is uninsurable but has significant unencumbered assets that he uses to support himself. The Former Wife would potentially be left in dire straits after the Former Husband's death because she is not capable of full-time employment. The Former Wife has significant medical history resulting in some medical disability, and both parties agreed that the Former Wife needs to be home on afternoons and weekends to care for their youngest child, who has been diagnosed with a form of autism and cannot be left alone. The child also may remain dependant even after he reaches majority."

2. "Although the trial court did not abuse discretion in imposing a lien, the trial court failed to make any specific findings concerning whether, in the context of alimony, the lien only secures arrearages at the time of the Former Husband's death or if it was also intended to secure future payments in order to minimize economic harm to the family."

3. "Without such findings we are unable to determine whether the amount of the lien was appropriately tailored to the obligation being secured."

Mackoul v. Mackoul, 32 So.3d 741 (Fla. 1st DCA 2010)

Second District

Third District

TRIAL COURT ERRED IN REQUIRING HUSBAND TO OBTAIN TERM LIFE INSURANCE TO SECURE ALIMONY AWARD IN THE ABSENCE OF EVIDENCE AS TO THE COST, AMOUNT, OR AVAILABILITY OF SUCH INSURANCE.

The Husband was a self-employed marine electronic technician with a reported gross monthly income of $1,759. Although the Husband was unable to testify as to the number of hours he worked per week, he admitted that if he worked 2 hours per day, 5 days per week, he

could make $850 per week. The evidence showed that during the pendency of the divorce, the Husband paid the mortgage and expenses for the wife and children; he also paid credit card bills and children's expenses. The trial court found that husband's income was greater than he reported and imputed an additional $3,000 in monthly income to him. As to the requirement that the Husband obtain life insurance to secure the alimony and child support awards, the District Court held:

1. "It is within the trial court's authority to order the husband to provide term life insurance to protect the child support and alimony payments. In determining whether to secure support awards, the trial court should consider the need for such insurance, the costs and availability of such insurance, and the financial impact upon the obligor."

2. "Absent special circumstances, however, the trial court may not impose such requirement…. Such special circumstances include a spouse potentially left in dire financial straits after the death of the obligor spouse due to ill health and/or lack of employment skills, minors living at home, and supported spouse with limited earning capacity."

3. "Here, the record clearly indicates the requisite circumstances to support imposition of this requirement, including minor children residing in the home, the wife's disability, her diminished earning capacity, and her dependence on the husband for financial support."

4. "We agree, however, that this requirement may not stand absent evidence or findings as to the cost, amount, or availability of such insurance."

Child v. Child, 34 So.3d 159 (Fla. 3rd DCA 2010)

Fourth District

Fifth District

ERROR TO REQUIRE HUSBAND TO OBTAIN LIFE INSURANCE TO SECURE ALIMONY AND CHILD SUPPORT OBLIGATIONS WITHOUT FINDINGS REGARDING AVAILABILITY AND COST OF INSURANCE, ABILITY TO PAY, OR APPROPRIATE CIRCUMSTANCES TO JUSTIFY THE REQUIREMENT.

The Wife filed a petition to end her 22-year marriage and requested, among other things, alimony, child support, attorney's fees, and shared parental responsibility. The lower court granted attorney's fees and awarded the wife alimony and child support; requiring husband to secure those obligations with life insurance. The court further awarded the wife, sole parental custody, an award well beyond the shared parental responsibility actually requested by the Wife. As to the insurance requirements, the District Court held:

1. "The courts are statutorily authorized to order the obligor to maintain life insurance to protect alimony awards and child support allegations… when "appropriate circumstances" exist to justify the award."

2. "Appropriate circumstances may include the dire impact that the sudden death of the obligated party would have on the receiving party."

3. "In order this protection, the court should consider the 'availability and costs of such insurance and the financial impact it will have on the former husband…. The final judgment should include appropriate findings regarding the availability and cost of insurance, the ability of the obligor to pay, and the appropriate circumstances that justify the insurance requirement."

4. "Here, the trial court made no findings to support the order of life insurance, and Wife concedes the error."
Rashid v. Rashid, 35 So.3d 992 (Fla. 5th DCA 2010)

G. Modification

First District

TRIAL COURT ABUSED ITS DISCRETION IN ALIMONY MODIFICATION CASE TO AWARD MORE THAN NOMINAL ALIMONY TO WIFE WHO NOW EARNS MORE THAN HUSBAND.

The Husband appealed from an order that reduced but did not terminate his alimony obligation even though evidence demonstrated that Wife earned more income than he. The District Court held: "Because the undisputed evidence in the record is that… former wife, now earns more income that the former husband and there is no justification in the record for a continued alimony award under the circumstances, we agree with the former husband that the trial court abused its discretion in awarding more than a nominal amount of alimony."
Castleberry v. Castleberry, 29 So.3d 1207 (Fla. 1st DCA 2010)

Second District

TRIAL COURT DID NOT ABUSE DISCRETION IN REDUCING ALIMONY AWARD WHERE HUSBAND'S INCOME DECREASED AND WHERE WIFE NO LONGER HAD A NEED FOR THE ORIGINAL AMOUNT OF ALIMONY AWARDED.

The Final Judgment awarded $11,000/month in alimony to the Wife. After a series of employees quit, the Husband was left to man his business alone and shortly thereafter, the Husband sold the practice to Veterinary Clinics of America. As a result, the Husband's income was reduced as he began working on a commission-only basis. The trial court found that the Husband's decision to sell was prudent and necessary and that the Wife's need was not as high as originally calculated. As such, the trial court granted the requested downward modification and the District Court affirmed:

1. "Generally, to justify an alimony modification, the moving party must establish: (1) a substantial change in circumstances; (2) the change was not contemplated at the time of the final judgment of dissolution; and (3) the change is sufficient, material, permanent, and involuntary."

2. "The record supports the trial court's conclusion that business exigencies prompted the sale, the consideration received was reasonable, the sale enabled the Former Husband to continue working as a veterinarian until retirement age, and the sale proceeds ensured long-term security for both the Former Wife and the Former Husband."

3. "Although the Former Husband did not retire, we observe that involuntariness of income loss may no longer be a bright-line requirement for alimony modification . . . . Here, the trial court's finding that the Former Husband's decision to sell his practice was "prudent" satisfies the "reasonable" standard of *Pimm* and *Rahn* concerning that voluntary loss of income."

4. "The trial court did not err in finding a number of the items [contained in the wife's financial affidavit] unnecessary and concluding that the former Wife did not need alimony of $11,000 per month."
Wilson v. Wilson, 37 So.3d 877 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT DID NOT ERR IN MODIFYING PERMANENT PERIODIC ALIMONY EVEN THOUGH HUSBAND'S INCOME INCREASED AFTER THE DIVORCE WHERE THE AMOUNT OF ALIMONY AGREED UPON WAS PREMISED UPON A PROJECTED AMOUNT OF INCOME FOR THE HUSBAND WHICH HE DID NOT ATTAIN.

The parties were divorced after a long-term marriage and entered into a Marital Settlement Agreement. The Agreement provided that the Husband would pay alimony to the Wife in the amount of $5,250 per month and would provide support for the parties' adult disabled son "as he has done in the past." Four years after their divorce, the Husband moved for modification, contending that the provision that he provide support for their son "as he has done in the past" was vague and ambiguous and seeking a reduction in alimony based on his assertion that his income was "substantially less than the income estimated at the time of the Final Judgment." Following a two day trial, the court entered an order modifying the Husband's child support obligations, relieving him of his agreed-to obligation to pay for all of his disabled son's expenses not covered by SSI payments. Instead the husband was ordered to pay all of the mortgage, taxes, insurance, and condominium fees on the condominium in which his son lived and only one-half of his son's uncovered medical, dental, and psychological care. He was relieved of his obligation to pay his son's utilities and the wife was ordered to pay the remaining half of her son's medical expenses. The trial court further modified the child support provisions to apply the child support guidelines thereby making each party responsible for a portion of their child's support. As to the alimony modification, the District Court held:

1. "An alimony award contained in a final judgment may be modified where a substantial, material, involuntary and permanent change in circumstances not contemplated at the time of the final judgment has occurred."

2. "The record in this case shows that in 2002, the year in which the parties entered into their marital settlement agreement, [the Husband's] gross income was approximately $131,000. In 2003, it was approximately $170,000; in 2004, approximately 129,000; in 2005, approximately $148,000; in 2006, approximately $151,000; and in 2007, approximately $147,000."

3. "While it is clear that [the Husband's] income increased between the date of the parties' agreement and the date of the modification, we cannot say that the court below abused its discretion in granting a modification in light of the fact that the year before the parties' entered into their agreement [the Husband's] before tax income was over $300,000 and the parties expressly stated in the marital settlement agreement that the $5,250 alimony agreed upon was based on 'the husband's projected and estimated income of $250,000' per year."

4. "There is no dispute that this level of income has not been duplicated since then. For

this reason, we agree that modification of the amount of the permanent periodic alimony award was warranted."
Schmachtenberg v. Schmachtenberg, 34 So.3d 28 (Fla. 3rd DCA 2010)

Fourth District

Fifth District

H. Supportive Relationships

First District

ERROR TO FAIL TO MAKE WRITTEN FINDINGS REQUIRED BY STATUTE WHEN DETERMINING HER MODIFIED ALIMONY AWARD AND IN FAILING TO MAKE FINDINGS OF FACTS AS TO THE FACTORS OUTLINED IN THE STATUTE WHEN DETERMINING WHETHER SHE WAS IN A SUPPORTIVE RELATIONSHIP; EVIDENCE DID NOT SUPPORT FINDING OF A SUPPORTIVE RELATIONSHIP.

The Wife appealed, contending that the trial court erred in failing to make findings of fact with respect to its determination of alimony. The District Court held:

1. "In order to make an alimony award, the trial court must consider and make findings regarding each of the factors set out in section 61.08(2), Florida Statutes (2007)."
2. "In the instant case, although the trial court stated that it considered all of the factors outlined in section 61.08(2), it failed to make any written findings regarding the factors."
3. "An award for alimony may be modified in light of the recipient's supportive relationship. Section 61.14(1)(b)(1) provides that, upon specific findings that a supportive relationship exists between an obligee and a person with whom the obligee resides, the trial court may reduce or terminate alimony."
4. "Section 61.14(1)(b)(2) delineates factors that the trial court 'shall give consideration to when determining whether a supportive relationship exists.'"
5. "A supportive relationship is a relationship that 'takes the financial place of a marriage and necessarily decreases the need of the obligee.' Section 61.14(1)(b) recognizes the economic support that occurs when independent individuals choose to live together. Such support is equivalent to a marriage and requires a reduction in alimony. Financial support alone, however, does not define a supportive relationship."
6. "In the instant case, the trial court did not make any findings regarding the factors outlined in section 61.14(1)(b). Although the wife admitted that she lived with someone when her children were not visiting her that they drove to work together almost daily, and that they planned to marry in the future, she also testified that he did not provide her with any financial support. They did not hold themselves out as being married and had no joint assets. The parties expressed no intent to pool their assets in the future. The parties did not own or intend to purchase any property jointly and did not have any joint bank accounts. Additionally, they had separate residences."

7. "Here, the evidence suggests that, although the wife is in a relationship which may, in time, rise to the level of a supportive relationship contemplated in 61.14, it fails to reach that point yet. Her relationship does not appear to be a 'de facto' marriage."
Overton v. Overton, 34 So.3d 759 (Fla. 1st DCA 2010)

Second District

Third District

Fourth District

Fifth District

I. Amount

First District

TRIAL COURT DID NOT ERR IN REFUSING TO REDUCE HUSBAND'S INCOME FOR CERTAIN CLAIMED "BUSINESS EXPENSES"; THE FACT THAT HUSBAND CAN DEDUCT EXPENSES FOR TAX PURPOSES DOES NOT MAKE THEM "ORDINARY AND NECESSARY" FOR CHAPTER 61 INCOME CALCULATION PURPOSES.

The Husband sought a modification of alimony based on his asserted decrease in income. The court ultimately reduced the alimony from $8,000 per month to $5,000 (on a temporary basis for two years) and further ordered the Husband to pay $8,500 toward the $17,200 attorney's fees incurred by the Wife during the modification proceedings. On appeal, the Husband contended that the trial court erred by failing to deduct business expenses when computing his income, specifically, that the trial court was required to deduct his "ordinary and necessary business expenses" in calculating his gross income. The District Court held:

1. "In 2008, the Former Husband earned $119,949 from his distributorship…. On his 2008 tax return, he deducted $30,028 in business expenses for an unadjusted gross taxable income of $89,921. The deducted expenses included: car and truck expenses; office expenses; repairs and maintenance; travel; deductible meals and entertainment; and 'other expenses' (telephone, internet/phone/fax; software; passport; clothing; freight; [publications]; entertainment; parking)."

2. "Citing section 61.30, Florida Statutes, and cases interpreting that statute, the Former Husband argues the trial court was required to deduct his 'ordinary and necessary' business expenses in calculating his gross income. The statute he relies on governs *child support determinations* and provides that in determining a parent's monthly income for *that* purpose, gross income includes 'business income,' which in turn 'means gross receipts minus ordinary and necessary expenses required to produce income.'"

3. "We are not persuaded section 61.30 should be applied in this case where the relevant statute is section 61.08 governing alimony awards, and that statute speaks only in terms of

'financial resources' and 'all sources of income.' But even assuming the definition of 'business income' in section 61.30 is properly applied here, the trial court did not act unreasonably in declining to accept the Former Husband's representations. Except for a $500 monthly car allowance the Former Husband received as a sales representative, there is no evidence in the record showing he incurs expenses in selling surgical equipment as a distributor that differ from those he incurred as a salesman or that previously were paid or reimbursed by his former employer. That the Former Husband can now deduct those expenses for tax purposes does not make them *ipso facto* 'ordinary and necessary' for Chapter 61 income calculation purposes and he has presented no authority - nor have we found any - to support such a proposition."

4. "Absent such authority or any competent, substantial evidence of what expenses are 'ordinary and necessary' to running the Former Husband's distributorship, the trial court did not abuse its discretion in finding that his 2008 gross income was $120,000."

McQuaig v. McQuaig, 36 So.3d 801 (Fla. 1st DCA 2010)

Second District

IN CALCULATING HUSBAND'S INCOME FOR PURPOSES OF ALIMONY AND CHILD SUPPORT, TRIAL COURT ERRED IN EXCLUDING HUSBAND'S ANNUAL BONUS WHERE HUSBAND HAD RECEIVED BONUS PAYMENTS EACH YEAR FOR THE PAST NINE YEARS.

The trial court excluded the husband's bonus payment from his income finding that bonuses were not "fixed or guaranteed" because they are paid at the discretion of husband's employer. The District Court reversed the award of alimony and child support for further proceedings:

1. "Section 61.30(2), Florida Statutes (2007), requires trial courts to consider bonuses in calculating a spouse's income for purposes of child support, and section 61.08(2)(g) requires trial courts to consider 'all sources of income available to either party' in computing an award of alimony."

2. "Thus, we have held that when a trial court calculates income for the purpose of awarding child support or alimony, it may not exclude from consideration bonuses that are regular and continuous."

3. "Here, the trial court excluded the husband's bonus payments from his income finding that the bonuses were not 'fixed or guaranteed' because they are paid at the discretion of the husband's employer and because they are dependent upon the employer's yearly profit. While this is true, it is undisputed that the husband has received bonus payments each year for the past nine years, the last eight of which exceeded $25,000."

4. Under similar circumstances, we have concluded that the trial court abused its discretion when it excluded bonuses when determining a party's income for the purposes of alimony or support."

Drew v. Drew, 27 So.3d 802 (Fla. 2nd DCA 2010)

WHERE FORMER HUSBAND SOUGHT DOWNWARD MODIFICATION OF ALIMONY AND CHILD SUPPORT ON GROUNDS THAT HIS INCOME HAD BEEN REDUCED AND COURT WAS PRESENTED WITH FOUR DIFFERENT PERCENTAGES TO DETERMINE THE REDUCTION IN INCOME WHICH RESULTED IN FOUR DIFFERENT PERCENTAGES OF REDUCTION IN INCOME, IT WAS IMPROPER FOR COURT TO AVERAGE THE FOUR PERCENTAGES TO DETERMINE THE REDUCTION IN INCOME.

At the trial level the court was given four different methods of calculating the reduction of husband's gross income, and averaged the percentages to determine that the former husband's annual gross income was reduced by 17%. The court reduced husband's monthly alimony payments to $22,825, a 17% reduction, although the evidence ranged from 10.5% to 25%. The District Court held that the trial court abused its discretion in calculating an independent average of the former husband's reduction in income because, standing alone, the 17% was not supported by competent, substantial evidence:

1. "[W]e find the trial court abused its discretion when it calculated an independent average of the former husband's reduction in income because the finding of a 17% decrease, standing alone, was not supported by competent, substantial evidence."

2. "If the trial court decides to utilize an average method, the method should be implemented only if competent substantial evidence supports the court's assessment."

Vollmer v. Vollmer, 33 So.3d 67 (Fla. 2nd DCA 2010)

IN CALCULATING WIFE'S MONTHLY NEED FOR ALIMONY PURPOSES, COURT ERRED IN FAILING TO INCLUDE INCOME THAT WILL BE AVAILABLE TO WIFE FROM LIQUID ASSETS SHE IS RECEIVING AS PART OF EQUITABLE DISTRIBUTION AND IN FAILING TO REDUCE THE TOTAL (PRESUMED OVER A FIVE YEAR FUTURE PERIOD) TO PRESENT VALUE.

Prior to the dissolution hearing, husband and wife resolved the majority of issues between them. The trial court was asked to consider only the wife's claim for permanent and retroactive alimony and her claim that the liquid marital assets should be distributed unequally due to the husband's dissipation of certain marital assets during the marriage. At the close of the dissolution proceedings, the trial court awarded the wife permanent alimony payable as lump sum as well as retroactive alimony. It also found that the husband had dissipated marital assets, and it charged those dissipated assets to the Husband in its equitable distribution scheme. The husband first contended that the trial court abused its discretion by awarding the wife $261,240 in permanent alimony payable as a lump sum. The argument has two components: first, whether the wife was entitled to permanent alimony, payable as a lump sum; and second, whether the amount of the award was supported by evidence. As to the amount awarded, the District Court held:

1. "The permanent alimony awarded by the trial court was calculated based on the Wife's monthly need of $4354 multiplied by sixty months, which was the time remaining between the dissolution hearing and the Wife's sixty-fifth birthday when she will be eligible to collect Social Security benefits."

2. "However, in calculating the Wife's monthly need, the trial court failed to consider the interest income that will be available to her from the liquid assets she is receiving as part of the equitable distribution."

3. "Here, the Husband presented evidence that the Wife would be expected to earn 2 to 2 ½ percent each month on the approximately $500,000 in liquid assets that she would be receiving as part of the equitable distribution. This would give the Wife approximately $800 to $1000 per month in interest income. However, the final judgment does not mention this income, and it is not deducted form the amount established as the Wife's monthly need."

4. "Because it is an abuse of discretion to award an amount of alimony that exceeds a spouse's need… we must reverse and remand for a re-determination of the amount of the Wife's need for alimony in light of this unaccounted-for income."

5. "In addition, since we are remanding for a re-determination of the amount of permanent alimony to which the Wife is entitled, we note that because the award was intended to function as a 'prepayment' of the next five years' worth of the Wife's need, the trial court should have reduced the amount to present value . . . ."

Buoniconti v. Buoniconti, 36 So.3d 154 (Fla. 2nd DCA 2010)

AWARD OF RETROACTIVE ALIMONY APPROPRIATE WHERE SPOUSE WITH ABILITY TO PAY DOES NOT DO SO AND THUS THE OTHER PARTY MUST USE CAPITAL ASSETS FOR SUPPORT BUT, COURT MUST ACCOUNT FOR USE OF OTHER PARTY'S SHARE OF ASSETS SO UTILIZED.

Prior to the dissolution hearing, husband and wife resolved the majority of issues between them. The trial court was asked to consider only the wife's claim for permanent and retroactive alimony and her claim that the liquid marital assets should be distributed unequally due to the husband's dissipation of certain marital assets during the marriage. At the close of the dissolution proceedings, the trial court awarded the wife permanent alimony payable as lump sum as well as retroactive alimony. It also found that the husband had dissipated marital assets, and it charged those dissipated assets to the Husband in its equitable distribution scheme. The husband first contended that the trial court abused its discretion by awarding the wife $261,240 in permanent alimony payable as a lump sum. The argument has two components: first, whether the wife was entitled to permanent alimony, payable as a lump sum; and second, whether the amount of the award was supported by evidence. As to the retroactive award, the District Court held:

1. "When one spouse has sufficient income to pay alimony during the pendency of dissolution proceedings but instead decides to provide only nominal support, thus requiring the other spouse to invade marital assets for support, an award of retroactive alimony may be proper."

2. "However… the amount of retroactive alimony awarded is not supported by the evidence because it does not account for the Wife's use of the Husband's share of certain marital assets to support herself…. The Final Judgment on its face does not account for the Wife's use of the Husband's one-half share of [such] marital funds."

Buoniconti v. Buoniconti, 36 So.3d 154 (Fla. 2nd DCA 2010)

TRIAL COURT IMPERMISSIBLY DOUBLE-COUNTED CHILD'S EXPENSES WHEN COURT AWARDED WIFE ALIMONY INCLUDING SUCH EXPENSES WITHIN HER "NEED."

The Wife's financial affidavit demonstrated her monthly need to be $1,637.75, which included expenses paid for the parties' child. The trial court awarded $1,700.00 per month in

alimony to meet this need but then awarded child support, making the total monthly award $2,405.76. The District Court held:

1. "An award of alimony must be based on the recipient spouse's need for alimony and the paying spouse's ability to pay… Thus, an award of alimony that exceeds the recipient spouse's need constitutes an abuse of discretion."

2. "In addition, an award of alimony that includes amounts for children's expenses that have already been accounted for in a child support award constitutes an impermissible double-counting of those expenses and requires reversal."

3. "Because the resulting alimony award partially duplicated the child support award and exceeded the Wife's monthly need, the award constituted an abuse of discretion that requires reversal."

Lin v. Lin, 37 So.3d 941 (Fla. 2nd DCA 2010)

TRIAL COURT'S DETERMINATION OF WIFE'S INCOME BASED ON AMOUNTS STATED IN HER FINANCIAL AFFIDAVIT RATHER THAN DIFFERENT AMOUNTS SHE TESTIFIED TO AT TRIAL WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The Wife's financial affidavit demonstrated her monthly need to be $1,637.75, which included expenses paid for the parties' child. The Wife, however, contended that the figures in the Affidavit assumed that she would be working sixty hours per week and she testified at trial that she was not guaranteed that amount of work. The District Court held:

1. "The trial court's determination of the amount of a party's income must be supported by competent, substantial evidence. When there is conflicting evidence concerning a party's income, it is within the trial court's purview to determine what evidence is most credible."

2. "Here, the trial court determined the Wife's income based on the amounts she swore to in her Sixth Amended Financial Affidavit rather than the different amounts she testified to at the evidentiary hearing. While it is true that the trial court could have reached a different determination of the Wife's income, it is nevertheless supported by competent, substantial evidence."

Lin v. Lin, 37 So.3d 941 (Fla. 2nd DCA 2010)

TRIAL COURT ERRED IN DENYING WIFE'S REQUEST FOR PERMANENT ALIMONY BASED ON HUSBAND'S SUPPOSED LACK OF ABILITY TO PAY WHERE COURT FAILED TO TAKE INTO CONSIDERATION ALL OF HUSBAND'S INCOME.

The trial court found that the Husband's income was double that of the Wife but nevertheless found that the Husband lacked the ability to pay alimony. Instead, the court awarded the Wife $10,000 as lump sum alimony to be paid from the proceeds to be obtained from a refinance of the parties' former residence and re-characterized payments that the Husband had made on the mortgage on the home during the parties' separation as "transitional alimony." The District Court held:

1. "[I]t appears that the trial court failed to consider all sources of the Husband's income when it found that the Husband did not have the ability to pay the Wife permanent, periodic alimony. Although the final judgment states that the court was considering the Husband's actual

overtime pay, the gross monthly income figure cited in the final judgment from the Husband's financial affidavit…does not appear to be from his most recent affidavit and does not include the Husband's stipulated overtime…."

2. "In addition, the trial court did not make any factual findings with respect to the income the Husband historically earned in secondary employment."

3. "Further, the evidence reflects that the Husband is making monthly payments of $200 on an investment property that he purchased after the parties' separation. The trial court did not address this investment expense or the value of the property as an asset that could provide a means for making support payments. Similarly, it did not address the Husband's voluntary contributions to an AARP 401(k) plan…."

4. "In addressing alimony on remand, the trial court must consider all sources of income available to the Husband, including actual overtime pay and actual income from part-time employment at secondary jobs. In addition, it must consider the Husband's voluntary contributions to his investment property and 401(k) plan in making its 'ability to pay' alimony calculation."

Martinez v. Abinader, 37 So.3d 944 (Fla. 2nd DCA 2010)

Third District

IN AWARDING WIFE PERMANENT PERIODIC ALIMONY, TRIAL COURT ERRED IN THAT IT FAILED TO CONSIDER WIFE'S FINANCES IN LIGHT OF CONCURRENT AWARD TO HER OF A SIGNIFICANT AMOUNT OF LUMP SUM ALIMONY.

The parties were married in 1992 and separated in 2007. They had two minor children, ages nine and fourteen. The wife was 42 years old; the husband was 70. The husband was a general surgeon in private practice. The wife was also a doctor but had never been licensed and never practiced medicine. She was, however, employed in the field of public health and earned $47,000.00 annually. The trial court found that the husband earned $179,757.00 gross per year. The parties marital home was titled solely in the husband's name and was owned by him prior to the marriage. However, the parties devoted substantial time to rebuilding the home after Hurricane Andrew and marital funds were used to pay for the maintenance, upkeep and taxes on the property. The trial court awarded the wife $1.25 million as a lump sum alimony award, based on the marital contributions she made to the home, as well as the appreciation resulting from those contributions. The court also awarded the wife permanent alimony. The District Court reversed the alimony award: "In awarding the wife permanent periodic alimony, we hold that the trial court erred because it failed to consider the wife's finances in light of its concurrent award to her of $1.25 million as lump sum alimony."

Valladares v. Junco-Valladares, 30 So.3d 519 (Fla. 3rd DCA 2010)

TRIAL COURT ERRED IN FAILING TO PROVIDE A LEGALLY SUFFICIENT BASIS TO SUPPORT ITS DETERMINATION THAT THE 70 YEAR OLD HUSBAND'S INCOME AS A SURGEON WILL CONTINUE TO BE COMMENSURATE WITH THAT OF HIS PRIOR EARNINGS.

The parties were married in 1992 and separated in 2007. They had two minor children, ages nine and fourteen. The wife was 42 years old; the husband was 70. The husband was a general surgeon in private practice. The wife was also a doctor but had never been licensed and never practiced medicine. She was, however, employed in the field of public health and earned $47,000.00 annually. The trial court found that the husband earned $179,757.00 gross per year. The parties marital home was titled solely in the husband's name and was owned by him prior to the marriage. However, the parties devoted substantial time to rebuilding the home after Hurricane Andrew and marital funds were used to pay for the maintenance, upkeep and taxes on the property. The trial court awarded the wife $1.25 million as a lump sum alimony award, based on the marital contributions she made to the home, as well as the appreciation resulting from those contributions. The court also awarded the wife permanent alimony. The District Court reversed the alimony award: "The trial court also erred in that it failed to provide a legally sufficient factual basis to support its determination that the husband's income as a surgeon will continue to be commensurate with that of his prior earnings, now that he is over seventy years of age."
Valladares v. Junco-Valladares, 30 So.3d 519 (Fla. 3rd DCA 2010)

FORMER HUSBAND'S BEFORE TAX INCOME SHOULD NOT HAVE BEEN REDUCED TO GIVE HIM CREDIT FOR RENTAL LOSS ON CONDOMINIUM UNIT HE RECEIVED AS PART OF DIVORCE SETTLEMENT WHERE FORMER HUSBAND HAD BORROWED FUNDS AGAINST THE UNIT RATHER THAN USING HIS OWN FUNDS TO PAY PERSONAL EXPENSES.

In computing the amount of the Husband's income for alimony modification purposes, the trial court reduced former husband's before tax income from $147,214 to $124,391 to give him credit for a purported rental loss on a condominium that he received as part of the parties' divorce settlement. On appeal, the Third District found that the husband was not entitled to such a credit:

1. "The testimony was that the parties owned his unit before the divorce, and that [the Husband] lived in it both before and after the divorce. After [the Husband] remarried, and he and his new wife moved into another condominium, he kept [the unit] permitting his elderly parents to live there. After they died, he continued to own the unit, now worth over $600,000, using it as a cash cow and borrowing over $200,000 against it - rather than using his own substantial funds (including a $500,000 inheritance from his parents) - to pay for personal expenses. (including tens of thousands of dollars to maintain his 52 foot yacht.)"

2. "Below, he sought to reduce his gross income in an amount equal to $37,295.69 claiming that he had incurred $63,465.84 in expenses related to this unit (derived from first and second mortgage payments (34,189.08), property taxes ($10,593.16), maintenance fees ($10,030.96), cable TV bills ($727.32), electricity charges ($1,350), brokerage commissions ($2,267), repair costs ($3,877.04), and telephone expenses ($431.28), but had earned only $26,170.15 in rental income."

3. "The court below, while not allowing Mr. Schmachtenberg to deduct the entire $37,295.69 as a rental loss to reduce his gross income, permitted him to deduct $22,823 after concluding that he should receive no credit for payments made on the line of credit secured by the condominium (a little over $14,000) because he had used the fund for his own purposes."

4. "While we agree that [the Husband] was entitled to no credit for payments made towards the line of credit secured by this property, he should have received no deduction for any portion of the expenses relating to it. A former spouse cannot reduce his or her disposable income by voluntarily incurring debt."

Schmachtenberg v. Schmachtenberg, 34 So.3d 28 (Fla. 3rd DCA 2010)

ERROR TO INCLUDE ANNUITY PAYMENT AS INCOME IF THE PAYMENTS WERE FROM PRINCIPAL WHEN CALCULATING AMOUNT OF HUSBAND'S INCOME; COURT DID NOT ERR IN REFUSING TO "IMPUTE" INCOME TO THE WIFE THAT SHE COULD RECEIVE FROM A REVERSE MORTGAGE; A REVERSE MORTGAGE IS NOT "INCOME," IT IS A SECURED LOAN WHICH DISSIPATES THE EQUITY VALUE OF AN ASSET.

The Husband appealed from the trial court's reduction of his alimony obligation from $3,000 per month to $780.50 per month, contending, in part, that the trial court wrongfully computed his income. The District Court held:

1. "We do, however, agree that the court below erred in calculating the amount of permanent periodic alimony to be paid to [the Wife], because that calculation may have improperly included as 'income' for [the Husband], annuity payments, if they were payments from principal, and also because the calculation failed to include in [the Wife's] ' 'income' sums she was receiving from some of all of her investments."

2. "The modification award is therefore reversed and this matter remanded for re-determination of the amount of periodic alimony henceforth to be paid…. Such determination to include consideration of only *income* received by *either* party, with no amounts to be imputed to either party for purported "income" from reverse mortgages."

3. In a footnote, the Court added, "No 'income' should have been imputed to [the Wife] for sums [the Husband's] expert opined she might be able to secure from a reverse mortgage. A reverse mortgage is not 'income"' it is a secured loan which over a period of time dissipates the equity value of an asset."

Boggess v. Boggess, 34 So.3d 115 (Fla. 3rd DCA 2010)

ERROR TO REFUSE TO AWARD WIFE PERMANENT PERIODIC ALIMONY IN A NOMINAL AMOUNT, WHERE, AT THE TIME OF THE FINAL HEARING, HUSBAND WAS INVOLUNTARILY TEMPORARILY UNEMPLOYED, BUT HAD AN EXPECTATION OF SECURING A POSITION SHORTLY THEREAFTER.

The parties' only substantial asset was a family home, which was severely under water and was awarded, by agreement, to the Wife. During the marriage, both parties worked, with the Husband earning substantially more than the Wife. At the time of the final hearing, the Husband was involuntarily, temporarily unemployed but had the expectation of securing a position shortly thereafter. The trial court refused to award alimony in any form and the Wife appealed. The District Court held:

1. "Under these circumstances, we agree with the [Wife's] sole contention on appeal: that the trial court erred and abused its discretion by failing to award her alimony in any form."

2. "In recognition of the desirability of providing for the real likelihood that such an award, although not now appropriate because of the husband's inability to pay, may become so in the future, we remand the case with directions to award her permanent periodic alimony in a nominal amount."

Purrinos v. Purrinos, 34 So.3d 244 (Fla. 3rd DCA 2010)

Fourth District

AMOUNT OF PERMANENT ALIMONY AWARDED TO WIFE CANNOT BE RECONCILED WITH TRIAL COURT'S FINDINGS OF NEED AS STATED IN ORDER ON APPEAL.

The trial court awarded the former wife a gross taxable amount of $11,000 in permanent periodic alimony, resulting in a net monthly award of $8,035. On appeal, the District Court reversed, holding:

1. "Former wife's pre-alimony disposable income is $5,221 and adding that amount to former wife's net monthly alimony award results in former wife's monthly disposable income of $13,256. Former wife's post-divorce disposable income will exceed her claimed living expenses of $12,098 by approximately $1,200 per month."

2. "We cannot determine whether the additional alimony amount is based, in whole or in part, on standard of living adjustments, such as for the former wife's future 'vacation and travel expenses' since the trial court specifically found that frequent and expensive worldwide vacation 'were part of the parties' lifestyle'; if this is so, the court should make clear in its final order on remand."

Garcia v. Garcia, 25 So.3d 687 (Fla. 4th DCA 2010)

FINDING THAT HUSBAND , WHO OWNED A COPY MACHINE REPAIR BUSINESS , COULD BILL HIS CLIENT TWENTY HOURS PER WEEK AMOUNTED TO SPECULATION, AND REVIEW OF HUSBAND'S BUSINESS ACCOUNTS BY WIFE'S FORENSIC ACCOUNTANT FAILED TO CONSIDER THE HUSBAND'S BUSINESS EXPENSES.

At trial, the husband, who owns a copy machine repair business, stated he could bill an average of only one hour per day (at $95 an hour) to his clients. The trial court found that the husband could bill his clients twenty hours per week. On appeal, the Fourth District found the trial court's ruling amount to speculation and the account's review of the husband's business accounts failed to consider business expenses.

1. "The court believed the husband could bill at least twenty hours per week, raising his gross corporate revenues to roughly $95,000 per year."

2. "The court then subtracted $15,000 to be retained by the corporation to meet expenses, leaving $80,000 in imputed gross income. This calculation was supported by the opinion of the wife's forensic accountant."

3. "Nevertheless, the trial court's finding that the husband could bill his clients twenty hours per week amounts to speculation, and the accountant's review of the husband's business bank accounts failed to consider the husband's business expenses."

4. "The only competent evidence regarding the husband's income was his ability to fund household expenses amounting to $5,000 per month. A spouse's ability to maintain a standard of living at a certain financial level is probative evidence of the spouse's income."

5. "Nevertheless, a trial court may not impute income to a party based solely on past earning power because past income may not reflect a present ability to pay."

Sallaberry v. Sallaberry, 27 So.3d 234 (Fla. 4th DCA 2010)

TRIAL COURT CORRECTLY DETERMINED THAT INCOME CANNOT REASONABLY BE IMPUTED FROM A MARITAL HOME IN WHICH THE WIFE RESIDES, HOWEVER, IF SUCH AN ASSET BECOMES INCOME PRODUCING IN THE FUTURE, HUSBAND IS NOT PRECLUDED FROM SEEKING MODIFICATION OF ALIMONY OBLIGATION.

In a short per curiam opinion with only one fact, to wit: the Wife lives in the marital home with her children, the District Court held: "The trial court correctly determined that income cannot reasonably be imputed from this asset at this time. However, should this asset become income-producing in the future, the former husband is not precluded from seeking modification of his alimony obligation.

Levine v. Levine, 29 So.3d 464 (Fla. 4th DCA 2010)

NO ABUSE OF DISCRETION IN AWARDING PERMANENT ALIMONY TO HUSBAND WHERE WIFE WAS IN SUPERIOR FINANCIAL POSITION OR IN THE AMOUNT OF ALIMONY AWARDED WHERE TRIAL COURT REJECTED WIFE'S CLAIMED EXPENSES AS INFLATED.

The trial court awarded the husband $500 per month in permanent alimony. On appeal, the Fourth District found no abuse of discretion:

1. "The wife works as a paralegal for a law firm. The husband, who has little education, worked as a cook at the beginning of the marriage. Later, he and the wife opened a deli, which continues to be his main source of income. At the time of the dissolution, the wife earned approximately $2,000 more per month than the husband."

2. "The trial court carefully considered the factors for awarding alimony under section 61.08, Florida Statutes. Based upon the wife's greater earnings and earning ability, as well as the husband's limited education and prospects, the trial court awarded the husband permanent alimony of $500 per month."

3. "The trial court rejected the wife's contention that she had an inability to pay alimony, finding that some of her expenses were inflated and some could be eliminated. Indeed, the wife's own testimony, in which she acknowledged a significant increase in her expenses since the filing of the divorce, supports the trial court's findings. In addition, for other expenses related to child support, the trial court also noted that the wife would be receiving child support from the husband."

Leonardis v. Leonardis, 30 So.3d 568 (Fla. 4th DCA 2010)

Fifth District

ERROR TO FAIL TO CONSIDER ASSETS AWARDED TO HUSBAND AS A POTENTIAL SOURCE OF ALIMONY OR, ALTERNATIVELY, ADJUSTING THE WIFE'S EQUITABLE DISTRIBUTION TO ACCOUNT FOR THE HUSBAND'S LIMITED ABILITY TO PAY ALIMONY.

The parties separated in 2001 without entering into a formal separation agreement, and filed for divorce six years later in 2007. When the parties separated the Husband had a 401(k) valued at about $6,000, the parties did not own a home and had few assets. As of the filing date, the 401(k) account grew to over $100,000, the Husband had acquired a Benefit Restoration Plan with a value of about $20,000, and had purchased a house which had about $100,000 in equity. For purposes of equitable distribution the trial court used the date of separation leaving wife with a net distribution of about $11,000 and husband with a net distribution of over $200,000. Wife appeals this order. As to the alimony issue, the District Court held:

1. "With respect to alimony, the trial court correctly found that the wife qualified for and needed permanent alimony. However, the court only awarded a nominal amount of alimony, finding that the husband could not afford to pay any more in light of the termination of his job…."

2. "As the wife correctly argues, this decision should not have been made independently of the asset distribution decision. In other words, the trial court erred by failing to consider the assets awarded to the husband in the final judgment as a potential source of alimony."

3. "Alternatively, as the wife suggests, the trial court could have adjusted her equitable distribution scheme to account for the husband's limited ability to pay the needed alimony in light of his unemployment."

Boyle v. Boyle, 30 So.3d 665 (Fla. 5th DCA 2010)

J. Imputed Income

First District

Second District

Third District

TRIAL COURT ERRED IN IMPUTING INCOME TO FORMER WIFE FOR PURPOSE OF DETERMINING AMOUNT OF ALIMONY WHERE THERE WAS NO EVIDENCE THAT FORMER WIFE IS EMPLOYABLE EXCEPT AS A REAL ESTATE AGENT, AND NO EVIDENCE AS TO CURRENT JOB MARKET OR PREVAILING EARNINGS LEVEL FOR REAL ESTATE AGENTS IN COMMUNITY WHERE FORMER WIFE LIVES.

The trial court, when determining the amount of alimony that the Husband should pay in a modification case, imputed $18,000 in income to the Wife. This was the same amount that the

parties agreed to impute to her in 2002 in their Marital Settlement Agreement. On appeal, the District Court held that because the "projected and estimated" income imputed to the Wife in the marital settlement agreement did not come to fruition the amount should not have been imputed to her:

1. "There is no dispute that [the Wife] is currently unemployed and has engaged in no meaningful employment since the parties' divorce in 2002. The undisputed record is, therefore, that her current income in $0. Rather than using that number as a basis for determining need and thus the amount of alimony [the Husband] should currently pay, the court below imputed $18,000 in income to [the Wife], which is the amount the parties agreed to impute to her in 2002 when they executed their marital settlement agreement ."

2. "The record in this case is that while [the Wife] has both a college degree and a real estate license, she has not held meaningful full-time employment since the 1970's. The last meaningful part-time employment she enjoyed was in [the Husband's] law office where she assisted in real estate related work."

3. "[The Wife] has sold only two properties as a real estate agent and has spent most of her time assisting the parties' disabled son. Other than this, there is no evidence that, now at age 58 and many years outside the workplace, [the Wife] is employable except as a real estate agent. As to this (or for that matter any other) line of work, there is no evidence whatsoever as to the current job market or as to the prevailing earnings level for such agents in the community where [the Wife] lives. Absent such evidence, income could not be imputed to her."

4. "The amount imputed to [the Wife] in the 2002 marital settlement agreement, as the agreement itself confirms, did not represent her actual income, but represented no more than an estimate of potential future earnings…. As we know, the 'projected and estimated' income imputed to [the Husband] in this agreement did not come to fruition; nor, as the record confirms, did [the Wife's]. This estimate should not, therefore, have been attributed to her now for the purpose of determining either alimony or child support."

Schmachtenberg v. Schmachtenberg, 34 So.3d 28 (Fla. 3rd DCA 2010)

ERROR TO IMPUTE INCOME TO FORMER WIFE ON THE BASIS OF FUNDS GIVEN TO HER BY HER PARENTS TO MAKE ENDS MEET WHERE FUNDS RECEIVED FROM PARENTS WERE NOT SHOWN TO BE CONTINUING AND ONGOING.

The trial court imputed $2066 per month as additional income to the Wife in an alimony and child support modification case based upon gifts received from her parents. The District Court reversed:

1. "Nor should any amount have been imputed as income to [the Wife] because her parents gave her money to make ends meet…. [T]he general rule is that the trial court may only consider the financial resources of the parties and not the financial assistance of family or friends."

2. "[The Wife] testified that she had received substantial monetary gifts from her parents since the divorce to help her make ends meet…. [W]here a spouse receives sporadic sums (even if substantial) to defray living expenses, those sums cannot be imputed as income."

3. "[T]he record in this case is that [the Wife] received substantial monetary gifts from her parents following the divorce. There is no evidence that these gift were made on a regular,

ongoing basis or that they would continue in the future. Absent such evidence…. amounts received by [the Wife] from her parents should not have been imputed to her as income."
Schmachtenberg v. Schmachtenberg, 34 So.3d 28 (Fla. 3rd DCA 2010)

TRIAL COURT DID NOT ERR IN FINDING THAT SELF-EMPLOYED HUSBAND'S INCOME WAS GREATER THAN HE REPORTED BUT ERRED IN IMPUTING A SPECIFIC AMOUNT OF INCOME TO THE HUSBAND WITHOUT SUFFICIENT EVIDENCE.

The Husband was a self-employed marine electronic technician with a reported gross monthly income of $1,759. Although the Husband was unable to testify as to the number of hours he worked per week, he admitted that if he worked 2 hours per day, 5 days per week, he could make $850 per week. The evidence showed that during the pendency of the divorce, the Husband paid the mortgage and expenses for the wife and children; he also paid credit card bills and children's expenses. The trial court found that husband's income was greater than he reported and imputed an additional $3,000 in monthly income to him. The District Court held:

1. "It is within the trial court's discretion to impute income to a spouse in order to determine the support awards. In addition, Florida case law has long recognized that self-employed spouses, in contrast to salaried employees, have the ability to control and regulate their income. Their testimony, tax returns, and business records accordingly may not reflect their true earnings, earning capability, and net worth."

2. "Here, the husband is a self-employed marine electronic technician, reporting a gross monthly income of $1759. He has been in this business for the past twenty years and operates his business with minimal cost at a property owned by his sister. He does not advertise his services and obtains customers based on referrals…. The husband does not have separate bank accounts or credit card accounts for his personal and business expenses…. The credit card bills varied from approximately $3000 to $15,000 a month. The husband submitted tax returns showing a reported range of gross income from $13,004 to $27,772."

3. "This record justifies the trial court's conclusion that the husband's financial documents and testimony did not demonstrate the accuracy of his reported income and that the negative cash flow, which the trial court concluded was not satisfactorily explained, supports a ruling that the husband's income was greater than he reported."

4. "We find merit, however, in the husband's argument that the record lacks competent, substantial evidence to support the trial court's imputation of the specific amount of an additional $3,000 in monthly income to the husband. At trial, the court did not explain how it arrived at this figure, and the final judgment and the record do not disclose any basis for finding that the husband actually earned or is capable of earning $3000 in additional income each month."
Child v. Child, 34 So.3d 159 (Fla. 3rd DCA 2010)

Fourth District

FINDING THAT HUSBAND , WHO OWNED A COPY MACHINE REPAIR BUSINESS , COULD BILL HIS CLIENT TWENTY HOURS PER WEEK AMOUNTED TO SPECULATION, AND REVIEW OF HUSBAND'S BUSINESS ACCOUNTS BY WIFE'S FORENSIC ACCOUNTANT FAILED TO CONSIDER THE HUSBAND'S BUSINESS EXPENSES.

At trial, the husband, who owns a copy machine repair business, stated he could bill an average of only one hour per day (at $95 an hour) to his clients. The trial court found that the husband could bill his clients twenty hours per week. On appeal, the Fourth District found the trial court's ruling amount to speculation and the account's review of the husband's business accounts failed to consider business expenses.

1. "The court believed the husband could bill at least twenty hours per week, raising his gross corporate revenues to roughly $95,000 per year."

2. "The court then subtracted $15,000 to be retained by the corporation to meet expenses, leaving $80,000 in imputed gross income. This calculation was supported by the opinion of the wife's forensic accountant."

3. "Nevertheless, the trial court's finding that the husband could bill his cclients twenty hours per week amounts to speculation, and the accountant's review of the husband's business bank accounts failed to consider the husband's business expenses."

4. "The only competent evidence regarding the husband's income was his ability to fund household expenses amounting to $5,000 per month. A spouse's ability to maintain a standard of living at a certain financial level is probative evidence of the spouse's income."

5. "Nevertheless, a trial court may not impute income to a party based solely on past earning power because past income may not reflect a present ability to pay."

Sallaberry v. Sallaberry, 27 So.3d 234 (Fla. 4th DCA 2010)

ALTHOUGH EVIDENCE THAT HUSBAND HAD ABILITY TO FUND HOUSEHOLD EXPENSES AMOUNTING TO $5,000 PER MONTH WAS PROBATIVE EVIDENCE OF HUSBAND'S INCOME, IT WAS NOT SUFFICIENT BY ITSELF TO IMPUTE A GROSS INCOME OF $80,000.

At the trial level, the court imputed to the husband a gross income of $80,000. On appeal, the court found the evidence regarding the husband's prior ability to support the marital home was insufficient by itself.

1. "A trial, the husband claimed only $3,400 per month in gross income. He stated he could bill an average of only one hour per day (at $95 per hour) to his clients."

2. "The trial court held that the husband's reduction in income was the result of voluntary underemployment. The trial court then imputed to the husband an annual income of $80,000."

3. "The only competent evidence regarding the husband's income was his ability to fund household expenses amounting to $5,000 per month. A spouse's ability to maintain a standard of living at a certain financial level is probative evidence of the spouse's income."

4. "Nevertheless, a trial court may not impute income to a party based solely on past earning power because past income may not reflect a present ability to pay."

5. "On this limited basis, we reverse the trial court's decision to impute $80,000 in gross annual income to the husband and remand for further proceedings. In remanding to the trial court, we stress that the wife bears the burden of proof in this instance, and trial court's net income finding must be supported by competent, substantial evidence."
Sallaberry v. Sallaberry, 27 So.3d 234 (Fla. 4th DCA 2010)

Fifth District

K. Miscellaneous

First District

ABUSE OF DISCRETION TO PROSPECTIVELY MODIFY AN ALIMONY AWARD BY FINDING THAT THE AWARD SHOULD CEASE WHEN EQUITABLE DISTRIBUTION IS DISPERSED.

The trial court awarded alimony to the Wife but ruled that the award would cease once she began receiving her share of the Husband's retirement benefits. The District Court reversed:

1. "In the [final] order, the trial court prospectively determined that Appellant's alimony award would cease once she began receiving her share of Appellee's retirement benefit."

2. "This prospective modification was an abuse of discretion because the retirement benefit was awarded to Appellant as part of her equitable distribution."
Pombrio v. Pombrio, 29 So.3d 1208 (Fla. 1st DCA 2010)

Second District

Third District

Fourth District

Fifth District

PROVISIONS OF JUDGMENT RELATING TO ALIMONY AWARDED TO WIFE WERE INADEQUATE; COURT'S FINDING THAT HUSBAND'S INCOME RANGED FROM $7,000 TO $12,000 PER MONTH WAS UNCERTAIN AND INADEQUATE; FINDINGS AS TO WIFE'S NEED INADEQUATE; REMAND FOR NEW TRIAL BECAUSE OF EXCESSIVE LAPSE IN TIME BETWEEN TRIAL AND ENTRY OF JUDGMENT.

The parties were married for eleven years. The Husband was self-employed in his own business; the Wife was not employed. The parties settled all issues in their divorce case except alimony and attorney's fees. The evidence at trial showed the parties lived a comfortable life during the marriage. The Wife did not work during the marriage, and Husband acknowledged that Wife had been a good mother and homemaker until, at the end of the marriage, Wife

engaged in numerous adulterous affairs. More than two years after the trial, the court entered an order awarding the Wife $1,800.00 per month in alimony, finding that the $1,000 per month in temporary alimony the wife had been receiving was inadequate. The District Court held:

1. "The final judgment is sparse. On the issue of need and ability to pay, there are only three findings: the Husband's net income was between $7,000 and $12,000 per month; that Wife has illnesses that prevent her from working full time and that she has 'substantial' medical and drug expenses."

2. "We find the judgment to be inadequate in several respects. The finding of such a wide range for Husband's income is too uncertain, and is not warranted by the evidence. There is a lack of findings on Wife's need, an issue greatly disputed at trial, making it impossible for this Court to make any meaningful review. These deficiencies are combined with a twenty-eight month delay between the trial and entry of the judgment and appear to be related."

3. "Even though the trial court was eventually provided a transcript, it is doubtful, with the passage of so much time, that issues of credibility and weight of evidence could accurately be recalled. Loath as we are to require parties to incur the cost and delay of a retrial, it is necessary in this case, and the parties are partly responsible for the delay. A new hearing of all alimony issues, including whether the Wife's adultery should affect the amount of alimony awarded is required."

Eckert v. Eckert, 29 So.3d 381 (Fla. 5th DCA 2010)

III. APPEAL

First District

ORDER MODIFYING CUSTODY OF PARTIES' CHILD, WAS A NON-FINAL ORDER BECAUSE IT CONTEMPLATED ADDITIONAL JUDICIAL LABOR TO ESTABLISH AMOUNT OF CHILD SUPPORT.

The trial court's order, among other things, modified custody of the parties' minor child and terminated the child support obligations of the appellee. The appellate court dismissed the appeal for lack of jurisdiction because the March 17, 2009 required additional judicial labor making it a non-final order that would eventually result in an appealable final order: "Although the March 17, 2009 order was an appealable non-final order under rule 9.130(a)(3)(C)(iii), Florida Rules of Appellate Procedure, a notice of appeal was required to be filed within 30 days of the rendition of this order."

Cassell v. Erquiaga, 28 So.3d 143 (Fla. 1st DCA 2010)

HUSBAND FAILED TO PRESERVE ISSUE OF ABSENCE OF FACTUAL FINDINGS PERTAINING TO EQUITABLE DISTRIBUTION WHEN HE FILED HIS NOTICE OF APPEAL PRIOR TO HIS REHEARING MOTION BEING HEARD THUS ABANDONING THE REHEARING MOTION.

At the trial level, the former husband was ordered to pay $30,000 to the former wife. The trial court characterized this as "lump sum alimony" On appeal, the First District found that the award was "intended as an equitable award to reimburse the former wife for $30,000 of

premarital funds she lost when the home was foreclosed upon because the former husband did not pay the mortgage while the dissolution litigation was pending as he had been ordered to do." On appeal, the Husband argued that if the award was equitable distribution, the trial court failed to make appropriate factual findings. The District Court held: "To the extent that, as part of this issue, the former husband complains that the trial court failed to make findings of fact as required by statute, he had not preserved the point because, although he filed a motion for rehearing, he abandoned it when he filed his notice of appeal before the trial court had ruled on the motion."
Jonsson v. Dickinson, 35 FLW D378 (Fla. 1st DCA 2010)

Second District

WHERE HUSBAND FAILED TO PROVIDE TRANSCRIPT OF FINAL HEARING OR STATEMENT OF EVIDENCE OF THE PROCEEDINGS, NO REVERSIBLE ERROR SHOWN.

The Husband appealed from a final judgment of dissolution of marriage, raising several challenges to the equitable distribution and alimony awards. However, he failed to provide a transcript of the final hearing or a statement of the evidence or the proceeding. The District Court held:

1. "We recognize that the final judgment fails to contain certain requisite findings supporting the equitable distribution and alimony determinations. However, in the absence of a transcript or an appropriate substitute, we are constrained to affirm."
2. "In reaching this conclusion, we note that the lack of necessary findings in dissolution cases not only hinders appellate review but also poses problems for modification or enforcement proceedings which may occur in the future."

Arias v. Arias, 28 So.3d 157 (Fla. 2nd DCA 2010)

AN ORDER THAT DETERMINES ONLY THE RIGHT TO ATTORNEY'S FEES AND NOT THE AMOUNT OF ATTORNEY'S FEES IS NOT SUBJECT TO APPEAL.

In a short opinion setting forth no specific facts, the District Court declined to review the Order regarding attorney's fees and held:

1. "We dismiss, as premature, Ms. Zuberer's appeal of the trial court's ruling that she is entitled to contribution to her attorney's fees and costs, but reserve[d] jurisdiction to determine a reasonable amount of fees and the amount to be offset as a sanction for her failure to attend the first trial."
2. "The trial court's ruling addressed only entitlement to fees; the issue is not ripe for appeal until it determines the amount."

Zuberer v. Zuberer, 28 So.3d 993 (Fla. 2nd DCA 2010)

ABSENCE OF TRANSCRIPT PREVENTS HUSBAND FROM DEMONSTRATING REVERSIBLE ERROR WITH REGARD TO AWARD OF TEMPORARY SUPPORT TO WIFE.

The Husband appealed from the trial court's non-final order, directing him to pay temporary support and attorney's fees to the Wife. The record however, did not contain a transcript of the proceedings below. With regard to the award for temporary relief the District Court held:

1. "Without a record of the trial proceedings, the appellate court can not [sic] properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory."
2. "Because we cannot provide a meaningful review of the trial court's order awarding temporary relief to the Wife, we affirm that award."

Macarty v. Macarty, 29 So.3d 434 (Fla. 2nd DCA 2010)

EVEN IN THE ABSENCE OF A TRANSCRIPT, ERROR TO AWARD ATTORNEY'S FEES WHERE ORDER LACKED ADEQUATE FINDINGS JUSTIFYING THE AMOUNT OF AWARD THUS MAKING IT FACIALLY ERRONEOUS; QUESTION CERTIFIED AS TO WHETHER SUCH ORDERS ARE FACIALLY INVALID.

The Husband appealed from the trial court's non-final order directing the husband to pay temporary support and attorneys fees to the Wife. The record did not contain a transcript of the proceedings below and the order awarding attorney's fees lacked the required findings regarding the reasonableness of attorney's hours and rates. With regard to the award for attorney's fees the District Court held:

1. "We reverse the award of attorney's fees to the Wife because the portion of the order awarding attorney's fees is facially erroneous."
2. "[A]n award of attorney's fees without adequate findings justifying the amount of the award is reversible even where the appellant has provided an inadequate record of the trial court proceedings."
3. "We certify the following question to be of great public importance: is an order awarding attorney's fees….that lacks the required findings regarding the number of hours reasonably expended and the reasonableness of the hourly rate fundamentally erroneous on its face, thus requiring reversal, even when the appellate record does not include a transcript or approved statement of the proceedings below?"

Macarty v. Macarty, 29 So.3d 434 (Fla. 2nd DCA 2010)

ORDER GRANTING REQUEST FOR RELOCATION AFFIRMED BECAUSE OF THE ABSENCE OF A TRANSCRIPT WHERE THE ORDER WAS NOT ERRONEOUS AS A MATTER OF LAW.

In November, 2008 and March, 2009, both the Husband and the Wife filed Notices of Intent to Relocate with Children: the Wife sought to move to Illinois and the Husband to North Carolina. The trial court denied the Wife's request and granted the Husband's. The District Court held:

1. "A trial court's order regarding relocation is reviewed on appeal under an abuse of discretion standard. However, this court is unable to determine whether the order is supported by substantial competent evidence because the record before us does not contain a transcript from the relocation hearing, which was held without the presence of a court reporter."

2. "Therefore, the order must be upheld to the extent that it is not erroneous as a matter of law."

Tillotson v. Sanchez, 32 So.3d 191 (Fla. 2nd DCA 2010)

ERROR TO FAIL TO MAKE FINDINGS REGARDING PARTIES' INCOMES AND ABILITY TO PAY WITH RESPECT TO CHILD SUPPORT COMPUTATIONS; DISTINCTION BETWEEN CHILD SUPPORT AND OTHER MARITAL AWARDS IN TERMS OF NON-APPLICABILITY OF HARMLESS ERROR STANDARD.

The parties were divorced in New Jersey in 2005. The Final Judgment incorporated the parties' Agreement that, in pertinent part: the Wife would have sole legal custody of their adopted child; the Husband would pay $1,186.80 per month in child support (based on the child support guidelines); the Husband would pay 70% of the costs of a nanny and 70% of any non-covered medical/dental/prescription costs. Additionally, the Agreement recognized that the Husband would shortly be unemployed at which point support would then be modified. The Husband indeed sought a modification and the respective income statements filed in the case showed that the Wife was making slightly less than twice the amount of the Husband. The trial court then reduced the Husband's monthly payments to $754.27 per month although the court made no findings regarding the parties' income or their ability to pay. The court also ordered the parties to split the costs of childcare and medical/dental/prescriptions. The District Court held:

1. "It is well settled that a trial court errs by failing to make findings of fact regarding the parties' incomes when determining child support. This is because findings regarding the parties' incomes are necessary for a determination of whether the support ordered departed from the guidelines and, if so, whether that departure was justified."

2. "Thus, the failure to include findings regarding the parties' incomes for purposes of child support calculations renders a final judgment facially erroneous, and the absence of a transcript does not preclude reversal on that basis."

3. "We are mindful that, in cases involving equitable distribution and alimony, this court has held that the lack of a transcript precludes a party from establishing that any error in failing to make the required findings was harmful…. Simply put, child support is different than alimony or equitable distribution. Child support is not a requirement imposed by one parent on the other, rather it is a dual obligation imposed on the parents by the State. The right to child support belongs to the child, and it cannot be waived by parents."

Wilcox v. Munoz, 35 So.3d 136 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WIFE'S MOTION TO SET ASIDE ORDER GRANTING MOTION TO ENFORCE MEDIATED SETTLEMENT AGREEMENT; STANDARD OF REVIEW TO SET ASIDE A JUDGMENT FROM A MEDIATED AGREEMENT IS "GROSS ABUSE OF DISCRETION."

The husband and wife were married in 1978 and entered into a prenuptial agreement which provided that the past, present and future property of each spouse would remain the separate property of the respective spouse. In 2006 the husband died while divorce proceedings were pending. The wife sought an elective share of the estate along with other property. The trial court ordered mediation, the parties settled the case and the trial court approved the agreement. When the wife later failed to comply with the terms of the agreement, the personal representative of the estate moved to enforce the settlement. The wife appeared at the hearing and testified that she wanted more time to consult with an attorney and to investigate the settlement and the prenuptial agreement. The court granted the motion to enforce. The wife did not appeal. Instead, she retained new counsel who filed an emergency motion to stay the proceedings, a motion for rehearing and a motion to set aside the order of enforcement. The motions were denied and the wife appeal, seeking rescission of the settlement agreement. The District Court held:

1. "Because her appeal is directed to the order denying her motion for rehearing and a denial of her motion to set aside the order granting the motion to enforce the mediated settlement, the standard of review is gross abuse of discretion."

2. "We additionally note that there is a more stringent standard of review, however, when the final judgment to be vacated follows a mediated settlement agreement."

Rachid v. Perez, 26 So.3d 70 (Fla. 3rd DCA 2010)

WIFE'S CLAIM THAT AGREEMENT SHOULD BE RESCINDED BECAUSE OF UNILATERAL MISTAKE WAS NOT PRESERVED FOR APPELLATE REVIEW WHERE ISSUE WAS NOT RAISED IN TRIAL COURT.

The husband and wife were married in 1978 and entered into a prenuptial agreement which provided that the past, present and future property of each spouse would remain the separate property of the respective spouse. In 2006 the husband died while divorce proceedings were pending. The wife sought an elective share of the estate along with other property. The trial court ordered mediation, the parties settled the case and the trial court approved the agreement. When the wife later failed to comply with the terms of the agreement, the personal representative of the estate moved to enforce the settlement. The wife appeared at the hearing and testified that she wanted more time to consult with an attorney and to investigate the settlement and the prenuptial agreement. The court granted the motion to enforce. The wife did not appeal. Instead, she retained new counsel who filed an emergency motion to stay the proceedings, a motion for rehearing and a motion to set aside the order of enforcement. The motions were denied and the wife appeal, seeking rescission of the settlement agreement. The District Court held:

1. "We begin our analysis with [the wife's] failure to present the legal argument of unilateral mistake below. To preserve an issue for appellate review, it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation.'"

2. "Because [the wife] failed to raise the argument of unilateral mistake at the trial court level, this issue is not preserved and not properly before this Court."

Rachid v. Perez, 26 So.3d 70 (Fla. 3rd DCA 2010)

Fourth District

WHERE TRIAL JUDGE, IN FINAL JUDGMENT, ESSENTIALLY RESERVED JURISDICTION TO DETERMINE WHICH ITEM OF HUSBAND'S PROPERTY WOULD BE SUBJECT TO A LIEN TO SECURE WIFE'S ALIMONY PAYMENTS, JUDGMENT DID NOT BRING END TO JUDICIAL LABOR REQUIRED IN THE CASE, AND ORDER WAS NOT SUBJECT TO APPEAL AS A FINAL ORDER.

The trial court reserved jurisdiction to determine which item of the husband's property would be subject to a lien to secure the wife's alimony payments. The District Court found that the final judgment did not bring an end to the judicial labor required in the case and therefore, it was not appealable as a final order:

1. "Although the final judgment had the effect of terminating the marriage and finally adjudicating certain issues, procedurally it did not bring an end to the judicial labor required in this case. Therefore, the order is not appealable as a final order."

2. "We dismiss the appeal without prejudice to either party's right to file a timely notice of appeal after a final order has been rendered by the trial court."

Inman v. Inman, 26 So.3d 724 (Fla. 4th DCA 2010)

SUCCESSOR JUDGE PRESIDING OVER CONTEMPT HEARING VIOLATED LAW OF THE CASE DOCTRINE BY RECONSIDERING PREDECESSOR JUDGE'S PRIOR CLARIFICATION WHICH WAS AFFIRMED ON APPEAL.

In an earlier appeal, the District Court had directed the trial court to determine what portion of a purge amount set in a contempt matter was necessary for support and the Husband's ability to pay. The trial judge who had entered the original final judgment entered an order providing that the first two of three payments labeled as "equitable distribution" were really meant as support. The Husband appealed from the clarification order which was affirmed on appeal. The Husband then declared bankruptcy and when that proceeding was concluded, the Wife again moved to hold the Husband in contempt for his failure to make the first two payments. She sought a purge amount of $2 million dollars. The case was then assigned to a successor judge. At the contempt hearing it was established that the Husband rents a furnished apartment, does not own a car and travels only when he has enough frequent flyer miles. He works as a real estate broker and claimed a total monthly income of $9,733 less expenses of $13,359. He claimed $411,109 in assets and more than $10 million dollars in liabilities, the latter which included $8 million dollars owed to the Wife in "support." In its Order on the contempt motion, the trial judge found that the Husband lacked the ability to pay the $2 million dollar purge sought by the Wife and then revisited the court's earlier finding that the first two

payments were in the nature of support, finding that the payments were property distribution payments. The Wife appealed, contending that the trial court erred in revisiting the court's earlier adjudication and erred in finding that the Husband lacked the ability to pay the purge. The District Court held:

1. "We affirm the finding that he [husband] lacked the ability to pay a purge of $2 million as she [wife] requested because it is supported by substantial competent evidence."

2. "All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case. The substantive nature of the payments thereupon became the law of the case under Florida law."

3. "We reject this argument [that the clarification order was solely for the bankruptcy proceedings] because the federal court requested that it [the clarification order] be made under Florida law, not the Bankruptcy Code. We also reject his [husband's] argument on appeal that the manifest injustice exception to the law of the case doctrine would be applicable in this case. There is nothing manifestly unjust about requiring him to comply with a final judgment whose benefits he has accepted."

4. "The issue is settled. The first two payments are support. He has failed to make these payments. Contempt is available to enforce compliance. On remand we direct the trial court to determine an appropriate form and amount of purge."

Cummings v. Cummings, 37 So.3d 287 (Fla. 4th DCA 2010)

Fifth District

APPEAL OF FINAL JUDGMENT OF DISSOLUTION DISMISSED AS UNTIMELY WHERE MOTION FOR REHEARING WAS UNTIMELY.

The final judgment at issue was rendered and filed on August 20, 2008 and the husband served an untimely motion for rehearing of the final judgment fifteen (15) days after the final judgment was filed. Finding that the former husband had ample opportunity to file a timely notice of appeal despite his untimely motion for rehearing but again was untimely, the court dismissed the appeal for lack of jurisdiction:

1. "[A] motion for rehearing served in a civil case more than ten (10) days from the entry of judgment is insufficient to extend the date of rendition of judgment."

2. "In this case, the former husband had ample opportunity to file a timely notice of appeal despite the untimely motion for rehearing."

Dann v. Dann, 24 So.3d 791 (Fla. 5th DCA 2009)

TRIAL COURT'S CUSTODY DECISION AFFIRMED WHERE NO ERROR APPEARED ON THE FACE OF THE JUDGMENT AND THE ABSENCE OF A TRANSCRIPT PRECLUDED EVIDENTIARY REVIEW; FACTUAL FINDINGS NOT REQUIRED IN A CUSTODY JUDGMENT SO LONG AS EVIDENCE SUPPORTS A FINDING OF THE BEST INTEREST OF THE CHILD.

The Father appealed from a final judgment of paternity which determined that the Florida courts had subject matter jurisdiction over the parties' custody dispute concerning the parties' eight-year-old daughter; granted custody of the child to the mother, ordered monthly child

support; and placed the burden of visitation costs entirely on the father. With regard to the court's custody decision, the District Court held:

1. "In making an initial custody determination, the trial court must evaluate the non-inclusive factors listed in section 61.13(3), Florida Statutes, and determine the best interests of the child…. However, there is no statutory requirement that the trial court make specific written findings in a custody decision. Thus, a final judgment is not erroneous simply for failing to list the factors on which it relied in making its determination."

2. "Here, the court found that it was in the best interest of the child that the mother have primary residential custody. A finding that primary residential custody is in the "best interests" of the child, whether made in the final judgment or at trial, is sufficient to uphold a custody determination so long as there is substantial competent evidence in the record that permits the court to properly evaluate the relevant factors."

3. "Because no transcript of the final hearing is contained in the record, this Court can review only errors that appear on the face of the judgment. As no error appears on the face of the judgment, this Court is unable to review the evidentiary basis of the court's ruling, and must affirm on appeal."

Hindle v. Fuith, 33 So.3d 782 (Fla. 5th DCA 2010)

IV. ATTORNEY'S FEES

A. Basis for Requiring Other Party to Pay

First District

ERROR TO ENTER ORDER GRANTING FORMER WIFE ATTORNEY'S FEES WITHOUT MAKING SPECIFIC FINDINGS REGARDING HUSBAND'S ABILITY TO MAKE REQUIRED PAYMENTS.

The trial court made specific factual findings concerning the reasonableness of the fees awarded to the wife, but failed to address husband's ability to pay. The District Court reversed: "Because it is not readily apparent from the record that the husband has the ability to make required payments, we reverse that portion of the order granting attorney's fees and direct the trial court to readdress the issue."

Presley v. Presley, 24 So.3d 1274 (Fla. 1st DCA 2009)

Second District

A PARTY MAY SEEK APPELLATE ATTORNEY'S FEES IN AN APPEAL CONCERNING THE AMOUNT OF TEMPORARY ATTORNEY'S FEES AWARDED BY THE TRIAL COURT.

The Husband appealed from the trial court's order awarding temporary attorney's fees to the Wife. There was sparse testimony regarding fees at the hearing below. The Wife testified that she borrowed $4,500 to retain counsel and that $1,800 was spent on four days of depositions. No other evidence was presented regarding the Wife's attorney's hourly rate, or the number of hours expended on the case. The trial court found that the Wife had the need, and the Husband had the ability to pay $7,500. The husband challenged the lack of evidence to support the amount awarded and challenged the need for a remand, arguing that the Wife had failed to produce evidence to support her claim for temporary relief. The Husband also contended that the Wife could not be awarded appellate attorney's fees for litigating the issue of her temporary fees. The District Court held:

1. "We decline to extend [an earlier case] to temporary fee awards because it may affect the needy party's ability to litigate the remainder of the case."

2. "The Florida Supreme Court has stated 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.' Section 61.16 also serves the 'significant purpose' of assuring that the needy party 'is not limited in the type of representation he or she would receive because that party's financial position is so inferior to that of the other party.' The needy party may be unable to undertake litigation of the amount of fees, and in a case regarding temporary fees, like the present one, it may affect the needy party's ability to litigate the remainder of the case."

Baker v. Baker, 35 So.3d 76 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO WIFE WHERE MARRIAGE WAS SHORT-TERM, CASE WENT TO TRIAL SOLELY ON WIFE CLAIM FOR PERMANENT ALIMONY, THE BASIS OF THE WIFE'S CLAIM WAS FALSE, AND THE WIFE TURNED DOWN A FAVORABLE OPPORTUNITY TO SETTLE THE CASE BEFORE TRIAL.

The Husband appeals from the trial court's decision to award attorney's fees to the Wife. The couple were married for only 14 months. At one point, the Husband offered to pay $36,000 in alimony to the wife, but she refused. The Wife then sought permanent alimony on the basis that the Husband had purportedly induced her to quit her lucrative job; this was found to be untrue and the request for permanent alimony was denied. The District Court held:

1. "[T]he trial court should have denied the wife's attorney's fee claim on the authority of *Rosen v. Rosen*…. This was an extremely short-term marriage - fourteen months. Permanent alimony is generally inappropriate in a short-term marriage…. The Wife in this case contended that she was entitled to permanent alimony because of her claim (which turned out to be false) that the husband induced her to leave her thirty-year employment with Cox Communications to become a full-time wife. Presumably, her position was that she would be unable to find new

employment, let alone comparable employment, or otherwise be self-supporting…. [T]he case went to trial solely because of the wife's claim for permanent alimony."

2. "Adding this up, (1) this was a claim for permanent alimony in a short-term marriage, which is almost never successful; (2) the case went to trial solely on the permanent alimony issue; (3) the basis of the claim was false, as outlined above; and (4) the wife turned down a favorable opportunity to settle the case before trial. Attorney's fees should not have been awarded to the wife."

Greenwald v. Rivkind-Greenwald, 31 So.2d 250 (Fla. 3rd DCA 2010)

TRIAL COURT DID NOT ABUSE DISCRETION IN ORDERING HUSBAND TO PAY WIFE'S ATTORNEY'S FEES COUNSEL FOR POST-ABSCONDING LEGAL WORK, EVEN THOUGH THE PARTIES ENTERED INTO AN AGREEMENT WHICH PROVIDED FOR EACH PARTY TO BEAR HIS OR HER OWN ATTORNEY'S FEES.

The Husband and Wife jointly appealed from a court order mandating the Husband to pay the Wife's attorney's fees. Their dissolution action went to trial in January and was set to resume in February; in the interim, the Husband left the country, taking with him certain marital assets, and did not return for four months. Upon his return, the parties entered into a settlement agreement, which stated, among other things, that each party was responsible for their own attorney's fees. The trial court agreed to approve the marital settlement with one exception, that the Husband, for absenting himself from the jurisdiction, would be required to pay the Wife's attorneys fees attributable to post-absconding legal work. The trial court ordered the Husband to pay $90,237.75 and both the husband and wife objected. The District Court held:

1. "The husband and wife rely on cases which hold that a trial court cannot remake a marital settlement agreement simply because the court believes that one of the parties has made a bad bargain."

2. "This case is unlike the ones the parties rely on. In this case the husband absconded in midtrial, taking with him some of the marital assets, and was gone for four months. This was most definitely sanctionable behavior, and the trial court ordered that the husband would be sanctioned in the form of attorney's fees."

4. "We see no abuse of discretion in the trial court's imposition of attorney's fees in accordance with its earlier oral announcement."

Gottfried v. The Kutner Law Firm, 34 So.3d 56 (Fla. 3rd DCA 2010)

Fourth District

ERROR TO AWARD FEES WHERE PREVAILING PARTY STANDARD WAS APPLICABLE ONLY TO ACTIONS BROUGHT FOR BREACH OF AGREEMENT AND NO SUCH BREACH EXISTED; NO ERROR IN AWARDING PREVAILING PARTY FEES WHERE HUSBAND FILED A PETITION WHICH SOUGHT RELIEF BASED ON CLAIMS OF BREACH OF AGREEMENT WHICH HE LATER VOLUNTARILY DISMISSED.

The parties entered into a mediated marital settlement, which provided, among other things, for an award of attorney's fees to the prevailing party in the event of breach of the agreement. The agreement was later incorporated into the final judgment. In November 2005, the

Husband filed an Emergency Motion Regarding Christmas Vacation which was denied. In February 2006, the Husband filed an amended supplemental petition to modify custody, or visitation which was later dismissed by the Husband. The Wife then filed a motion for, and was granted fees pertaining to the husband's Christmas motion and the petition to modify custody. The trial court awarded fees to the Wife as "the prevailing party." The District Court reversed:

1. "In cases involving a marital settlement agreement with a prevailing party provision, section 61.16, Florida Statutes, cannot be used as a basis for an award of attorney's fees. Instead, the provisions in the marital settlement agreement awarding attorney's fees are generally enforced."

2. "In this case, under the terms of the agreement awarding attorney's fee provisions incorporated in the final judgment, the prevailing party standard applies and it is applicable only to those actions brought in the event of a breach of the agreement."

3. "As to the former husband's petition for modification of the Christmas holiday visitation, neither party was claiming default or breach of the agreement. The former husband was merely seeking a one-day modification of the agreement to accommodate his holiday schedule. Thus, after denying the petition, the trial court erred in using the prevailing party standard to award the former wife attorney's fees for the holiday visitation petition, rather than the general family law standard."

4. "We, therefore, reverse the attorney's fees awarded the former wife for the holiday modification petition because the trial court did not determine entitlement to fees based on a showing of need and ability to pay, as required by the general family law standard."

5. "We affirm, however, the prevailing party attorney's fees awarded to the former wife following the former husband's voluntary dismissal of his amended supplemental petition, because the petition sought relief based on claims of default and breach of the agreement."

Vitale v. Vitale, 31 So.3d 970 (Fla. 4th DCA 2010)

Fifth District

TRIAL COURT ERRED IN NOT AWARDING APPELLATE ATTORNEY'S FEES TO FORMER WIFE IN VIEW OF EQUITABLE DISTRIBUTION OF ASSETS, RELATIVE FINANCIAL RESOURCES OF PARTIES, AND SIGNIFICANT DISPARITY IN INCOME BETWEEN FORMER HUSBAND AND FORMER WIFE.

In a prior appeal, the District Court reversed the trial court's order regarding child custody and imputation of income, and entered an order granting the former wife's motion for appellate attorney's fees. On remand, the trial court conducted a hearing on the fee issue, and issued an order, without factual findings, concluding former wife had demonstrated a need for attorney's fees but failed to demonstrate former husband's ability to pay. On appeal, the Fifth District concluded the trial court erred in not awarding attorney's fees to the former wife:

1. "Need and ability to pay are the primary considerations in deciding entitlement to attorney's fees in a dissolution proceeding. The idea is to 'ensure that both parties have similar access to competent legal counsel."

2. "After reviewing the equitable distribution of assets, the relative financial resources of the parties, as well as the significant disparity in income between the former husband and former wife, we conclude that the trial court erred in not awarding attorney's fees to the former wife."

Fuller v. Fuller, 29 So.3d 380 (Fla. 5th DCA 2010)

TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES TO WIFE WHERE EQUITABLE DISTRIBUTION LEFT THE PARTIES IN AT LEAST EQUAL FINANCIAL POSITIONS; IF FEE AWARD BASED ON MISCONDUCT OF A PARTY, APPROPRIATE FINDINGS MUST BE MADE TO SUPPORT THE AWARD.

The Wife filed a petition to end her 22-year marriage and requested, among other things, alimony, child support, attorney's fees, and shared parental responsibility. The lower court granted attorney's fees and awarded the wife alimony and child support; requiring husband to secure those obligations with life insurance. The court further awarded the wife, sole parental custody, an award well beyond the shared parental responsibility actually requested by the Wife. As to the attorney's fee award, the District Court held:

1. "Because the purpose of [§ 61.16(1), Florida Statutes (2006)] is to ensure that each party has the ability to obtain competent counsel, the most important considerations are the financial ability to pay fees and the need of the party requesting fees. The need and ability to pay are determined by the trial court at the conclusion of the proceedings."

2. "[I]t is an abuse of discretion to award attorney's fees if the dissolution decree leaves both parties in equal financial positions."

3. "Here, the trial court did more than place Wife in an equal position to Husband; instead, the trial court inequitably distributed assets and placed Wife in a superior position to Husband."

4. "Wife responds that the fees were awarded to punish Husband for his misconduct during the dissolution proceedings. Specifically, she contends that Husband engaged in bad faith delay tactics that caused her to incur unnecessary fees as the proceedings progressed. Although there is authority for awards of fees in such circumstances, there are no specific findings in the final judgment indicating that Husband's misconduct is the reason for the fee award other than reference in the first numbered paragraph of the judgment to Husband's noncompliance with certain discovery matters."

5. "We therefore reverse the award of attorney's fees. On remand, if the trial court made the award because of Husband's misconduct, appropriate findings should be included in the judgment to the support the award."

Rashid v. Rashid, 35 So.3d 992 (Fla. 5th DCA 2010)

B. Standard for Award/Amount

First District

Second District

A PARTY MAY SEEK APPELLATE ATTORNEY'S FEES IN AN APPEAL CONCERNING THE AMOUNT OF TEMPORARY ATTORNEY'S FEES AWARDED BY THE TRIAL COURT.

The Husband appealed from the trial court's order awarding temporary attorney's fees to the Wife. There was sparse testimony regarding fees at the hearing below. The Wife testified that she borrowed $4,500 to retain counsel and that $1,800 was spent on four days of depositions. No other evidence was presented regarding the Wife's attorney's hourly rate, or the number of hours expended on the case. The trial court found that the Wife had the need, and the Husband had the ability to pay $7,500. The husband challenged the lack of evidence to support the amount awarded and challenged the need for a remand, arguing that the Wife had failed to produce evidence to support her claim for temporary relief. The Husband also contended that the Wife could not be awarded appellate attorney's fees for litigating the issue of her temporary fees. The District Court held:

1. "We decline to extend [an earlier case] to temporary fee awards because it may affect the needy party's ability to litigate the remainder of the case."

2. "The Florida Supreme Court has stated 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.' Section 61.16 also serves the 'significant purpose' of assuring that the needy party 'is not limited in the type of representation he or she would receive because that party's financial position is so inferior to that of the other party.' The needy party may be unable to undertake litigation of the amount of fees, and in a case regarding temporary fees, like the present one, it may affect the needy party's ability to litigate the remainder of the case."

Baker v. Baker, 35 So.3d 76 (Fla. 2nd DCA 2010)

ERROR TO AWARD WIFE ATTORNEY'S FEES IN AN AMOUNT LESS THAN THE PARTIES' STIPULATED AMOUNT WITHOUT MAKING SPECIFIC FINDINGS SUPPORTING THE REDUCTION.

After two years of litigation on various issues the Wife sought an award of attorney's fees and costs. The parties stipulated to the reasonableness of the attorney's hourly rate ($275) and to the hours extended on litigation (30.6). After the hearing, at which the trial court heard testimony on the Wife's need and the Husband's ability to pay, the trial court awarded the wife half of her fees, despite the parties' stipulation. The District Court held:

1. "After determining the lodestar amount, the trial court must consider the parties' respective financial resources and then assess other relevant circumstances, including the scope and history of the litigation, its duration, the merits of the respective positions, whether the

parties bring or maintain the litigation primarily to harass or present a defense mainly to frustrate or stall, and the existence and course of prior or pending litigation."

2. "The trial court must set forth specific findings as to these factors…. The husband concedes that the trial court erred in failing to make specific findings."

3. "In [an earlier case] we reversed an attorney's fee award because the trial court failed to make findings explaining why it reduced the fees from a stipulated amount."

Tullos v. Tullos, 37 So.3d 355 (Fla. 2nd DCA 2010)

Third District

Fourth District

ERROR TO REFUSE TO AWARD FEES FOR FEE LITIGATION AS A MATTER OF LAW, SUCH FEES IN A MARRIAGE DISSOLUTION CASE FALL WITHIN THE DISCRETION OF THE TRIAL COURT.

The Wife appealed from two judgments ordering her husband to pay attorney's fees - one award of fees arises out of the original dissolution proceedings, and the other arise out of post-judgment proceedings to compel the husband to increase his life insurance. With respect to the fees for the post-judgment proceedings, wife contended that the court erred in declining to award her fees for litigating the reasonableness and amount of those fees. The District Court held:

1. "[The Wife] contends that the court erred in failing to award her fees to litigating the reasonableness and amount of fees. The trial court specifically declined to include such fees in its award."

2. "On appeal, the Wife claims that [an earlier case, *State Farm Fire & Casualty Co. v. Palma*] required the court to award fees to litigating the entitlement to fees but contends that Palma should not be followed to the extent that it disallows attorney's fees for litigating the amount of fees. We conclude that *Palma* does not apply to attorney's fees awarded in dissolution proceedings pursuant to 61.16, Florida Statutes."

3. "[*P]alma*… is strictly a statutory interpretation case and not a general public policy pronouncement on the compensation of 'fees for fees.'"

4. "Our supreme court in *Rosen v. Rosen*… explained that under Chapter 61 the principal consideration for awarding fees is the relative financial circumstances of the parties regarding their need and ability to pay. It emphasized the wide discretion that family courts have in determining fee awards."

5. "Thus, unlike the statute involved in Palma in which attorney's fees were granted in an action at law, courts assessing fees in dissolution of marriage proceedings look to far different factors in determining both the entitlement and amount of fees. Whether a party is entitled to fees depends upon the court's findings as to the distribution of assets, alimony, and child support which all factor into the determination of the need of the requesting spouse. But the amount of fees also impacts the financial circumstances of the requesting spouse, because leaving an impecunious spouse with substantial fees to pay could severely impact that spouse's financial circumstances."

6. "The assessment of fees in a marital dissolution action is part of the court's duty to effect an equitable divisions of the parties' assets and income. The need and ability to pay requirement is tantamount to a finding of entitlement of one spouse to have the other spouse pay

all or a portion of the spouse's fees. To determine that need and ability, however, the amount of those fees must also be considered. Therefore, the court in its discretion may assess fees for litigating both factors, as they are part and parcel of the equitable proceedings."
Schneider v. Schneider, 32 So.3d 151 (Fla. 4th DCA 2010)

Fifth District

C. Enforcement and Liens

First District

Second District

Third District

Fourth District

ERROR TO IMPOSE CHARGING LIEN AGAINST A PARTY PRIOR TO THE ENTRY OF FINAL JUDGMENT IN THE UNDERLYING ACTION.

The Wife filed an action for dissolution of marriage, and the Husband retained Hodgson Russ LLP to represent him. Prior to trial, Hodgson Russ LLP withdrew from the case and filed a notice of a charging lien. An evidentiary hearing on the lien was held and the trial court issued a final order establishing the charging lien. The Husband moved to vacate, arguing that the charging lien was not attached to a final order in the dissolution proceedings. The trial court responded by amending the judgment to state that the lien applied only to the appellant's "right, title and interest in and to any and all real personal property which is before this Court for and on account of this action for dissolution of marriage." The District Court held:

1. "As this court has stated, '[t]he charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit. It is not enough to support the imposition of a charging lien that an attorney has provided his services; their services must, in addition, produce a positive judgment or settlement for the client, since the lien will attach only to tangible fruits of the services.'"

2. "Property awarded in a dissolution action pursuant to an equitable distribution constitutes a 'proceed' to which a charging lien may attach."

3. "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 service' for the benefit of the client. If the litigation produces no judgment of monetary value for the client, the court may not impose a charging lien for the attorney's benefit."

4. "In the case at bar, the underlying dissolution action has not reached a final judgment. No property has been distributed to either appellant or the wife. The trial court imposed a

charging lien on a prospective judgment that appellant may or may not receive at a future date. Because the underlying dissolution action has not reached a final judgment, imposition of a charging lien was premature."
Walia v. Hodgson Russ LLP, 28 So.3d 987 (Fla. 4th DCA 2010)

Fifth District

D. Judgment

First District

Second District

EVEN IN THE ABSENCE OF A TRANSCRIPT, ERROR TO AWARD ATTORNEY'S FEES WHERE ORDER LACKED ADEQUATE FINDINGS JUSTIFYING THE AMOUNT OF AWARD THUS MAKING IT FACIALLY ERRONEOUS; QUESTION CERTIFIED AS TO WHETHER SUCH ORDERS ARE FACIALLY INVALID.

The Husband appealed from the trial court's non-final order directing the husband to pay temporary support and attorneys fees to the Wife. The record did not contain a transcript of the proceedings below and the order awarding attorney's fees lacked the required findings regarding the reasonableness of attorney's hours and rates. With regard to the award for attorney's fees the District Court held:

1. "We reverse the award of attorney's fees to the Wife because the portion of the order awarding attorney's fees is facially erroneous."
2. "[A]n award of attorney's fees without adequate findings justifying the amount of the award is reversible even where the appellant has provided an inadequate record of the trial court proceedings."
3. "We certify the following question to be of great public importance: Is an order awarding attorney's fees….that lacks the required findings regarding the number of hours reasonably expended and the reasonableness of the hourly rate fundamentally erroneous on its face, thus requiring reversal, even when the appellate record does not include a transcript or approved statement of the proceedings below?"

Macarty v. Macarty, 29 So.3d 434 (Fla. 2d DCA 2010)

ERROR TO AWARD WIFE ATTORNEY'S FEES IN AN AMOUNT LESS THAN THE PARTIES' STIPULATED AMOUNT WITHOUT MAKING SPECIFIC FINDINGS SUPPORTING THE REDUCTION.

After two years of litigation on various issues the Wife sought an award of attorney's fees and costs. The parties stipulated to the reasonableness of the attorney's hourly rate ($275) and to the hours extended on litigation (30.6). After the hearing, at which the trial court heard testimony on the Wife's need and the Husband's ability to pay, the trial court awarded the wife half of her fees, despite the parties' stipulation. The District Court held:

1. "After determining the lodestar amount, the trial court must consider the parties' respective financial resources and then assess other relevant circumstances, including the scope and history of the litigation, its duration, the merits of the respective positions, whether the parties bring or maintain the litigation primarily to harass or present a defense mainly to frustrate or stall, and the existence and course of prior or pending litigation."

2. "The trial court must set forth specific findings as to these factors…. The husband concedes that the trial court erred in failing to make specific findings."

3. "In [an earlier case] we reversed an attorney's fee award because the trial court failed to make findings explaining why it reduced the fees from a stipulated amount."

Tullos v. Tullos, 37 So.3d 355 (Fla. 2nd DCA 2010)

Third District

Fourth District

ERROR TO TREAT INCOMPLETE ORDER AWARDING FEES OUT OF ORIGINAL LITIGATION AS A FINAL ORDER; ORDER WAS INCOMPLETE AND CONTAINED NO FACTUAL FINDINGS.

The Wife appealed from two judgments ordering her husband to pay attorney's fees - one award of fees arose out of the original dissolution proceedings, and the other arose out of post-judgment proceedings to compel the husband to increase his life insurance. With respect to the fees up to the time of the entry of the final judgment, the trial court announced its ruling orally with the assistance of a demonstrative aid. Some of the figures used were approximations and some figures, including the amount of accounting fees which it found was reasonable, were not included. The court permitted questions from both attorneys and asked wife's attorney to reduce the ruling to writing. The written order prepared by wife's attorney simply stated that fees and costs were to be paid pursuant to the attached transcript of the oral ruling. The written order did not contain any provisions of the oral ruling, nor did it contain the demonstrative aid referenced during the oral ruling. The District Court held:

1. "The order is incomplete. Under prevailing law, the trial court must make findings to substantiate a fee award and allow for meaningful review."

2. "This requires the trial court to make findings of fact in the judgment as to the number of hours spent and a reasonable hourly rate."

3. "Because the order does not contain these findings, we would reverse even if we did consider it a final order."

Schneider v. Schneider, 32 So.3d 151 (Fla. 4th DCA 2010)

Fifth District

E. Jurisdiction

First District

Second District

Third District

Fourth District

Fifth District

F. Temporary

First District

Second District

TRIAL COURT ERRED IN AWARDING TEMPORARY ATTORNEY'S FEES WITHOUT FINDINGS REGARDING THE REASONABLENESS OF HOURLY RATE OR NUMBER OF HOURS EXPENDED; RULE AGAINST REMAND WHERE THERE WAS A LACK OF EVIDENCE BELOW DOES NOT APPLY IN TEMPORARY MATTERS.

The Husband appealed from the trial court's order awarding temporary attorney's fees to the Wife. There was sparse testimony regarding fees at the hearing below. The Wife testified that she borrowed $4,500 to retain counsel and that $1,800 was spent on four days of depositions. No other evidence was presented regarding the Wife's attorney's hourly rate, or the number of hours expended on the case. The trial court found that the Wife had the need, and the Husband had the ability to pay $7,500. The husband challenged the lack of evidence to support the amount awarded and challenged the need for a remand, arguing that the Wife had failed to produce evidence to support her claim for temporary relief. The District Court held:

1. "To obtain an award of temporary attorney's fees in a dissolution of marriage proceeding, '[t]he party seeking fees must prove with evidence the reasonableness and the necessity of the fee sought.'"

2. "Here, the trial court did not make factual findings regarding the reasonableness of the attorney's fees and, in fact, could not do so because no evidence was presented to support findings on a reasonable hourly rate. Further, limited information was presented as to the time expended or to be expended."

3. "Because the record does not contain competent, substantial evidence to support a determination on the reasonableness of the fees awarded, we reverse the appealed order to the extent that it awarded $7500 in temporary attorney's fees."

4. "[A] temporary award does not create vested rights, and the trial court may modify or vacate a temporary award at any time during the litigation. We thus remand for further proceedings for the trial court to determine a reasonable temporary fee award and for the trial court to make findings to support that award."

Baker v. Baker, 35 So.3d 76 (Fla. 2nd DCA 2010)

ERROR TO AWARD TEMPORARY ATTORNEY'S FEES IN AN AMOUNT NOT ESTABLISHED IN ACCORDANCE WITH APPLICABLE LAW.

The divorce proceedings below began in 2000. In 2002, a Final Judgment was entered which was reversed on appeal as to four specific and discrete issues: (1) the rehabilitative alimony awarded needed to be increased to cover the cost of proposed training as established by the existing record; (2) the trial court needed to consider the tax consequences created by the award of alimony based on the evidence in the record and also such additional evidence as may be necessary; (3) the equitable distribution needed to be adjusted to give the Wife an additional $6,250; and (4) the trial court needed to make findings concerning the income the Wife could reasonably be expected to receive from her liquid assets and then adjust permanent alimony to reflect these findings. For reasons not made clear on the record, the parties waited four years to bring these matters to the trial court. The trial court (now a new judge) ruled as to these issues: (1) the rehabilitative alimony was increased by $1,624.80; (2) after considering testimony regarding tax consequences, no change in the alimony award was warranted; (3) the Wife was entitled to an additional $6,250 in equitable distribution, and (4) permanent alimony was reduced to $2,940 after considering prospective income from liquid assets. The Wife sought an award of "temporary" attorney's fees for the proceedings on remand (in the amount of $51,425.65) as to these "four narrow issues on remand," and there was "little question that the trial court regarded this request as exorbitant." The trial court then ordered the Husband to pay fees in the amount of $34,575.20, "a number that coincidentally left each party owing the other nothing." Although the District Court observed that, "it seems rather clear that the trial judge was encouraging these parties to simply pack up their tents and go home," the Court nevertheless reversed:

1. "Finally, the trial court's award of $34,575.20 as temporary attorney's fees, although undoubtedly well intended, simply was not established in accordance with the applicable law."

2. "We reverse this award. Given the posture of this case, we suggest that the trial court simply make a traditional final determination of attorney's fees on remand."

Sharon v. Sharon, 35 So.3d 962 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

G. Miscellaneous

First District

Second District

WHERE CANADIAN DIVORCE DECREE AWARDED ALIMONY TO WIFE AND PARTIES RESOLVED A SUBSEQUENT ENFORCEMENT ACTION THROUGH A SETTLEMENT AGREEMENT WHICH PROVIDED FOR PREVAILING PARTY ATTORNEY'S FEES IN ANY FUTURE ENFORCEMENT ACTION, CANADIAN COURT'S SUBSEQUENT GRANT OF ANNULMENT BUT DETERMINATION THAT BECAUSE OF THE PARTIES' SIX-YEAR PUTATIVE MARRIAGE, THE PARTIES "SHALL BENEFIT FROM THE EFFECT OF THE JUDGMENT OF DIVORCE," TRIAL COURT ERRED IN DENYING WIFE ATTORNEY'S FEES WHEN IT FOUND HUSBAND IN CONTEMPT FOR NON-PAYMENT OF ALIMONY.

The trial court found the former husband in contempt for non-payment of alimony, set a purge amount, and entered a money judgment in the former wife's favor for the arrears. The trial court, however, denied former wife's request for prevailing party attorney's fees, reasoning the provision entitling her to prevailing party attorney's fees in the parties' 2004 settlement agreement did not apply because it had been based on the premise of a valid marriage. The District Court reversed:

1. "The request for fees does not require us to explore the equitable principles apparently at play in [an earlier case]. Rather, the real issue is the deference owed to the Canadian decree."

2. "In handling [the Wife's] motion for contempt and enforcement, the trial court was called upon to enforce a domesticated Canadian decree that specifically retained all accessory measures, despite the grant of annulment. According, [the Wife] is entitled to prevailing party attorney's fees as an accessory measure that survived the annulment of her marriage to [the Husband]."

Deegan v. Taylor, 28 So.3d 227 (Fla. 2nd DCA 2010)

A PARTY MAY SEEK APPELLATE ATTORNEY'S FEES IN AN APPEAL CONCERNING THE AMOUNT OF TEMPORARY ATTORNEY'S FEES AWARDED BY THE TRIAL COURT.

The Husband appealed from the trial court's order awarding temporary attorney's fees to the Wife. There was sparse testimony regarding fees at the hearing below. The Wife testified that she borrowed $4,500 to retain counsel and that $1,800 was spent on four days of depositions. No other evidence was presented regarding the Wife's attorney's hourly rate, or the number of hours expended on the case. The trial court found that the Wife had the need, and the Husband had the ability to pay $7,500. The husband challenged the lack of evidence to support the amount awarded and challenged the need for a remand, arguing that the Wife had failed to produce evidence to support her claim for temporary relief. The Husband also contended that the Wife could not be awarded appellate attorney's fees for litigating the issue of her temporary fees. The District Court held:

1. "We decline to extend [an earlier case] to temporary fee awards because it may affect the needy party's ability to litigate the remainder of the case."

2. "The Florida Supreme Court has stated 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.' Section 61.16 also serves the 'significant purpose' of assuring

that the needy party 'is not limited in the type of representation he or she would receive because that party's financial position is so inferior to that of the other party.' The needy party may be unable to undertake litigation of the amount of fees, and in a case regarding temporary fees, like the present one, it may affect the needy party's ability to litigate the remainder of the case."
Baker v. Baker, 35 So.3d 76 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING HUSBAND TO PAY WIFE'S ATTORNEY'S FEES FOR POST-ABSCONDING LEGAL WORK, EVEN THOUGH THE PARTIES ENTERED INTO AN AGREEMENT WHICH PROVIDED FOR EACH PARTY TO BEAR HIS OR HER OWN ATTORNEY'S FEES.

The Husband and Wife jointly appealed from a court order mandating the Husband to pay the Wife's attorney's fees. Their dissolution action went to trial in January and was set to resume in February; in the interim, the Husband left the country, taking with him certain marital assets, and did not return for four months. Upon his return, the parties entered into a settlement agreement, which stated, among other things, that each party was responsible for their own attorney's fees. The trial court agreed to approve the marital settlement with one exception, that the Husband, for absenting himself from the jurisdiction, would be required to pay the Wife's attorneys fees attributable to post-absconding legal work. The trial court ordered the Husband to pay $90,237.75 and both the husband and wife objected. The District Court held:

1. "The husband and wife rely on cases which hold that a trial court cannot remake a marital settlement agreement simply because the court believes that one of the parties has made a bad bargain."
2. "This case is unlike the ones the parties rely on. In this case the husband absconded in mid-trial, taking with him some of the marital assets, and was gone for four months. This was most definitely sanctionable behavior, and the trial court ordered that the husband would be sanctioned in the form of attorney's fees."
3. "We see no abuse of discretion in the trial court's imposition of attorney's fees in accordance with its earlier oral announcement."

Gottfried v. The Kutner Law Firm, 34 So.3d 56 (Fla. 3rd DCA 2010)

ERROR TO AWARD GUARDIAN AD LITEM FEES AGAINST WIFE WHERE THERE WAS NO EVIDENCE OF WHAT SERVICES WERE PROVIDED OR THEIR CLAIMED VALUE.

In a short opinion with no specific facts described in the majority opinion (one judge dissented), the District Court reversed the trial court's judgment ordering the Wife to pay the fees incurred by a guardian ad litem: "The award of a portion of the Guardian Ad Litem fees against the wife is reversed for a new hearing, as unsupported by any evidence of what those services were or their claimed value."
Rotta v. Rotta, 34 So.3d 107 (Fla. 3rd DCA 2010)

Fourth District

Fifth District

V. CHILD SUPPORT

A. Support for Children Beyond 18 Years

First District

Second District

Third District

Fourth District

Fifth District

TRIAL COURT ERRED IN TERMINATING HUSBAND'S CHILD SUPPORT OBLIGATION BECAUSE CHILD WOULD NOT GRADUATE FROM HIGH SCHOOL BEFORE ATTAINING THE AGE OF 19 WHERE THE PARTIES' AGREEMENT REQUIRED CHILD SUPPORT TO CONTINUE UNTIL CHILD GRADUATED FROM HIGH SCHOOL, NOT TO EXCEED THE AGE OF 19.

The Final Judgment of Dissolution incorporated an Agreement between the parties pursuant to which the Husband agreed to pay child support for each of the parties' three children until each child "graduates from high school, but not to exceed age 19." The Husband moved to terminate his child support obligation as to the parties' two oldest children but the youngest child was still in high school. A Hearing Officer determined that child support should terminate immediately because the youngest child, although 18 years old and although still in high school, would not be able to complete high school before his 19th birthday. The Hearing Officer relied on section 743.07(2), Florida Statutes (2009) which refers to a court's ability to assign child support beyond the age of 18 for reasons of physical or mental incapacity. The District Court reversed:

1. "In the matter before us section 743.07(2) should have played no role in the disposition. This case involved only the implementation of an agreement of the parties and the final judgment of dissolution. It was not about a court ordering child support beyond the age of 18 because of incapacity of the child."

2. "Here, by an unambiguous written agreement [the Husband] was to pay child support for [the child at issue] until the child graduated from high school, but not beyond the child's nineteenth birthday. [The child] was still in high school and had not yet reached 19 when the court terminated child support for him."

3. "Because the trial court failed to order [the Husband] to pay child support for [the

child] in accordance with the agreement and as required by the final judgment, it erred."
Neville v. Neville, 34 So.3d 779 (Fla. 5th DCA 2010)

B. Expenses Paid as Child Support

First District

ERROR TO ALLOW FATHER CREDIT FOR GIFTS HE GAVE TO CHILD ON CHRISTMAS AND BIRTHDAYS WITHOUT RECORD EVIDENCE ESTABLISHING THE NATURE OF THE GIFTS IN ORDER TO ENABLE DETERMINATION OF WHETHER THE GIFTS BENEFITED THE CHILD.

The trial court determined a retroactive child support obligation and allowed father credit against this support obligation, including approximately $1,600 based on gifts the father stated he purchased for the child on Christmas and her birthdays. The District Court reversed:

1. "Section 61.30(17)(b), Florida Statutes (2008), authorizes the assignment of credit against a retroactive child support obligation for: '(b) All actual payments made by a parent to the other parent of the child or third parties for the benefit of the child throughout the proposed retroactive period.'"

2. "Here, the record reveals [the father] merely testified he purchased $1,600 in gifts for his daughter and did not specify what those gifts entailed except to state he purchased his daughter a puppy at the cost of $500."

3. "Prior to the passage of section 61.30(17)(b), Florida courts generally prohibited the crediting of payments for non-essential items against child support arrearages…. It is well settled that statutes must be read in the light of the common law."

4. "Accordingly, the use of the term 'benefit' should be interpreted in light of the earlier settled precedent establishing only those payments which provide for the health and well-being of the child may be credited against a retroactive child support obligation."

5. "There are many types of payments which may provide for a child's necessities so as to 'benefit' the child pursuant to section 61.30(17)(b). While a court retains broad discretion in awarding credit, the failure to exercise that discretion constitutes reversible error."

6. "Without record evidence establishing the nature of the gifts [the father] stated he purchased for his daughter, it is impossible for this court or the trial court to determine if those gifts benefited the child pursuant to section 61.30(17)(b)."

Dept. Revenue/Soto v. Soto, 28 So.3d 171 (Fla. 1st DCA 2010)

Second District

AMOUNTS AWARDED FOR HEALTH CARE EXPENSES TO BE RECALCULATED ON REMAND TO REFLECT ACTUAL AMOUNTS MOTHER PAID TO MAINTAIN HEALTH, DENTAL, AND VISION INSURANCE ON THE CHILD.

The Father appealed from a child support modification order, increasing his child support obligation. The District Court held:

1. "The trial court's award for retroactive child support is based, in part, on the trial court's finding that the Mother maintained health, dental, and vision insurance on the child at a rate of $265 per month during "all relevant time periods."

2. "The Father argues that the Mother's affidavits show that she paid $189.76 per month for health care expenses through the end of 2005 and that the figure increased to $265 per month from January, 2006 forward."

3. "Our review of the record supports this claim…. Accordingly, on remand, the trial court shall amend the order granting Mother's motion for modification of final judgment of paternity to reflect an award allowing for health, dental, and vision insurance costs of $189.76 per month before January 1, 2006, and $265 per month after that date."

G.S.P. v. K.B., 30 So.3d 667 (Fla. 2nd DCA 2010)

ERROR TO ORDER PARTIES TO SHARE CHILD CARE COSTS; COURT SHOULD HAVE ADDED SEVENTY-FIVE PERCENT OF CHILD CARE EXPENSES TO THE BASIC CHILD SUPPORT AMOUNT.

The parties were divorced in New Jersey in 2005. The Final Judgment incorporated the parties' Agreement that, in pertinent part: the Wife would have sole legal custody of their adopted child; the Husband would pay $1,186.80 per month in child support (based on the child support guidelines); the Husband would pay 70% of the costs of a nanny and 70% of any non-covered medical/dental/prescription costs. Additionally, the Agreement recognized that the Husband would shortly be unemployed at which point support would then be modified. The Husband indeed sought a modification and the respective income statements filed in the case showed that the Wife was making slightly less than twice the amount of the Husband. The trial court then reduced the Husband's monthly payments to $754.27 per month although the court made no findings regarding the parties' income or their ability to pay. The court also ordered the parties to split the costs of childcare and medical/dental/prescriptions. The District Court held:

1. "The Former Husband correctly argues that the court should have included seventy-five percent of the child care expenses in the basic child support amount as required by section 61.30(7)."

2. "This error is apparent on the face of the record because the court instead ordered that the parents equally share child care expenses."

Wilcox v. Munoz, 35 So.3d 136 (Fla. 2nd DCA 2010)

TRIAL COURT SHOULD ENSURE THAT NON-COVERED MEDICAL, DENTAL, AND PRESCRIPTION MEDICATION COSTS ARE PROPORTIONATE TO THE PARTIES' PERCENTAGE SHARE OF CHILD SUPPORT NEED.

The parties were divorced in New Jersey in 2005. The Final Judgment incorporated the parties' Agreement that, in pertinent part: the Wife would have sole legal custody of their adopted child; the Husband would pay $1,186.80 per month in child support (based on the child support guidelines); the Husband would pay 70% of the costs of a nanny and 70% of any non-covered medical/dental/prescription costs. Additionally, the Agreement recognized that the Husband would shortly be unemployed at which point support would then be modified. The Husband indeed sought a modification and the respective income statements filed in the case showed that the Wife was making slightly less than twice the amount of the Husband. The trial

court then reduced the Husband's monthly payments to $754.27 per month although the court made no findings regarding the parties' income or their ability to pay. The court also ordered the parties to split the costs of childcare and medical/dental/prescriptions. The District Court held:

1. "It is error for the court to equally divide the noncovered medical, dental, and prescription medication expenses when the court arrives at an unequal percentage share of child support."

2. "We are unable to determine whether the court's award of noncovered medical, dental, and prescription medication expenses was error because of the court's failure to provide findings of fact regarding the parties' incomes and the parties' percentage share of the child support need."

Wilcox v. Munoz, 35 So.3d 136 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT ERRED IN REQUIRING HUSBAND TO OBTAIN TERM LIFE INSURANCE TO SECURE ALIMONY AWARD IN THE ABSENCE OF EVIDENCE AS TO THE COST, AMOUNT, OR AVAILABILITY OF SUCH INSURANCE.

The Husband was a self-employed marine electronic technician with a reported gross monthly income of $1,759. Although the Husband was unable to testify as to the number of hours he worked per week, he admitted that if he worked 2 hours per day, 5 days per week, he could make $850 per week. The evidence showed that during the pendency of the divorce, the Husband paid the mortgage and expenses for the wife and children; he also paid credit card bills and children's expenses. The trial court found that husband's income was greater than he reported and imputed an additional $3,000 in monthly income to him. As to the requirement that the Husband obtain life insurance to secure the alimony and child support awards, the District Court held:

1. "It is within the trial court's authority to order the husband to provide term life insurance to protect the child support and alimony payments. In determining whether to secure support awards, the trial court should consider the need for such insurance, the costs and availability of such insurance, and the financial impact upon the obligor."

2. "Absent special circumstances, however, the trial court may not impose such requirement…. Such special circumstances include a spouse potentially left in dire financial straits after the death of the obligor spouse due to ill health and/or lack of employment skills, minors living at home, and supported spouse with limited earning capacity."

3. "Here, the record clearly indicates the requisite circumstances to support imposition of this requirement, including minor children residing in the home, the wife's disability, her diminished earning capacity, and her dependence on the husband for financial support."

4. "We agree, however, that this requirement may not stand absent evidence or findings as to the cost, amount, or availability of such insurance."

Child v. Child, 34 So.3d 159 (Fla. 3rd DCA 2010)

Fourth District

ERROR TO REQUIRE HUSBAND TO PAY CHILDREN'S PRIVATE SCHOOL TUITION WHERE WIFE'S COUNTER-PETITION DID NOT CONTAIN REQUEST FOR TUITION, HUSBAND DID NOT AGREE TO PAY AND COURT DID NOT MAKE FINDINGS AS TO ABILITY TO PAY AND WHETHER SUCH EXPENSES WERE IN ACCORD WITH CUSTOMARY STANDARD OF LIVING AND IN THE CHILDREN'S BEST INTERESTS.

The trial court directed the Former Husband to pay the minor children's private school tuition. The District Court reversed:

1. "A court may order a non-custodial parent to pay for private educational expenses if it finds that the parent has the ability to pay for private school and the expenses are in accordance with the family's customary standard of living and are in the child's best interest."

2. "Former Husband contends that the trial court improperly ordered him to pay the children's private school tuition because Former Wife did not plead for the award and the trial court failed to make requisite findings of fact…."

3. "Former Wife's counter-petition did not contain a request for payment of private school tuition. Moreover, there is no record evidence establishing that Former Husband agreed to pay the tuition. Finally, the court did not make the requisite findings as to whether Former Husband has the ability to pay the tuition, and whether the private school expenses are in accordance with the family's customary standard of living and are in the children's best interest."

Gelman v. Gelman, 24 So.3d 1281 (Fla. 4th DCA 2010)

Fifth District

TRIAL COURT ERRED IN ORDERING FATHER TO BEAR THE ENTIRE COST OF VISITATION; TRANSPORTATION EXPENSES SHOULD BE SHARED BY PARENTS IN ACCORDANCE WITH FINANCIAL MEANS; EXPENSE OF VISITATION IS A CHILD-REARING EXPENSE "LIKE ANY OTHER."

The Father appealed from a final judgment of paternity which determined that the Florida courts had subject matter jurisdiction over the parties' custody dispute concerning the parties' eight-year-old daughter; granted custody of the child to the mother, ordered monthly child support; and placed the burden of visitation costs entirely on the father. With regard to the court's requirement that the Father bear all of the costs of visitation, the District Court held:

1. "The [parties'] child was born in the United Kingdom where the father resides and removed to Florida by the mother's unilateral decision. The trial court ruled that the father can only visit the child in Florida, thereby incurring substantial travel expenses to effectuate his visitation."

2. "The expense of visiting the child in Florida from the father's residence in the United Kingdom is a childrearing expense like any other. Child support guidelines provide that transportation expenses, like other childrearing costs, should be shared by the parents in accordance with their financial means.

Hindle v. Fuith, 33 So.3d 782 (Fla. 5th DCA 2010)

ERROR TO REQUIRE HUSBAND TO OBTAIN LIFE INSURANCE TO SECURE ALIMONY AND CHILD SUPPORT OBLIGATIONS WITHOUT FINDINGS REGARDING AVAILABILITY AND COST OF INSURANCE, ABILITY TO PAY, OR APPROPRIATE CIRCUMSTANCES TO JUSTIFY THE REQUIREMENT.

The Wife filed a petition to end her 22-year marriage and requested, among other things, alimony, child support, attorney's fees, and shared parental responsibility. The lower court granted attorney's fees and awarded the wife alimony and child support; requiring husband to secure those obligations with life insurance. The court further awarded the wife, sole parental custody, an award well beyond the shared parental responsibility actually requested by the Wife. As to the insurance requirements, the District Court held:

1. "The courts are statutorily authorized to order the obligor to maintain life insurance to protect alimony awards and child support allegations… when "appropriate circumstances" exist to justify the award."

2. "Appropriate circumstances may include the dire impact that the sudden death of the obligated party would have on the receiving party."

3. "In ordering this protection, the court should consider the 'availability and costs of such insurance and the financial impact it will have on the former husband…. The final judgment should include appropriate findings regarding the availability and cost of insurance, the ability of the obligor to pay, and the appropriate circumstances that justify the insurance requirement."

4. "Here, the trial court made no findings to support the order of life insurance, and Wife concedes the error."

Rashid v. Rashid, 35 So.3d 992 (Fla. 5th DCA 2010)

C. Modification

First District

Second District

Third District

ABUSE OF DISCRETION TO MODIFY CHILD SUPPORT RETROACTIVE TO THE DATE OF FINAL DISSOLUTION JUDGMENT, RATHER THAN TO DATE OF CHILD SUPPORT MODIFICATION PETITION; ERROR TO ALLOW MOTHER TO RETROACTIVELY MODIFY CHILD SUPPORT PAYMENTS AFTER WAITING AN UNREASONABLE AMOUNT OF TIME.

In 1995 the court ordered child support in the amount of $75/month stating that this was the minimum amount based on probable earnings and was subject to retroactive modification if found to be incorrect. In 1997, the mother filed a motion with the court for permission to take the child to Colombia and received the father's written consent. The mother made no mention of child support. In 2004, the mother sought public assistance, prompting the Department of

Revenue to initiate child support proceedings on her behalf. These proceedings were later dismissed because the mother failed to cooperate. In 2006, the mother commenced proceedings alleging that father was in arrears in the amount of $10,575, and to modify the support retroactively based on father's becoming an electrical engineer. The General Magistrate recommended a purge amount of $8,800 ($75/month from March 1995 to August 2007, less a $2,375 credit for payments made) and concluded that the father owed $110,506.44 retroactive to the date of final judgment in 1995. The Magistrate then found that the mother was entitled to a retroactive modification of child support and held that father's earnings were established for the first time during the proceedings to modify child support. The Father filed Exceptions, arguing that mother failed to take any action prior to 2006, though she had numerous opportunities. The Exceptions were denied. The District Court held:

1. "The mother has not cited to any cases which allow such a reservation [the original ruling that the child support would be subject to retroactive modification if found to be incorrect] in what was ostensibly a final judgment, but assuming that the trial court had authority basically to retain jurisdiction to modify its award retroactively should the amount be 'found to be incorrect, it was incumbent upon the mother to seek such a modification within a reasonable period of time."

2. "We hold that waiting over eleven years to prove that the amount was incorrect is an unreasonable period of time."

3. "Normally, a modification of child support is only retroactive to the date of filing of a petition seeking such relief."

4. "Here, the mother filed a Motion to Clarify Final Judgment of Dissolution of Marriage. seeking authorization for the child to travel to Colombia without the father's authorization. The mother obtained the father's written consent, which she filed with the motion, along with a 'Custodial and Parental Rights Agreement.' Nowhere in those pleadings did the mother assert that the child support previously awarded was 'incorrect.' Additionally, she aborted efforts made on her behalf by the Department of Revenue to enforce even the amount ordered in the final judgment. More than eleven years elapsed between the date on which the court entered its final judgment and the filing of the mother's motion for contempt during which the mother did nothing to collect any child support, let alone seek a modification. Thus, assuming the trial court could properly reserve jurisdiction in the final judgment to modify support retroactively, the mother waived her right to seek such a retroactive modification by waiting over eleven years."

Cordell v. Cordell, 30 So.3d 647 (Fla. 3rd DCA 2010)

TRIAL COURT ERRED IN CLARIFYING AND MODIFYING CHILD SUPPORT OBLIGATION IMPOSED BY SETTLEMENT AGREEMENT WHERE AGREEMENT WAS CLEAR AND UNAMBIGUOUS, AND WHERE THERE WAS NO DEMONSTRATION OF A SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

The parties were divorced after a long-term marriage and entered into a Marital Settlement Agreement. The Agreement provided that the Husband would pay alimony to the Wife in the amount of $5,250 per month and would provide support for the parties' adult disabled son "as he has done in the past." Four years after their divorce, the Husband moved for modification, contending that the provision that he provide support for their son "as he has done in the past" was vague and ambiguous and seeking a reduction in alimony based on his assertion

that his income was "substantially less than the income estimated at the time of the Final Judgment." Following a two day trial, the court entered an order modifying the Husband's child support obligations, relieving him of his agreed-to obligation to pay for all of his disabled son's expenses not covered by SSI payments. Instead the husband was ordered to pay all of the mortgage, taxes, insurance, and condominium fees on the condominium in which his son lived and only one-half of his son's uncovered medical, dental, and psychological care. He was relieved of his obligation to pay his son's utilities and the wife was ordered to pay the remaining half of her son's medical expenses. The trial court further modified the child support provisions to apply the child support guidelines thereby making each party responsible for a portion of their child's support. On appeal, the District Court reversed the child support modification finding that the provisions of the parties' Agreement were clear and unambiguous and there was no basis in the record to support modification or "clarification" of the terms:

1. "In this case, no ambiguity was alleged to exist. Rather, the petition for modification alleges only that [the Husband's] contractual obligation to support his son, as he had "done in the past," had gradually increased over time, causing friction between the parties…. These allegations demonstrate no ambiguity in need of clarification. Moreover, no ambiguity was proved to exist. To the contrary, the testimony was that [the Husband] paid all of his son's expenses before the parties' divorce, and that he had continued to do so afterward, all as contemplated by the parties' agreement. There was, therefore, no basis for clarification."

2. "There also was no basis on which the marital settlement agreement could be modified to reduce [the Husband's]obligation to fully support his son in favor of applying the statutory child support guidelines to impose some or all of those costs on his former wife."

3. "In this case, no substantial change in circumstances was demonstrated to support modification of [the Husband's] agreed-to support obligation…. [The Husband] clearly failed to sustain the burden imposed on him to demonstrate a substantial change in circumstances."

4. "He also failed to demonstrate that it is in his disabled son's best interests to decrease the amount of support that he agreed to pay in favor of imposing those costs on [the Wife]. The record is that [the Husband] has the financial ability to pay, and consistently has paid, for the goods and services needed by his own son; whereas [the Wife] has no income from which to pay such costs. It cannot, therefore, be said that it is in the child's best interests to impose a portion of his expenses which are currently being paid by his father, who can afford to pay them, on his mother who has no ability to pay them."

5. "In short, neither clarification nor modification of the child support provisions of the marital settlement agreement incorporated into the final judgment should have been granted."

Schmachtenberg v. Schmachtenberg, 34 So.3d 28 (Fla. 3rd DCA 2010)

Fourth District

Fifth District

D. Enforcement/Defenses

First District

ERROR TO ALLOW FATHER CREDIT FOR GIFTS HE GAVE TO CHILD ON CHRISTMAS AND BIRTHDAYS WITHOUT RECORD EVIDENCE ESTABLISHING THE NATURE OF THE GIFTS IN ORDER TO ENABLE DETERMINATION OF WHETHER THE GIFTS BENEFITED THE CHILD.

The trial court determined a retroactive child support obligation and allowed father credit against this support obligation, including approximately $1,600 based on gifts the father stated he purchased for the child on Christmas and her birthdays. The District Court reversed:

1. "Section 61.30(17)(b), Florida Statutes (2008), authorizes the assignment of credit against a retroactive child support obligation for: '(b) All actual payments made by a parent to the other parent of the child or third parties for the benefit of the child throughout the proposed retroactive period.'"

2. "Here, the record reveals [the father] merely testified he purchased $1,600 in gifts for his daughter and did not specify what those gifts entailed except to state he purchased his daughter a puppy at the cost of $500."

3. "Prior to the passage of section 61.30(17)(b), Florida courts generally prohibited the crediting of payments for non-essential items against child support arrearages…. It is well settled that statutes must be read in the light of the common law."

4. "Accordingly, the use of the term 'benefit' should be interpreted in light of the earlier settled precedent establishing only those payments which provide for the health and well-being of the child may be credited against a retroactive child support obligation."

5. "There are many types of payments which may provide for a child's necessities so as to 'benefit' the child pursuant to section 61.30(17)(b). While a court retains broad discretion in awarding credit, the failure to exercise that discretion constitutes reversible error."

6. "Without record evidence establishing the nature of the gifts [the father] stated he purchased for his daughter, it is impossible for this court or the trial court to determine if those gifts benefited the child pursuant to section 61.30(17)(b)."

Dept. Revenue/Soto v. Soto, 28 So.3d 171 (Fla. 1st DCA 2010)

Second District

Third District

Fourth District

Fifth District

E. Amount

First District

Second District

ERROR TO INCLUDE IN HUSBAND'S INCOME FOR PURPOSE OF CALCULATING CHILD SUPPORT, ANTICIPATED ANNUAL FINANCIAL GIFTS WHICH HUSBAND'S MOTHER HAD HISTORICALLY MADE TO MINOR CHILDREN FOR THEIR EDUCATION.

The trial judge added $22,000 per year to the husband's income to calculate his child support obligation. The court reasoned that these gifts were regular and would continue. The District Court reversed:

1. "[The husband]…does not control his mother's largesse. His mother testified that she anticipated making future gifts, depending on the economy, her health, and her family needs."

2. "In past years, she gave the children's money directly to [the husband], earmarking it for school tuition. But, well before the final hearing, she began paying the school directly."

3. "On the record before us, [the wife] properly concedes that the anticipated gifts should not have been included with Mr. Butler's income."

Palumbo v. Butler, 26 So.3d 723 (Fla. 2nd DCA 2010)

IN CALCULATING HUSBAND'S INCOME FOR PURPOSES OF ALIMONY AND CHILD SUPPORT, TRIAL COURT ERRED IN EXCLUDING HUSBAND'S ANNUAL BONUS WHERE HUSBAND HAD RECEIVED BONUS PAYMENTS EACH YEAR FOR THE PAST NINE YEARS.

The trial court excluded the husband's bonus payment from his income finding that bonuses were not "fixed or guaranteed" because they are paid at the discretion of husband's employer. The District Court reversed the award of alimony and child support for further proceedings:

1. "Section 61.30(2), Florida Statutes (2007), requires trial courts to consider bonuses in calculating a spouse's income for purposes of child support, and section 61.08(2)(g) requires trial courts to consider 'all sources of income available to either party' in computing an award of alimony."

2. "Thus, we have held that when a trial court calculates income for the purpose of awarding child support or alimony, it may not exclude from consideration bonuses that are regular and continuous."

3. "Here, the trial court excluded the husband's bonus payments from his income finding that the bonuses were not 'fixed or guaranteed' because they are paid at the discretion of the husband's employer and because they are dependent upon the employer's yearly profit. While this is true, it is undisputed that the husband has received bonus payments each year for the past nine years, the last eight of which exceeded $25,000."

4. Under similar circumstances, we have concluded that the trial court abused its discretion when it excluded bonuses when determining a party's income for the purposes of alimony or support."
Drew v. Drew, 27 So.3d 802 (Fla. 2nd DCA 2010)

ERROR TO TREAT HEALTH INSURANCE PREMIUMS AS IN-KIND PAYMENT FROM S CORPORATION WHERE THE BUSINESS DID NOT DEDUCT THE PREMIUMS AS AN EXPENSE BUT INCLUDED IT AS PASS-THROUGH INCOME REPORTED ON INCOME TAX RETURNS.

The trial court found that Father's Subchapter S corporation paid for several of the Father's personal expenses, including health insurance in the amount of $560 per month. Accordingly, the trial court included this amount as an in-kind payment in its computation of father's gross income from 2003 to 2006. The District Court held:

1. "In this case, the trial court found that the Father's Subchapter S corporation paid for several personal expenses, including health insurance... life insurance… and automobile insurance…. Accordingly, the trial court included these amounts as in-kind payments in its computations of the Father's gross income for the year 2003 through 2006."

2. "Although the Father's S corporation paid the health insurance premiums, the business did not deduct the cost of these premiums as an expense. Instead, these costs were included in the pass-through income reported on the Father's personal income tax return and were therefore included in his gross personal income for each year in question."

3. "As a result, the trial court erred in treating the health insurance premiums as an in-kind payment from the S corporation reducing the Father's personal expenses."
G.S.P. v. K.B., 30 So.3d 667 (Fla. 2nd DCA 2010)

ERROR TO REDUCE FATHER'S PERSONAL EXPENSES BY AMOUNT OF PREMIUMS FOR LIFE INSURANCE POLICY WHERE SUBSTANTIAL, COMPETENT EVIDENCE DID NOT SUPPORT THE TRIAL COURT'S FINDING THAT THE S CORPORATION PAID THESE PREMIUMS.

The trial court found that the Father's Subchapter S corporation paid for several personal expenses including life insurance in the amount of $184.91 per month. Accordingly, the trial court included this amount as an in-kind payment in its computation of father's gross income from 2003 to 2006. Father challenges this addition to his gross income. The District Court held:

1. "Our review of the record shows that in 2003, the S corporation paid $2219 in premiums for 'key man life insurance,' but the business treated these premiums as non-deductible expenses."

2. "Because the Father failed to produce his 2004 tax return, and because the Mother did not obtain a copy for introduction into evidence, we do not know how the business handled insurance premiums in 2004. In 2005, the business deducted $2966 for 'insurance,' but there is no evidence proving that this amount was for the key man life insurance. The S corporation's 2006 tax returns contain no entry for life insurance."

3. "Accordingly, the record fails to contain competent, substantial evidence to support

the trial court's finding that the key man life insurance was paid for by the business. Therefore, the inclusion of this as an in-kind payment reducing personal expenses was error."
G.S.P. v. K.B., 30 So.3d 667 (Fla. 2nd DCA 2010)

TRIAL COURT WAS CORRECT IN FINDING THAT EVIDENCE SUPPORTING THAT THE S CORPORATION PAID INSURANCE PREMIUMS FOR FATHER'S VEHICLE WAS COMPETENT AND SUBSTANTIAL ENOUGH TO TREAT THESE EXPENSES AS IN-KIND INCOME.

The trial court found that father's Subchapter S corporation paid for several personal expenses including automobile insurance in the amount of $250 per month. Accordingly, the trial court included this amount as an in-kind payment in its computation of father's gross income from 2003 to 2006. Father challenges this addition to his gross income. The District Court held:

1. "Testimony at the hearing and evidence in the record support the trial court's conclusion that the insurance premiums for a Ford and a Saturn driven for personal use were paid by the business."

2. "Accordingly, we conclude that the trial court's finding that the insurance premiums for these two vehicles were paid by the S corporation was supported by substantial, competent evidence in the record."

G.S.P. v. K.B., 30 So.3d 667 (Fla. 2nd DCA 2010)

TEMPORARY CHILD SUPPORT AWARD REVERSED FOR FAILURE TO COMPLY WITH CHILD SUPPORT GUIDELINES.

The Father appealed from a court order temporarily allowing the Mother to relocate with the parties' child. Following the dissolution of the parties' marriage, the Mother decided to move to north Florida to be with her family and friends. In contemplation of the move, the parties discussed timesharing. The Mother prepared a schedule but the Father refused to agree to it. After several hearings, the lower court entered a temporary order permitting mother to move the child, apparently relying upon the parties' "agreement" which did not, in fact, exist. In addition, the Father is a member of the Seminole Tribe as a result of which the parties' child receives a monthly stipend in addition to a monthly deposit into a trust account. The testimony, however, revealed that there was some uncertainty about future payments which are determined by the Tribe. Instead of employing the guidelines, the trial court simply ordered that the Mother would receive child support in the amount of the monthly stipend that the child had received in the past and that the Father would make up any difference if the Tribe were to reduce the amount. The District Court held:

1. "Section 61.30 established child support guidelines based on the parent's income. It contains a specific provision allowing the court to adjust child support obligations based on "independent income of the child, not to include moneys received by a child from supplemental security income…. The statute also mandates an adjustment in support when a parent exercises visitation at least 40% of the overnights of the year."

2. "Here, the circuit court was not authorized to completely bypass the child support guidelines."

3. "We reverse the temporary support award and remand for the court to fashion

temporary child support in a manner consistent with section 61.30"
Zepeda v. Zepeda, 32 So.3d 679 (Fla. 2nd DCA 2010)

WHERE FORMER HUSBAND SOUGHT DOWNWARD MODIFICATION OF ALIMONY AND CHILD SUPPORT ON GROUNDS THAT HIS INCOME HAD BEEN REDUCED AND COURT WAS PRESENTED WITH FOUR DIFFERENT PERCENTAGES TO DETERMINE THE REDUCTION IN INCOME WHICH RESULTED IN FOUR DIFFERENT PERCENTAGES OF REDUCTION IN INCOME, IT WAS IMPROPER FOR COURT TO AVERAGE THE FOUR PERCENTAGES TO DETERMINE THE REDUCTION IN INCOME.

At the trial level the court was given four different methods of calculating the reduction of husband's gross income, and averaged the percentages to determine that the former husband's annual gross income was reduced by 17%. The court reduced husband's monthly alimony payments to $22,825, a 17% reduction, although the evidence ranged from 10.5% to 25%. The District Court held that the trial court abused its discretion in calculating an independent average of the former husband's reduction in income because, standing alone, the 17% was not supported by competent, substantial evidence:

1. "[W]e find the trial court abused its discretion when it calculated an independent average of the former husband's reduction in income because the finding of a 17% decrease, standing alone, was not supported by competent, substantial evidence."

2. "If the trial court decides to utilize an average method, the method should be implemented only if competent substantial evidence supports the court's assessment."

Vollmer v. Vollmer, 33 So.3d 67 (Fla. 2nd DCA 2010)

TRIAL COURT ERRED IN CONSIDERING, AS PART OF HUSBAND'S INCOME, A ONE-TIME RECEIPT OF EQUITY COMPENSATION AND AN ANTICIPATED BUT NOT RECEIVED STOCK AWARD; NON-RECURRING INCOME MAY ONLY BE CONSIDERED WHERE RECURRING INCOME IS NOT SUFFICIENT TO MEET A CHILD'S NEED.

At the trial level the court was given four different methods of calculating the reduction of husband's gross income, and averaged the percentages to determine that the former husband's annual gross income was reduced by 17%. The court reduced husband's monthly alimony payments to $22,825, a 17% reduction, although the evidence ranged from 10.5% to 25%. The District Court held that the trial court abused its discretion in including certain amounts as part of the Husband's income for child support purposes:

1. Further, we point out that the trial court erred by considering the former husband's one-time receipt of $21,960 of equity compensation in March 2008 and his anticipated yet unearned stock awards for December 2008 as part of his annual income for 2008. Such nonrecurring income is not sufficient to meet a child's needs."

2. "Finally, in light of our reversal of the trial court's determination of the former husband's income, the trial court is directed to revisit and, if needed, recalculate its modification of child support."

Vollmer v. Vollmer, 33 So.3d 67 (Fla. 2nd DCA 2010)

ERROR TO FAIL TO MAKE FINDINGS REGARDING PARTIES' INCOMES AND ABILITY TO PAY WITH RESPECT TO CHILD SUPPORT COMPUTATIONS; DISTINCTION BETWEEN CHILD SUPPORT AND OTHER MARITAL AWARDS IN TERMS OF NON-APPLICABILITY OF HARMLESS ERROR STANDARD.

The parties were divorced in New Jersey in 2005. The Final Judgment incorporated the parties' Agreement that, in pertinent part: the Wife would have sole legal custody of their adopted child; the Husband would pay $1,186.80 per month in child support (based on the child support guidelines); the Husband would pay 70% of the costs of a nanny and 70% of any non-covered medical/dental/prescription costs. Additionally, the Agreement recognized that the Husband would shortly be unemployed at which point support would then be modified. The Husband indeed sought a modification and the respective income statements filed in the case showed that the Wife was making slightly less than twice the amount of the Husband. The trial court then reduced the Husband's monthly payments to $754.27 per month although the court made no findings regarding the parties' income or their ability to pay. The court also ordered the parties to split the costs of childcare and medical/dental/prescriptions. The District Court held:

1. "It is well settled that a trial court errs by failing to make findings of fact regarding the parties' incomes when determining child support. This is because findings regarding the parties' incomes are necessary for a determination of whether the support ordered departed from the guidelines and, if so, whether that departure was justified."

2. "Thus, the failure to include findings regarding the parties' incomes for purposes of child support calculations renders a final judgment facially erroneous, and the absence of a transcript does not preclude reversal on that basis."

3. "We are mindful that, in cases involving equitable distribution and alimony, this court has held that the lack of a transcript precludes a party from establishing that any error in failing to make the required findings was harmful…. Simply put, child support is different than alimony or equitable distribution. Child support is not a requirement imposed by one parent on the other, rather it is a dual obligation imposed on the parents by the State. The right to child support belongs to the child, and it cannot be waived by parents."

Wilcox v. Munoz, 35 So.3d 136 (Fla. 2nd DCA 2010)

CHILD SUPPORT AWARD REVERSED WHERE THERE WAS A LACK OF COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT COURT'S DETERMINATION OF AMOUNT OF FATHER'S INCOME.

This case was appealed in the absence of a transcript, with only a Statement of the Evidence. The trial court determined that the Father's income was $2758 per month but the Statement of the Evidence reflected that the only evidence presented was the Father's testimony that he was working forty hours or less a week, earning $20 per hour. He did not testify as to the amount of deductions from his pay and no documentary evidence of his net income was presented. The District Court held:

1. "The Mother argues that the Father's testimony supports a gross of $3200 and, deducting taxes, his net income would be around $2758. However, she does not say that this assertion is based on evidence presented at the hearing."

2. "Moreover, the statement of the evidence says that the Father is working forty hours *or less* per week."

3. "Because it appears from the statement of the evidence that no evidence was presented regarding the Father's net income, we must reverse this aspect of the judgment and remand for further proceedings to determine the Father's income."
Galasso v. Gargione, 40 So.3d 14 (Fla. 2nd DCA 2010)

CHILD SUPPORT AMOUNT MUST BE ADJUSTED FOR SUBSTANTIAL TIME SHARING EVEN WHERE SUCH TIME IS TEMPORARY, SUCH AS LENGTHY TIME-SHARING DURING THE SUMMER MONTHS.

This case was appealed in the absence of a transcript, with only a Statement of the Evidence. The trial court determined that the Father's income was $2758 per month but the Statement of the Evidence reflected that the only evidence presented was the Father's testimony that he was working forty hours or less a week, earning $20 per hour. He did not testify as to the amount of deductions from his pay and no documentary evidence of his net income was presented. The Father also contended that the trial court erred in failing to adjust the amount of support to be paid during the summer months when he was to have substantial "make up" time with his child. The District Court held:

1. "[The] statute provides that the trier of fact 'shall' vary the amount of child support called for by the guidelines 'whenever any of the children are required by court order or mediation agreement to spend a substantial amount of time with either parent.' This requirement applies to any living arrangement, whether temporary or permanent."

2. "The final judgment does not contain an adjustment to the Father's child support obligation for the makeup period. In light of the mandatory language of section 61.30(1)(a), we must reverse and remand for compliance with the statute."
Galasso v. Gargione, 40 So.3d 14 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT MISCALCULATED FORMER HUSBAND'S CHILD SUPPORT OBLIGATION BY FAILING TO DEDUCT AMOUNT OF PERIODIC ALIMONY AWARD FROM HIS MONTHLY INCOME, AND THEN FAILING TO ADD IT TO MONTHLY INCOME OF FORMER WIFE.

In a single sentence of an opinion addressing other issues, the District Court agreed with the former husband that the trial court miscalculated his child support obligation: "by failing to deduct the amount of the periodic alimony award made to the former wife from the former husband's monthly income, and then failing to add it to the monthly income of the former wife."
Zarate v. Zarate, 28 So.3d 935 (Fla. 3rd DCA 2010)

TRIAL COURT ERRED IN IMPUTING TO WIFE DEPENDENT BENEFITS PROVIDED TO CHILDREN WHICH WERE ATTRIBUTED TO HUSBAND'S SOCIAL SECURITY BENEFITS. SOCIAL SECURITY BENEFITS SHOULD HAVE BEEN CALCULATED AS PART OF HUSBAND'S INCOME FOR DETERMINATION OF CHILD SUPPORT AND USED TO OFFSET HUSBAND'S CHILD SUPPORT OBLIGATION.

Because the husband was entitled to social security benefits, his minor children were provided with dependent benefits attributable to their father's social security benefits. Each minor child received a monthly payment of $715.00, payable until they each attain majority. The trial court redirected the combined amount ($1,430.00 per month or $1,515 per month, there being a discrepancy in the record) to the wife and then imputed that amount of income to the wife in determining child support. The District Court reversed:

1. "The trial court's determination to assign the children's Social Security benefits directly to the wife is pragmatic, but it does not follow that the dependent benefits attributable to the husband's Social Security benefits should then be imputed into the wife's income."

2. "Although payment of the children's Social Security benefits was assigned to the wife, these benefits should have been calculated as part of the husband's income for the determination of child support and further used to offset the husband's child support obligation."

3. "In this case the husband receive social security retirement benefits. According to the amended final judgment, the social security administration pays a total of $1515 in dependent benefits for the two children…. [T]he $1515 dependent benefits should be included as part of the husband's income for purposes of calculating the child support obligation."

4. However, since the dependent benefits will be sent directly to the wife (as primary residential parent) for use on behalf of the children, the $1515 monthly dependent benefit is deemed to be paid on the husband's behalf. The husband is then responsible for paying the remainder of the monthly support obligation."

Valladares v. Junco-Valladares, 30 So.3d 519 (Fla. 3rd DCA 2010)

Fourth District

TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CALCULATE AND AWARD CHILD SUPPORT TO FATHER FOR A CHILD RESIDING WITH HIM AND TO OFFSET THAT FROM THE AMOUNT OF CHILD SUPPORT OWED TO THE MOTHER.

The Final judgment at issue provided that the Mother would care for the two youngest children in Florida, and the Father would care for the eldest child in Ohio. The trial court awarded child support to Mother for the two children she cared for, but not to the Father for the child he cared for. The Father moved for rehearing, claiming that the court's award to the Mother did not provide an offset for any amounts she would owe toward the child in the Father's custody. The trial court also awarded the Mother retroactive child support but did not make a similar award to the Father. The District Court held:

1. "Although the child support guidelines set forth in section 61.30, Florida Statutes, do not address a split custody situation, where, as here, both parties earn income, it is an abuse of discretion not to award both parties child support."

2. "In [an earlier case], the second district noted that "[t]he general approach for setting child support in a split custody case is 'the trial court first determines the total child support obligation and each child's share of that obligation. Thereafter, the court determines the method of parental payment that gives each child his or her share while assuring that each parent pays no more than the proper percentage of the total support.'"

3. "We have similarly ruled that, so long as each parent is required to pay his or her pro rata share of support, the trial court has discretion to determine how to calculate the split custody offset."

4. "Because the trial court failed to calculate and award child support to the father for the child residing with him and to offset that from the amount of child support owed to the mother, we reverse and remand for the trial court to re-calculate the parties' child support obligations and to identify the child support calculation method used."

McKenna v. McKenna, 31 So.3d 890 (Fla. 4th DCA 2010)

TRIAL COURT ERRED IN REFUSING TO SET A CHILD SUPPORT AMOUNT ATTRIBUTABLE TO FATHER BASED ON IMPUTED INCOME BECAUSE HE WAS ABOUT TO BE INCARCERATED.

In petitioning for dissolution, mother requested sole parental responsibility and temporary and permanent support for the two minor children. The lower court awarded temporary support, but when the case later came up for final determination, the father had been convicted of domestic violence and was scheduled for sentencing. As such, the lower court declined to make any provisions for child support because the father had no monthly income, the court further declined to impute income because he "was on his way to prison." The District Court held:

1. "The principal issue here is whether a trial court can properly decline to set a specific amount of child support due from an incarcerated parent without current income or assets while imprisoned."

2. "[In an earlier case] the Florida Supreme Court [held] that an incarcerated parent may not automatically have his or her child support payment obligations modified based solely on a reduction in income resulting from incarceration. It held that 'the child's interests are not served where the obligor parent is unable to fulfill his or her own support obligations because there is no income while in prison.'"

3. "A child's best interest is certainly not served by refusing to set an initial amount of support based on imputed income for a parent about to be imprisoned. We therefore hold that income should be imputed to the father so that the arrearages can accumulate until he is able to earn an income. When release occurs, the court should establish a payment plan to reduce arrearages according to his earning ability, setting a payment plan."

McCall v. Martin, 34 So.3d 121 (Fla. 4th DCA 2010)

Fifth District

FINAL JUDGMENT AWARDING CHILD SUPPORT REMANDED WHERE THE COURT DID NOT MAKE FINDINGS AS TO THE INCOMES OF THE PARTIES.

The Father appealed from a final judgment of paternity which determined that the Florida courts had subject matter jurisdiction over the parties' custody dispute concerning the parties'

eight-year-old daughter; granted custody of the child to the mother, ordered monthly child support; and placed the burden of visitation costs entirely on the father. With regard to the court's child support award, the District Court held:

1. "In determining child support, the court found that the mother earned $8 per hour working twenty hours per week. With respect to the father's income, the court found that he 'has the capacity to be employed, earning at least minimum wage and has no disability that would prevent him from working a full-time schedule of forty hours per week.' The court then calculated the father's current child support obligation to be $623.53 per month, and determined that he owed retroactive child support in the amount of $29,154."

2. "However, in calculating child support, the court never disclosed the net incomes of each party and the parties' respective shares of the child support expenses. And, the Child Support Guidelines Worksheet, which would have provided some insight on the issue, was not attached to the final judgment of paternity as the final judgment indicated."

3. "Child support awards must be supported by substantial competent evidence. The failure to make adequate findings requires remand for determination of child support."

Hindle v. Fuith, 33 So.3d 782 (Fla. 5th DCA 2010)

TRIAL COURT ERRED IN ORDERING FATHER TO BEAR THE ENTIRE COST OF VISITATION; TRANSPORTATION EXPENSES SHOULD BE SHARED BY PARENTS IN ACCORDANCE WITH FINANCIAL MEANS; EXPENSE OF VISITATION IS A CHILD-REARING EXPENSE "LIKE ANY OTHER."

The Father appealed from a final judgment of paternity which determined that the Florida courts had subject matter jurisdiction over the parties' custody dispute concerning the parties' eight-year-old daughter; granted custody of the child to the mother, ordered monthly child support; and placed the burden of visitation costs entirely on the father. With regard to the court's requirement that the Father bear all of the costs of visitation, the District Court held:

1. "The [parties'] child was born in the United Kingdom where the father resides and removed to Florida by the mother's unilateral decision. The trial court ruled that the father can only visit the child in Florida, thereby incurring substantial travel expenses to effectuate his visitation."

2. "The expense of visiting the child in Florida from the father's residence in the United Kingdom is a childrearing expense like any other. Child support guidelines provide that transportation expenses, like other childrearing costs, should be shared by the parents in accordance with their financial means.

Hindle v. Fuith, 33 So.3d 782 (Fla. 5th DCA 2010)

F. Imputed Income

First District

Second District

TRIAL COURT ERRED IN IMPUTING INCOME TO FORMER WIFE FOR PURPOSE OF DETERMINING AMOUNT OF ALIMONY WHERE THERE WAS NO EVIDENCE THAT FORMER WIFE IS EMPLOYABLE EXCEPT AS A REAL ESTATE AGENT, AND NO EVIDENCE AS TO CURRENT JOB MARKET OR PREVAILING EARNINGS LEVEL FOR REAL ESTATE AGENTS IN COMMUNITY WHERE FORMER WIFE LIVES.

The trial court, when determining the amount of alimony that the Husband should pay in a modification case, imputed $18,000 in income to the Wife. This was the same amount that the parties agreed to impute to her in 2002 in their Marital Settlement Agreement. On appeal, the District Court held that because the "projected and estimated" income imputed to the Wife in the marital settlement agreement did not come to fruition the amount should not have been imputed to her:

1. "There is no dispute that [the Wife] is currently unemployed and has engaged in no meaningful employment since the parties' divorce in 2002. The undisputed record is, therefore, that her current income in $0. Rather than using that number as a basis for determining need and thus the amount of alimony [the Husband] should currently pay, the court below imputed $18,000 in income to [the Wife], which is the amount the parties agreed to impute to her in 2002 when they executed their marital settlement agreement ."

2. "The record in this case is that while [the Wife] has both a college degree and a real estate license, she has not held meaningful full-time employment since the 1970's. The last meaningful part-time employment she enjoyed was in [the Husband's] law office where she assisted in real estate related work."

3. "[The Wife] has sold only two properties as a real estate agent and has spent most of her time assisting the parties' disabled son. Other than this, there is no evidence that, now at age 58 and many years outside the workplace, [the Wife] is employable except as a real estate agent. As to this (or for that matter any other) line of work, there is no evidence whatsoever as to the current job market or as to the prevailing earnings level for such agents in the community where [the Wife] lives. Absent such evidence, income could not be imputed to her."

4. "The amount imputed to [the Wife] in the 2002 marital settlement agreement, as the agreement itself confirms, did not represent her actual income, but represented no more than an estimate of potential future earnings…. As we know, the 'projected and estimated' income imputed to [the Husband] in this agreement did not come to fruition; nor, as the record confirms, did [the Wife's]. This estimate should not, therefore, have been attributed to her now for the purpose of determining either alimony or child support."

Schmachtenberg v. Schmachtenberg, 34 So.3d 28 (Fla. 3rd DCA 2010)

TRIAL COURT DID NOT ERR IN FINDING THAT SELF-EMPLOYED HUSBAND'S INCOME WAS GREATER THAN HE REPORTED BUT ERRED IN IMPUTING A SPECIFIC AMOUNT OF INCOME TO THE HUSBAND WITHOUT SUFFICIENT EVIDENCE.

The Husband was a self-employed marine electronic technician with a reported gross monthly income of $1,759. Although the Husband was unable to testify as to the number of

hours he worked per week, he admitted that if he worked 2 hours per day, 5 days per week, he could make $850 per week. The evidence showed that during the pendency of the divorce, the Husband paid the mortgage and expenses for the wife and children; he also paid credit card bills and children's expenses. The trial court found that husband's income was greater than he reported and imputed an additional $3,000 in monthly income to him. The District Court held:

1. "It is within the trial court's discretion to impute income to a spouse in order to determine the support awards. In addition, Florida case law has long recognized that self-employed spouses, in contrast to salaried employees, have the ability to control and regulate their income. Their testimony, tax returns, and business records accordingly may not reflect their true earnings, earning capability, and net worth."

2. "Here, the husband is a self-employed marine electronic technician, reporting a gross monthly income of $1759. He has been in this business for the past twenty years and operates his business with minimal cost at a property owned by his sister. He does not advertise his services and obtains customers based on referrals…. The husband does not have separate bank accounts or credit card accounts for his personal and business expenses…. The credit card bills varied from approximately $3000 to $15,000 a month. The husband submitted tax returns showing a reported range of gross income from $13,004 to $27,772."

3. "This record justifies the trial court's conclusion that the husband's financial documents and testimony did not demonstrate the accuracy of his reported income and that the negative cash flow, which the trial court concluded was not satisfactorily explained, supports a ruling that the husband's income was greater than he reported."

4. "We find merit, however, in the husband's argument that the record lacks competent, substantial evidence to support the trial court's imputation of the specific amount of an additional $3,000 in monthly income to the husband. At trial, the court did not explain how it arrived at this figure, and the final judgment and the record do not disclose any basis for finding that the husband actually earned or is capable of earning $3000 in additional income each month."

Child v. Child, 34 So.3d 159 (Fla. 3rd DCA 2010)

Fourth District

TRIAL COURT ERRED IN REFUSING TO SET A CHILD SUPPORT AMOUNT ATTRIBUTABLE TO FATHER BASED ON IMPUTED INCOME BECAUSE HE WAS ABOUT TO BE INCARCERATED.

In petitioning for dissolution, mother requested sole parental responsibility and temporary and permanent support for the two minor children. The lower court awarded temporary support, but when the case later came up for final determination, the father had been convicted of domestic violence and was scheduled for sentencing. As such, the lower court declined to make any provisions for child support because the father had no monthly income, the court further declined to impute income because he "was on his way to prison." The District Court held:

1. "The principal issue here is whether a trial court can properly decline to set a specific amount of child support due from an incarcerated parent without current income or assets while imprisoned."

2. "[In an earlier case] the Florida Supreme Court [held] that an incarcerated parent may not automatically have his or her child support payment obligations modified based solely on a reduction in income resulting from incarceration. It held that 'the child's interests are not served

where the obligor parent is unable to fulfill his or her own support obligations because there is no income while in prison.'"

3. "A child's best interest is certainly not served by refusing to set an initial amount of support based on imputed income for a parent about to be imprisoned. We therefore hold that income should be imputed to the father so that the arrearages can accumulate until he is able to earn an income. When release occurs, the court should establish a payment plan to reduce arrearages according to his earning ability, setting a payment plan."

McCall v. Martin, 34 So.3d 121 (Fla. 4th DCA 2010)

Fifth District

G. Miscellaneous

First District

WHERE TRIAL COURT IMPOSED A LIEN UPON HUSBAND'S PREMARITAL PROPERTY TO SECURE ALIMONY AND CHILD SUPPORT, COURT ERRED IN FAILING TO MAKE SPECIFIC FINDINGS CONCERNING WHETHER THE LIEN ONLY SECURES ARREARAGES AT THE TIME OF HUSBAND'S DEATH OR IF IT WAS ALSO INTENDED TO SECURE FUTURE PAYMENTS IN ORDER TO MINIMIZE FUTURE ECONOMIC HARM TO THE FAMILY.

The Husband appealed from a final judgment of dissolution of marriage which imposed a lien on his premarital real property to secure the payment of child support and permanent periodic alimony, because the order did not specify whether the lien was to secure arrearages at the time of his death or if it is also intended to secure future payments to minimize economic harm to the surviving family. The District Court held:

1. "Here, the record supports the trial court's imposition of a lien to secure the payment of alimony and child support. The Former Husband is 77 years old and in poor health. The Former Husband is uninsurable but has significant unencumbered assets that he uses to support himself. The Former Wife would potentially be left in dire straits after the Former Husband's death because she is not capable of full-time employment. The Former Wife has significant medical history resulting in some medical disability, and both parties agreed that the Former Wife needs to be home on afternoons and weekends to care for their youngest child, who has been diagnosed with a form of autism and cannot be left alone. The child also may remain dependant even after he reaches majority."

2. "Although the trial court did not abuse discretion in imposing a lien, the trial court failed to make any specific findings concerning whether, in the context of alimony, the lien only secures arrearages at the time of the Former Husband's death or if it was also intended to secure future payments in order to minimize economic harm to the family."

3. "Without such findings we are unable to determine whether the amount of the lien was appropriately tailored to the obligation being secured."

Mackoul v. Mackoul, 32 So.3d 741 (Fla. 1st DCA 2010)

Second District

Third District

Fourth District

Fifth District

VI. CONTACT AND ACCESS (VISITATION)

A. Grandparents/Third Parties

First District

Second District

Third District

Fourth District

Fifth District

B. Modification/Enforcement

First District

Second District

Third District

Fourth District

Fifth District

ERROR FOR COURT TO REFUSE TO ALLOW A COURT REPORTER TO BE PRESENT WHEN COURT CONDUCTED INTERVIEW WITH CHILDREN IN CHAMBERS, WHEN CHILDREN'S TESTIMONY WAS NECESSARY FOR MOTHER TO MEET HER BURDEN OF PROOF AS TO VISITATION MODIFICATION.

The Mother moved to temporarily halt visitation between the parties' two children and their father. She alleged that the Father was abusing alcohol and therefore was posing a risk to the children. The Mother requested and was granted leave for the minor children to attend and testify at the hearing. However, during the trial, the court required that the children testify, in

chambers, without a court reporter present. The Mother objected, arguing that she needed the children's testimony, on the record, to meet her burden of proof. The trial court refused to conduct the interview with the children and then denied the Mother's motion to halt visitation with the father. The District Court held:

1. "[The Mother] was entitled to have the children's testimony transcribed. This is because due process requires the party seeking to modify visitation demonstrate that there has been a material change in circumstances and that modification is required to protect the child's best interest. The only avenue for [the Mother's] proof in this case is through the children's testimony."

2. We also reject [the Father's] argument that [the Mother] conceded to the interview being conducted without a court reporter because her motion did not specifically request the children's testimony be transcribed if taken *in camera*. Neither the family law rules, nor the rules of civil procedure require a party to request the testimony be transcribed in a motion to allow children to testify."

Hickey v. Burlinson, 33 So.3d 827 (Fla. 5th DCA 2010)

C. Miscellaneous

First District

ERROR TO REQUIRE THAT FATHER BE PERSONALLY PRESENT DURING ALL OF HIS TIMESHARING WITH THE MINOR CHILD AND TO FORBID FATHER FROM LEAVING CHILD WITH RELATIVES OR FRIENDS DURING HIS TIMESHARING WITHOUT PROVIDING APPROPRIATE FACTUAL FINDINGS JUSTIFYING SUCH SEVERE RESTRICTION.

In its final order, the trial court noted that during times when the child was left with the husband's relatives without the husband being present, the child was subjected to and witnessed violence. Based on this information, the court granted liberal timesharing, but required that the husband always be present, or forfeit his timesharing right. The District Court reversed:

1. "Here, the trial court's order, while initially appearing to grant liberal time sharing, in fact, severely limits the former husband's visitation. Visitation is limited to only those periods in which the former husband is not working and is personally able to be with the minor child. He is totally restricted from leaving the child with any member of his family or any of his friends."

2. "While certain allegations were made in a pre-hearing Motion for Testimony and Attendance of Minor Child which, if true, support the total limitation of unsupervised visitation as opposed to the limitation ordered, the trial court made no findings as to those allegations and the findings made were insufficient to support the unique remedy fashioned here."

3. "The severe restriction imposed in this case must be accompanied by specific findings concerning the frequency, nature, and severity of the violence as well as details concerning what role family members and friends played in the alleged violent behavior."

4. "The order is also silent as to what extent the husband's employment situation would allow him to comply with the trial court's order."

Kelly v. Colston, 32 So.3d 186 (Fla. 1st DCA 2010)

Second District

CHILD SUPPORT AMOUNT MUST BE ADJUSTED FOR SUBSTANTIAL TIME SHARING EVEN WHERE SUCH TIME IS TEMPORARY, SUCH AS LENGTHY TIME-SHARING DURING THE SUMMER MONTHS.

This case was appealed in the absence of a transcript, with only a Statement of the Evidence. The trial court determined that the Father's income was $2758 per month but the Statement of the Evidence reflected that the only evidence presented was the Father's testimony that he was working forty hours or less a week, earning $20 per hour. He did not testify as to the amount of deductions from his pay and no documentary evidence of his net income was presented. The Father also contended that the trial court erred in failing to adjust the amount of support to be paid during the summer months when he was to have substantial "make up" time with his child. The District Court held:

1. "[The] statute provides that the trier of fact 'shall' vary the amount of child support called for by the guidelines 'whenever any of the children are required by court order or mediation agreement to spend a substantial amount of time with either parent.' This requirement applies to any living arrangement, whether temporary or permanent."

2. "The final judgment does not contain an adjustment to the Father's child support obligation for the makeup period. In light of the mandatory language of section 61.30(1)(a), we must reverse and remand for compliance with the statute."

Galasso v. Gargione, 40 So.3d 14 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

ERROR FOR COURT TO REFUSE TO ALLOW A COURT REPORTER TO BE PRESENT WHEN COURT CONDUCTED INTERVIEW WITH CHILDREN IN CHAMBERS, WHEN CHILDREN'S TESTIMONY WAS NECESSARY FOR MOTHER TO MEET HER BURDEN OF PROOF AS TO VISITATION MODIFICATION.

The Mother moved to temporarily halt visitation between the parties' two children and their father. She alleged that the Father was abusing alcohol and therefore was posing a risk to the children. The Mother requested and was granted leave for the minor children to attend and testify at the hearing. However, during the trial, the court required that the children testify, in chambers, without a court reporter present. The Mother objected, arguing that she needed the children's testimony, on the record, to meet her burden of proof. The trial court refused to conduct the interview with the children and then denied the Mother's motion to halt visitation with the father. The District Court held:

1. "[The Mother] was entitled to have the children's testimony transcribed. This is because due process requires the party seeking to modify visitation demonstrate that there has been a material change in circumstances and that modification is required to protect the child's

best interest. The only avenue for [the Mother's] proof in this case is through the children's testimony."

2. "We also reject [the Father's] argument that [the Mother] conceded to the interview being conducted without a court reporter because her motion did not specifically request the children's testimony be transcribed if taken *in camera*. Neither the family law rules, nor the rules of civil procedure require a party to request the testimony be transcribed in a motion to allow children to testify."

Hickey v. Burlinson, 33 So.3d 827 (Fla. 5th DCA 2010)

VII. SHARED PARENTAL RESPONSIBILITY

A. Factors

First District

Second District

IN NAMING HUSBAND AS PRIMARY RESIDENTIAL PARENT, TRIAL COURT APPLIED AN INCORRECT STANDARD BY EQUATING THE CHILD'S ENVIRONMENT WITH THE PHYSICAL STRUCTURE OF THE HOME AND ELIMINATING WIFE FROM CONSIDERATION BECAUSE SHE COULD NOT AFFORD TO RETAIN THE HOME ON HER OWN INCOME.

During the parties' over three year separation, the parties' teenage son resided with the Wife in the former marital home. The trial court, "taking the stability of the child's residence in the dwelling itself as its polestar," eliminated the Wife from consideration as the primary residential parent because she could not afford to maintain the home on her own income. The District Court held:

1. "We agree with the Wife that the trial court misapplied the law in reaching its decision on this issue. The trial court applied an incorrect standard by equating the child's 'environment'… with the physical structure where the child lived, first with both parties and later- during the parties' lengthy separation - with the Wife."

2. "Taking the stability of the child's residence in the dwelling itself as its polestar, the trial court erroneously eliminated the Wife from consideration as the primary residential parent because she could not afford to retain the marital home on her income."

3. "Because the trial court used an incorrect standard in reaching its decision to designate the Husband as the primary residential parent, we reverse this provision of the final judgment…."

Martinez v. Abinader, 37 So.3d 944 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT'S DESIGNATION OF MOTHER AS PRIMARY RESIDENTIAL PARENT REVERSED WHERE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; MOTHER'S OPINIONS AS TO WHAT SHE BELIEVED TO BE BETTER FOR THE CHILD WAS NOT BASED ON FACTS AND WAS NOT COMPETENT EVIDENCE.

At the trial level, the court designated the mother as primary residential parent after refusing to adopt the rotating schedule that the parties had followed for over two years. The District Court reversed:

1. "First, with regard to section 61.13(3)(m), the trial court found that the parties' work schedules were a 'significant factor' in evaluating the custodial arrangement. Specifically, the trial court found that the fact that the father might have to rely on family, neighbors, or even the mother, to pick up the child from the school's after-school care or extracurricular activities, weighed in favor of designating the mother the primary residential parent."

2. "There was no evidence that the father had even been unable to pick up his son from the after-care program on time. Moreover, the parties amendment to the time sharing order provides that if the father cannot pick up the child, the mother will be entitled to pick up the child from school and the father will then pick up the child from her residence."

3. "Second, in addressing section 61.13(3)(d), the trial court found that despite the fact that, 'the child's environment has been stable and satisfactory…there was competent, substantial evidence that living in the same household would be in child's best interest and provide the continuity and resident stability which he needs.'"

4. "Our review of the record reveals that the only evidence on this point upon which the trial court could have relied in reaching this conclusion is the opinion of the mother. The mother's opinion was not based on any claimed adverse effects the son had suffered while spending alternating weeks with each of his parents, but simply on the fact that she was his mother and thought it was better, and that she had been a teacher for two years. This conclusory opinion testimony, not based upon any observable facts, did not constitute competent and substantial evidence on the issue of a stable environment for the parties' son."

Corey v. Corey, 29 So.3d 315 (Fla. 3rd DCA 2009)

Fourth District

Fifth District

TRIAL COURT'S CUSTODY DECISION AFFIRMED WHERE NO ERROR APPEARED ON THE FACE OF THE JUDGMENT AND THE ABSENCE OF A TRANSCRIPT PRECLUDED EVIDENTIARY REVIEW; FACTUAL FINDINGS NOT REQUIRED IN A CUSTODY JUDGMENT SO LONG AS EVIDENCE SUPPORTS A FINDING OF THE BEST INTEREST OF THE CHILD.

The Father appealed from a final judgment of paternity which determined that the Florida courts had subject matter jurisdiction over the parties' custody dispute concerning the parties' eight-year-old daughter; granted custody of the child to the mother, ordered monthly child

support; and placed the burden of visitation costs entirely on the father. With regard to the court's custody decision, the District Court held:

1. "In making an initial custody determination, the trial court must evaluate the non-inclusive factors listed in section 61.13(3), Florida Statutes, and determine the best interests of the child…. However, there is no statutory requirement that the trial court make specific written findings in a custody decision. Thus, a final judgment is not erroneous simply for failing to list the factors on which it relied in making its determination."

2. "Here, the court found that it was in the best interest of the child that the mother have primary residential custody. A finding that primary residential custody is in the 'best interests' of the child, whether made in the final judgment or at trial, is sufficient to uphold a custody determination so long as there is substantial competent evidence in the record that permits the court to properly evaluate the relevant factors."

3. "Because no transcript of the final hearing is contained in the record, this Court can review only errors that appear on the face of the judgment. As no error appears on the face of the judgment, this Court is unable to review the evidentiary basis of the court's ruling, and must affirm on appeal."

Hindle v. Fuith, 33 So.3d 782 (Fla. 5th DCA 2010)

TRIAL COURT ERRED IN AWARDING SOLE PARENTAL RESPONSIBILITY TO THE WIFE WITHOUT FINDING THAT SHARED PARENTAL RESPONSIBILITY WOULD BE DETRIMENTAL TO THE CHILD.

The Wife filed a petition to end her 22-year marriage and requested, among other things, alimony, child support, attorney's fees, and shared parental responsibility. The lower court granted attorney's fees and awarded the wife alimony and child support; requiring husband to secure those obligations with life insurance. The court further awarded the wife, sole parental custody, an award well beyond the shared parental responsibility actually requested by the Wife. The District Court reversed:

1. "Shared parental responsibility is statutorily required unless the court specifically finds that it would be detrimental to the child."

2. "The courts have consistently held that without such a finding, an award of sole parental responsibility is inappropriate."

3. "The trial court did not make the necessary finding in the final judgment. We note, parenthetically, that Wife requested primary residential responsibility, not sole parental responsibility, and that she concedes this error."

Rashid v. Rashid, 35 So.3d 992 (Fla. 5th DCA 2010)

B. Rotating Custody

First District

Second District

Third District

TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT FATHER WAS REQUIRED TO OVERCOME PRESUMPTION AGAINST ROTATING CUSTODY AND TO ESTABLISH "EXCEPTIONAL CIRCUMSTANCES" IN ORDER TO JUSTIFY ROTATING CUSTODY.

The husband and wife separated when the wife left the parties' home in Gainesville and moved to Key Biscayne. The husband then moved to Key Biscayne in order to be near the child. Thereafter, for a two year period of time, the parties followed a schedule in which the child spent alternating weeks with each party, a schedule under which the child thrived. At the trial level, the court applied a legal presumption against rotating custody and required the father to prove "exception circumstances." The District Court reversed:

1. "In 1997, the Legislature enacted section 61.121, Florida Statutes, which states as follows: 'The court may order rotating custody if the court finds that rotating custody will be in the best interest of the child.' Prior to that, case law established that rotating custody was presumptively disfavored."

2. "Subsequent to the Legislature's enactment of section 61.121, courts continued to apply the presumption against rotating custody…. Based upon the plain language of the statute, however, we cannot reach the same conclusion as our sister courts."

3. "In 1997, the Legislature chose to put rotating custody on the same level playing field as other types of custody arrangements - all of which are evaluated through the lens of the best interest of the child. This legislative action changed the judicially created presumption against rotating custody. If the Legislature had intended to continue the long-standing presumption against rotating custody, it would have stated so in the statute. Instead, the Legislature, in enacting section 61.121, expressly stated that the only standard for ordering rotating custody is whether it is in the best interest of the child."

4. "Put another way, after the 1997 Legislative action, no presumption - positive or negative - attaches to rotating custody in comparison to other permissible custody arrangements…. Courts that continue to impose a higher burden on a parent seeking rotating custody improperly displace the Legislative decision with their own judicial policy preference."

5. "Moreover, it necessarily follows that a parent seeking rotating custody need not establish 'exceptional circumstances' to overcome a presumption that no longer exists. The standard is simply the best interest of the child as set forth in section 61.13, Florida Statutes (2007)."

Corey v. Corey, 29 So.3d 315 (Fla. 3rd DCA 2009)

Fourth District

Fifth District

C. Third Party Custody

First District

Second District

Third District

Fourth District

ERROR TO DENY GRANDMOTHER'S PETITION FOR TEMPORARY CUSTODY OF HER GRANDCHILD ON THE BASIS THAT FATHER'S PATERNITY HAD NOT BEEN ESTABLISHED WHEN THE PATERNITY OF THE FATHER HAD ALREADY BEEN TWICE VOLUNTARILY ACKNOWLEDGED.

The birth certificate of the child at issue, R.L.K., named Sylenia Thomas and Rodney Kennedy as her parents. In 2008 Thomas and Kennedy executed a document giving all rights and legal guardianship to the paternal grandmother who then filed a chapter 751 petition for temporary custody. The trial court denied the petition based on a finding that Kennedy's name on the birth certificate was insufficient to establish paternity and required the father to file a paternity action. The District Court held:

1. "Subsection (4) [of Section 742.10] goes on to provide that once the sixty-day period referenced in subsection (1) has passed, the 'signed voluntary acknowledgment of paternity shall constitute an establishment of paternity and may be challenged in court only on the basis of fraud, duress, or material mistake of fact.'"

2. "In order for the hospital to have listed Kennedy as the father on the birth certificate Kennedy (and the child's mother) was required to sign an affidavit acknowledging paternity . . . . Second, in the signed and notarized October 2008 document purporting to give 'all rights' and 'legal guardianship' of R.L.K. to the paternal grandparents, Kennedy (and the mother) again acknowledged his paternity."

3. "These unchallenged voluntary acknowledgements of paternity have established paternity in Kennedy. No further proceedings under chapter 742 were required, or permitted, to establish Kennedy's paternity."

Mohorn v. Thomas, 30 So.3d 710 (Fla. 4th DCA 2010)

Fifth District

D. UCCJA/UCCJEA

First District

ERROR TO MAKE AN INITIAL CHILD CUSTODY DETERMINATION WHEN FLORIDA WAS NOT THE CHILD'S HOME STATE.

The Wife appealed from a portion of the trial court's final judgment of dissolution. It is undisputed that the child lived with her parents in North Carolina and then, after their separation, with her mother in Wisconsin, during the six months before the former husband commenced the dissolution proceedings in Duval County, where he was a legal resident. The District Court held: "[U]under section 61.514, Florida Statutes (2008), of the Uniform Child Custody Jurisdiction and Enforcement Act, Florida was not the child's home state and the circuit court did not have jurisdiction to make an initial child custody determination."
Collier v. Collier, 29 So.3d 437 (Fla. 1st DCA 2010)

Second District

Third District

Fourth District

Fifth District

TRIAL COURT WAS CORRECT IN FINDING THAT IT HAD JURISDICTION TO MAKE A CUSTODY DETERMINATION UNDER THE UCCJEA WHERE NO OTHER STATE HAD JURISDICTION.

The Father appealed from a final judgment of paternity which determined that the Florida courts had subject matter jurisdiction over the parties' custody dispute concerning the parties' eight-year-old daughter; granted custody of the child to the mother, ordered monthly child support; and placed the burden of visitation costs entirely on the father. With regard to the jurisdictional question, the District Court held:

1. "A Florida court has jurisdiction to make an initial child custody determination if Florida is the home state of the child on the date of the commencement of the proceeding. Home state is defined in relevant part as the state in which a child has lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding."

2. "The UCCJEA gives jurisdictional priority to the child's home state. However, the UCCJEA grants an exception to the home state jurisdictional requirement when 'a court of another state does not have jurisdiction' Therefore, under the UCCJEA, even if Florida is not the child's home state, Florida may exercise subject matter jurisdiction over a child custody matter if another state does not have jurisdiction."

3. "On the date that the paternity action was commenced in this case, Florida was not the 'home state' of the child because the child had not lived in Florida for six consecutive months prior to the commencement of the paternity action…. However, no other state had jurisdiction since the mother and child had lived in several states in the six months prior to their arrival in Florida and the commencement of the paternity action."

4. "As a result, because no court of any other state would have had jurisdiction under section 61.514, the Florida trial court had jurisdiction to make an initial custody determination."
Hindle v. Fuith, 33 So.3d 782 (Fla. 5th DCA 2010)

E. Geographical Limitations

Supreme Court

TRIAL COURT ERRED IN DETERMINING THAT WIFE COULD RELOCATE WITH CHILD TWENTY MONTHS AFTER FINAL HEARING BASED UPON CONCLUSION THAT RELOCATION WOULD BE IN BEST INTERESTS OF CHILD TWENTY MONTHS FROM DATE OF HEARING; BEST INTEREST DETERMINATION IN DETERMINING A PETITION FOR RELOCATION MUST BE MADE AT THE TIME OF THE FINAL HEARING AND MUST BE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The husband and wife married and had one child. At the time of the trial, the child was sixteen months old. The court granted shared parental responsibility, with the Wife designated as the primary residential parent, subject to reasonable visitation by the Husband. The Wife later sought permission to relocate with the child to Ohio which the trial court granted but only after the child had attained the age of three years. The District Court affirmed but, on appeal to the Supreme Court, the decision was quashed:

1. "[W]e conclude that a best interests determination in petitions for relocation must be made at the time of the final hearing and must be supported by competent, substantial evidence."

2. "In this case, the trial court authorized the relocation based in part on its conclusion that relocation would be in the best interests of the child twenty months from the date of hearing. Such a 'prospective-based' analysis is unsound."

3. "Indeed a trial court is not equipped with a 'crystal ball' that enables it to prophetically determine whether future relocation is in the best interests of a child. Any one of the various factors outlined in section 61.13001(7) that the trial court is required to consider, such as the financial stability of a parent or the suitability of the new location for the child, could change within the extended time period given by the court before relocation."

4. "Because trial courts are unable to predict whether a change in any of the statutory factors will occur, the proper review of a petition for relocation entails a best interests determination *at the time of the final hearing*, i.e., a 'present-based' analysis."

5. "Although the trial court in this case did not utilize this 'present-based' analysis, we conclude that if it had done so, the court would have denied the relocation request. Our reading of the order indicates that the court did not agree that a relocation at the time of the hearing was in the best interest of the child."

6. "We find the most telling phrase of the order to be the court's statement that '[b]ut for the Court's concern for the Husband's ability to bond with his son, the Wife's relocation would have been granted without further delay….' Thus, although the court may have favored relocation once the child reaches three years of age, it is clear that the court found that relocation was not in the best interest of the child at the time of hearing. Therefore the petition to relocate should have been denied."

7. In addition, the granting of the relocation petition improperly shifted the burden of proof from the Wife to the Husband. Pursuant to section 61.13001(8), the burden of proof was on the Wife, the party seeking relocation, to demonstrate that the relocation was in the best interest of the child. We agree with the Husband's argument that permitting a trial court to grant relocation based on a premature best interests finding would shift the burden of proof to the objecting party to demonstrate changed circumstances on a motion to modify. The res judicata effect of the final judgment would act as a presumption in favor of relocation in any subsequent effort to contest the Wife's relocation, a presumption that is difficult to overcome."

8. "This shifting of burden is in direct contravention to section 61.13001(7), Florida Statutes (2006), which prohibits presumptions in favor or against a relocation request. The proper course of action is to deny the relocation request where a party has not met the burden of proof at the time of hearing."

Arthur v. Arthur, 35 FLW S38 (Fla. 2010)

First District

IN ORDERING FORMER WIFE TO RETURN WITH CHILD AFTER RELOCATION, TRIAL COURT IMPROPERLY FOCUSED ON HOW IT WOULD HAVE RULED ON ISSUE OF RELOCATION HAD IT BEEN FACED WITH ISSUE PRIOR TO RELOCATION RATHER THAN UPON THE CHILD'S BEST INTEREST.

While the mother was pregnant with the parties' child, she moved to Albany, New York from Tallahassee, Florida. The father petitioned for relief after the child was born and after the mother had relocated. The trial court ordered the mother to return with the child and the District Court reversed:

1. "[T]he trial court, in ordering her to return to Tallahassee with the parties' child, employed an incorrect legal standard. In evaluating the child's best interests pursuant to section 61.1300(7), Florida Statutes, the trial court primarily focused on how it would have ruled on the issue of relocation had it been faced with the issue prior to appellant's move to Albany, New York…."

2. "However, because the relocation had already occurred when appellee, Shawn Mullins, petitioned for relief, the pertinent question was not whether the trial court would have permitted the relocation in the first place but whether the actual relocation was in the child's best interests pursuant to the factors set forth in section 61.13001(7)."

Conners v. Mullins, 27 So.3d 199 (Fla. 1st DCA 2010)

Second District

TRIAL COURT ERRED IN PERMITTING MOTHER TO TEMPORARILY RELOCATE WITH CHILD BASED ON THE PARTIES' ALLEGED "AGREEMENT" WHERE NO SUCH AGREEMENT WAS REACHED BETWEEN THE PARTIES.

The Father appealed from a court order temporarily allowing the Mother to relocate with the parties' child. Following the dissolution of the parties' marriage, the Mother decided to move to north Florida to be with her family and friends. In contemplation of the move, the parties discussed timesharing. The Mother prepared a schedule but the Father refused to agree to it. After several hearings, the lower court entered a temporary order permitting mother to move the child, apparently relying upon the parties' "agreement" which did not, in fact, exist. The District Court held:

1. "Here, the parties did not have an agreement for their child's relocation, but the court appeared to treat [the Mother's] proposed timesharing schedule as such."

2. "Without dispute, the schedule did not suffice as a relocation agreement under §61.13001(2), which requires a signed writing."

3. "[I]t was error for the court to base its relocation decision on a finding that the parties had agreed to the schedule when, in fact, they had not. For this reason, we are compelled to reverse the order approving the temporary relocation and remand for consideration of the issue in light of the factors prescribed in 61.13001(7)."

Zepeda v. Zepeda, 32 So.3d 679 (Fla. 2nd DCA 2010)

TRIAL COURT ERRED IN PERMITTING MOTHER TO TEMPORARILY RELOCATE WITH CHILD WITHOUT INCLUDING A TIMESHARING SCHEDULE WITH THE ORDER.

The Father appealed from a court order temporarily allowing the Mother to relocate with the parties' child. Following the dissolution of the parties' marriage, the Mother decided to move to north Florida to be with her family and friends. In contemplation of the move, the parties discussed timesharing. The Mother prepared a schedule but the Father refused to agree to it. After several hearings, the lower court entered a temporary order permitting mother to move the child, apparently relying upon the parties' "agreement" which did not, in fact, exist. The District Court held:

1. "Reversal is also warranted due to the order's failure to include a timesharing schedule. Without a schedule, the circuit court could not evaluate the feasibility of preserving the parent-child relationship through substitute arrangements."

2. "Although the court apparently contemplated that the parties would operate under Ms. Zepeda's proposal, it did not expressly adopt it."

3. "If, on remand, the court again authorizes the relocation of the child, it shall devise an appropriate timesharing schedule."

Zepeda v. Zepeda, 32 So.3d 679 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

F. Modification/Enforcement

First District

Second District

TRIAL COURT'S MODIFICATION OF CUSTODY PROVISION OF FINAL JUDGMENT OF DISSOLUTION BY VACATING ROTATING CUSTODY ARRANGEMENT AND AWARDING PRIMARY RESIDENCE TO FATHER WAS REVERSIBLE ERROR WHERE FATHER'S PETITION FOR PRIMARY RESIDENCE WAS NOT BEFORE COURT AT THE TIME OF THE HEARING.

The parties were divorced in 2003. They entered into a settlement agreement which included a rotating custody plan. In 2004, the husband agreed to allow the wife and children to move to Highlands County which necessarily ended the rotating custody plan and created a de facto primary residence of the children with the wife. In 2005, the husband filed a motion to enforce the final judgment, seeking that the court order the wife to return to Pascoe County with the children so that the rotating custody plan could be followed. In response, the wife filed a modification petition, asking that she be named the primary residential parent. In 2006, the husband filed a modification petition but never obtained proper service upon the wife. At the final hearing (on the wife's modification petition) the trial court informed the father of his failure to properly serve but nevertheless treated the wife's petition to modify the final judgment as having opened the door for the court to award the father primary residence without his petition being heard at the hearing. The District Court reversed:

1. "In reviewing the pleadings, the trial court instructed the Father, who appeared pro se, as follows: '[T]here is no summons now that has been successfully served.' The trial court further advised the Father, '[I]f she doesn't win, then ya'll are left where you were, unless you succeed at a later time with your amended supplemental petition.' The trial court subsequently clarified the purpose of the hearing, stating, 'Now I'm going to address what's going to happen with the kids and your respective contacts, which is both the court considering [the Mother's] request for there to be a change and [the Father's] request to enforce what was in place.' Based on these comments, we conclude that the Father's petition for modification was not before the trial court at the hearing, but rather that the Mother's petition and the Father's motion to enforce the rotating custody plan were the only issues to be tried."

2. "At the conclusion of the hearing, the court made certain factual findings regarding the Mother's poor parenting of the children. Then, despite the court's earlier comments, it named the Father primary residential parent and set out the visitation schedule for the Mother."

3. "The rotating custody plan of the final judgment is considered a custody determination, and res judicata attaches to that determination. To modify that plan, the parties must meet the same requirement as is necessary to modify any other custody provision of a final judgment of dissolution, i.e., satisfaction of the substantial change test."

4. "In this case, the trial court found that, as alleged by the Mother, the move to Highlands County was a substantial change that had occurred since the entry of the final judgment. However, the trial court already had ruled that the Father's request for modification was not before the court and that the only issues to be addressed were the Mother's petition to modify the final judgment of dissolution and the Father's motion to enforce the original rotating custody plan. The final judgment of modification did neither, but rather named the Father primary residential parent - relief that he requested in a petition that was not yet before the court. Since this was beyond the trial court's jurisdiction at that time, we must reverse."
Paulk v. Paulk, 25 So.3d 672 (Fla. 2nd DCA 2010)

TRIAL COURT ABUSED DISCRETION IN FINDING THAT HUSBAND'S RELOCATION OF 45 MILES DUE TO A CHANGE IN HIS EMPLOYMENT CONSTITUTED A SUBSTANTIAL CHANGE OF CIRCUMSTANCES WHICH SUPPORTED MODIFICATION OF CUSTODY.

The former wife filed a petition to modify custody alleging there had been several changes in circumstances since the dissolution of marriage that necessitated a change. The trial court found that the former husband's move from Largo to Brandon (45 miles from the wife's home) due to a change in his employment was a substantial change in circumstances. The District Court did not agree and found that the evidence presented at the hearing was insufficient to support the modification of custody:

1. "The custody provisions of a final judgment of dissolution of marriage can be materially modified if there has been a change in circumstances shown to have arisen after the judgment was entered and if the child's best interest justifies changing custody…. The degree of change in the conditions and circumstances since the date of the previous decree must be of a substantial character."

2. "In custody disputes involving the relocation of a parent, courts generally conclude that the relocation does not amount to a substantial change if the relocation is not a significant distance away from the child's current location."

3. "In the present case, there was no evidence that [the father's] move to Brandon would cause a significant interference with [the wife's] time with the child. [The father] testified that on the days he had custody of his son, he could drive him to and from school. He had verified with his employer that the employer was willing to allow him flexibility with his schedule so that he could provide such transportation."

4. "We recognize that as a result of [the father's] relocation, the drive to and from school and school-related activities will be longer; however, this change is not so substantial as to justify a change in the custody arrangement…."
Halbert v. Morico, 27 So.3d 771 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

ERROR TO ORDER A CHANGE OF PRIMARY RESIDENTIAL CUSTODY WHERE SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES WAS NOT SHOWN.

The Mother petitioned the court to allow her to relocate with her daughter to Oklahoma in order to be with her new husband. The Father responded (by way of an Answer to the Petition) that he wished to have primary residential custody over the child. He claimed that the change in circumstances was the Mother's remarriage and desire to relocate to Oklahoma. The trial court ordered a social investigation and study report. The investigator filed a report noting that the Mother had a pattern of partnering with men who engage in unlawful and questionable behavior and that her then-husband was incarcerated in Oklahoma on substance abuse related charges and had admitted to abusing substances. The investigator's report further noted that the Mother had exhibited employment and residential instability and recommended placing the child with the Father. Thereafter, the Mother obtained a dissolution of her marriage to her then-husband and withdrew her request to relocate. She filed an amended petition seeking only child support and other financial relief involving the payment of child support arrearages. Despite these changes in the operative facts of the case, the Father announced to the court his intention to proceed on his petition for modification of custody. The General Magistrate recommended a custody modification based on the social study and investigation. The trial judge granted the Mother's Exceptions but remanded the matter to the Magistrate for further factual findings. The Magistrate then held no additional hearings and merely deleted one finding from the earlier Report. This time, however, the trial court adopted the Magistrate's Report. The District Court reversed:

1. "There is a presumption in favor of an original custody determination, and before a court may modify such a judgment, it must decide whether there is a 'factual basis sufficient to show that conditions have become materially altered since the entry of the previous decree.' It then must determine whether the child's best interests justify changing custody. But, the preliminary question of a substantial and material change is a prerequisite to considering the best interests of the child under section 61.13(2)(d), Florida Statutes."

2. "Here, the GM's erroneous factual findings and erroneous application of the law with respect to his determination that a substantial change of circumstances had occurred since the entry of the final judgment of paternity were clear on the face of the amended report and recommendations. It follows that the circuit court erred in approving and ratifying the amended report…."

3. "The record reflects that the only substantial change that occurred since the entry of the final judgment of paternity was the Mother's marriage to [her former husband] and her closely-related decision to relocate to Oklahoma. The Mother's residential and employment instability were factors that had been considered when the final judgment was entered, and the circuit court had awarded her primary residential custody despite those concerns."

4. "For the foregoing reasons, the circuit court erred in finding that a substantial change in circumstances had occurred and in changing the primary residential custody of [the child] from the Mother to the Father."

D.M.G. v. G.E.M., 32 So.3d 750 (Fla. 2nd DCA 2010)

TRIAL COURT ABUSED DISCRETION IN CHANGING TEMPORARY CUSTODY OF CHILD WHERE THERE WAS A FAILURE TO PROVE A SUBSTANTIAL CHANGE IN CIRCUMSTANCES; THIS TEST APPLIES WHETHER A PARTY SEEKS A TEMPORARY OR PERMANENT MODIFICATION.

During the parties' dissolution proceedings, their child began experiencing emotional problems. Nevertheless, the final judgment incorporated the parties' settlement agreement which granted the Mother primary residential custody of the child. A few weeks after the entry of the final judgment, the father filed a Supplemental Petition for Modification but, before the petition could be heard, the father filed a Motion for Temporary Custody of Minor Child, which alleged that it was in the best interest of the child to be in his custody until the issues between the parties could be resolved. The trial court granted the temporary modification and the District Court reversed:

1. "In order to prevail on a petition for change of custody, including a petition for temporary change, the petitioner must plead and prove, and the trial court must find, the following: 1) a substantial change of circumstances occurred since entry of the previous custody order that was not reasonably contemplated when the previous order was entered; and 2) the requested change of custody is in the best interest of the child."

2. "The first requirement is a prerequisite of the second…. This court has described the petitioner's burden as 'extraordinary.'"

3. "Here, the father's petition for temporary custody does not allege, and the father failed to prove, a substantial and material change of circumstances. Although the child has emotional problems, that fact was recognized before the court ever signed the dissolution judgment and thus could not have been relied upon as a substantial change of circumstances. Moreover, the trial court did not make a finding of substantial and material change of circumstances."

4. "Hence, the failure to plead and prove a substantial change of circumstances and the lack of appropriate findings in the order under review require reversal."

5. "The father argues at some length that the temporary change was in the child's best interest. However, as previously explained, to warrant a change in custody there first must be evidence of a substantial change in circumstances; the requirement of the best interest of the child is not sufficient by itself to meet the petitioner's burden to establish a change in child custody."

Clark v. Clark, 35 So.3d 989 (Fla. 5th DCA 2010)

G. Miscellaneous

First District

Second District

Third District

Fourth District

Fifth District

VIII. EQUITABLE DISTRIBUTION

A. Marital vs. Non-Marital Assets

First District

ERROR TO FIND THAT PROPERTY WAS A MARITAL ASSET BECAUSE SALE PROCEEDS WERE CO-MINGLED WITH MARITAL FUNDS WITHOUT SUBSTANTIAL, COMPETENT EVIDENCE THAT SUCH OCCURRED.

The Wife owned a parcel jointly with her father and inherited the property when he passed away; all before the parties married. The Husband did repairs and maintenance to the home but the Wife paid the Husband $8,000 for his labor in constructing an addition on the home. Although Husband and Wife lived on the property for a period of time, it was rented out to third parties, the proceeds of which were reflected in the couple's joint income tax returns. Marital funds were used to cover the cost of debt, repairs, taxes, etc. The Wife alone maintained the account for the rental property and after filing for dissolution of marriage, the Wife sold the property and deposited the proceeds into a separate account on instructions from her attorney. The trial court found that Husband lived in the home and made substantial repairs, thus, the full sale price of the property was credited on Wife's side of the equitable distribution ledger as a marital asset. The court reasoned that the sale proceeds were co-mingled with marital funds because wife deposited those fund in accounts which also contained marital sums. The District Court held:

1. "[The Husband] does not dispute that his wife owned [the property] before the marriage. [The Wife] points out that filing a joint federal income tax return including the separate non-marital income of one spouse does not convert that income to marital property under section 61.075 (5)(b)3., Florida Statutes (2005) (defining as a non-marital asset "income derived from nonmarital assets during the marriage," unless treated or relied upon as a marital asset)."

2. "As [the Husband] admitted, [the Wife] deposited the rental income checks into her own personal bank accounts, over which she exercised exclusive control. We also know, of course, that even joint use, by husband and wife, of income from non-marital property, does not entirely transform the property itself into a marital asset."

3. "Here, the trial court largely relied upon the alleged disposition of the sale proceeds from [the property] as justification for classifying the property as marital. The court concluded [that the Wife] commingled the proceeds with marital funds when she deposited those proceeds 'into accounts which also contained marital sums.' At best, the record strains to support this conclusion. [The Wife] testified she deposited the proceeds of sale - approximately $130,000 after costs and taxes - into a 'new' account at the recommendation of her attorney. [The Husband] offered no evidence to contradict this testimony and, when asked on direct examination whether his wife had 'all of that $165,000,' [the Husband] stated, 'To the best of my

knowledge.' We are, respectfully, unable to identify what the trial court focused upon for its findings that appellant deposited the proceeds of sale 'into . . . accounts which also contained marital sums.' Competent, substantial evidence lacks in this regard."
Puskar v. Puskar, 29 So.3d 1201 (Fla. 1st DCA 2010)

WHERE TRIAL COURT FINDS MARITAL APPRECIATION IN PRE-MARITAL PROPERTY, COURT IS REQUIRED TO MAKE SPECIFIC FINDINGS REGARDING THE EXTENT TO WHICH HUSBAND'S LABOR ENHANCED THE VALUE OF THE PROPERTY.

The Wife owned a parcel jointly with her father and inherited the property when he passed away; all before the parties married. The Husband did repairs and maintenance to the home but the Wife paid the Husband $8,000 for his labor in constructing an addition on the home. Although Husband and Wife lived on the property for a period of time, it was rented out to third parties, the proceeds of which were reflected in the couple's joint income tax returns. Marital funds were used to cover the cost of debt, repairs, taxes, etc. The Wife alone maintained the account for the rental property and after filing for dissolution of marriage, the Wife sold the property and deposited the proceeds into a separate account on instructions from her attorney. The trial court found that Husband lived in the home and made substantial repairs, thus, the full sale price of the property was credited on Wife's side of the equitable distribution ledger as a marital asset. The court reasoned that the sale proceeds were co-mingled with marital funds because wife deposited those fund in accounts which also contained marital sums. The District Court held:

1. "We have also considered the parties' joint references to repair work [the Husband] performed on the [Wife's premarital property]. The expenditure of marital funds on a non-marital asset does not transform the entire asset into a marital one; rather, it is the enhancement in value that becomes marital."

2. "Moreover, Florida law is clear that to make an award for the enhancement in value and appreciation of a non-marital asset, the court must make specific findings as to the value of such enhancement and appreciation during the marriage, as well as which portion of that enhanced value is attributable to marital funds and labor."

3. "[The Husband] did testify he 'did a lot of repair work' on the home, but the trial court made no observation that the volume of work, plus expenditures, would have wiped out entirely the non-marital portion of the property. [Thus, on remand] the trial court should determine what, if any portion of that property may be characterized as marital."

Puskar v. Puskar, 29 So.3d 1201 (Fla. 1st DCA 2010)

ERROR TO ASSIGN TO WIFE IN EQUITABLE DISTRIBUTION MONEY SHE WITHDREW FROM PARTIES' BANK ACCOUNT PENDING RESOLUTION OF DISSOLUTION PETITION WHERE THERE WAS NO EVIDENCE THAT MONEY WAS WITHDRAWN FOR ANYTHING OTHER THAN REASONABLE LIVING EXPENSES.

The trial court "awarded" to the Wife the amount of funds she had withdrawn from the parties' bank accounts during the pendency of the proceedings below. Nothing in the record suggested that the Wife used the money she withdrew from the parties' bank account for

anything other than reasonable living expenses pending the resolution of her petition for dissolution. The District Court held:

1. "Because there is nothing in the judgment to suggest that the former wife used the money she withdrew from the parties' bank account for other than reasonable living expenses pending resolution of her petition for dissolution of the marriage, the trial court erred when it assigned that money to her as part of the scheme of equitable distribution."

2. "Accordingly, we reverse the trial court's scheme of equitable distribution. On remand, the trial court shall again address the issue of equitable distribution without taking into account money used by either party during pendency of the dissolution proceeding for reasonable livings expenses."

Annas v. Annas, 29 So.3d 1209 (Fla. 1st DCA 2010)

Second District

TRIAL COURT ERRED IN CLASSIFYING FUNDS THAT WERE BORROWED AGAINST A LIFE INSURANCE POLICY AS A MARITAL LIABILITY WHERE FUNDS WERE CONSIDERED TO BE THE PROPERTY OF HUSBAND'S FATHER WHO HAD PAID ALL PREMIUMS ON THE POLICY AND HAD NAMED THE HUSBAND AS OWNER OF THE POLICY FOR ESTATE PLANNING PURPOSES.

The trial court classified funds that were borrowed against a life insurance policy as a marital liability. On appeal, the District Court found it was error to determine that the borrowed funds were the Former Husband's marital obligation and reversed, directing the trial court to strike the $199,000 debt from the equitable distribution scheme.

1. "The testimony, which appeared undisputed, reflects that the Former Husband's father had paid all the premiums on the policy but that the Former Husband was named the policy owner for estate planning purposes."

2. "In November 2005, the father directed the Former Husband to borrow approximately $199,000 against the cash surrender value of the policy and endorsed the check over to him. Both the father and the Former Husband testified that they considered the funds to be the father's property."

Diehl v. Diehl, 25 So.3d 1289 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

TRIAL COURT ERRED IN DESIGNATING AS A MARITAL ASSET A CERTIFICATE OF DEPOSIT WHICH WAS REDEEMED BY WIFE AT THE TIME OF A PRIOR DISSOLUTION ACTION WHICH WAS LATER DISMISSED AND THE PROCEEDS HAD BEEN USED FOR THE WIFE'S AND CHILDREN'S LIVING EXPENSES.

The trial court determined that a Crown Bank Certificate of Deposit, having a value of $25,198 was a marital asset. The District Court reversed:

1. "We agree with the Wife that the trial court erred in designating as a marital asset the Crown Bank CD…. This CD was redeemed by Wife at the time the parties' first dissolution was filed in 1996 and the funds were used for her and the children's living expenses. This proceeding was dismissed later in 1996."

2. "In 1998, Wife filed a new petition for dissolution. The trial court apparently determined that the Crown Bank CD was a marital asset, based on an order in the earlier dissolution concerning temporary support that deferred classification of the proceeds of the CD, but we can find no legal basis to treat this previously liquidated CD as a marital asset in the present proceeding."

Sheth v. Sheth, 26 So.3d 633 (Fla. 5th DCA 2009)

TRIAL COURT IN ITS METHODOLOGY OF DISTRIBUTING APPRECIATED VALUE OF BEACH HOUSE DUE TO EXPENDITURE OF MARITAL FUNDS TO PAY THE MORTGAGE, DID NOT AWARD WIFE AN APPROPRIATE SHARE OF THE APPRECIATED VALUE; BURDEN OF PROOF IS ON THE NON-OWNER SPOUSE TO PRESENT EVIDENCE OF ENHANCED OR APPRECIATED VALUE.

The parties were married in 1998. Prior to the marriage, in 1994, the Husband purchased a beach house. He financed the property with a $131,400 mortgage. The Wife made no contributions to the beach house prior to the marriage. At the time of the marriage, the appraised value of the beach house was $150,000. Although the beach house was rented, it never generated enough income to pay for itself. During the marriage, the parties used marital funds from their joint account (their only bank account) to pay for repairs, the mortgage payments, the management fees, and the homeowner's association dues. Of the total spenT, only $14,000 was spent to pay the mortgage balance. At the time of the proceedings below, the beach house had a value of $805,000. The trial court found that the only marital portion of the house was the $14,000 contributed to pay the mortgage. The District Court held:

1. "The governing statute is section 61.075(5)(a)2., Florida Statutes (2004), which provides that a marital asset can be '[t]he enhancement in value and appreciation of non-marital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.'"

2. "However… improvements or expenditures of marital funds to a non-marital asset does not transform the entire asset into a marital asset; rather, it is only the enhancement in value and appreciation that becomes a marital asset."

3. "The correct application of section 62.075(5)(a)2, Florida Statutes (2004), requires the court to directly correlate the amount of value appreciation of the asset during the marriage to the percentage of the mortgage (principal and interest) paid with marital funds during the course of the marriage."

4. "The value appreciation is determined by subtracting the value of the asset at the time of marriage to the value of the asset at the time of dissolution."

5. "The percentage of the mortgage paid with marital funds is determined by dividing the amount of mortgage payments made with marital funds by the amount of the unpaid principal balance of the mortgage at the time of the marriage. This percentage is then multiplied by the amount of the value appreciation to arrive at the total amount of the marital asset that is directly attributable to the mortgage payments made with marital funds. This total figure should then be divided by two, with each spouse receiving credit for half."

6. "The non-owner spouse has the burden of establishing the value appreciation by presenting evidence of the value of the asset at the time of the marriage and the value of the asset at the time of the dissolution. The non-owner spouse also has the burden of establishing the amount of marital funds utilized to make mortgage payments and the outstanding balance of the mortgage at the time of the marriage. Once established, the amount of the value appreciation that constitutes a marital asset is presumed to be correct. The trial court may, in its discretion, deviate from the presumptively correct amount based on equitable factors…."

7. "This methodology affords the non-owner spouse a return on his or her investment of marital funds utilized to satisfy the mortgage that is more closely correlated to the actual amounts of marital funds expended for that purpose. It properly places the burden on the non-owner spouse to prove entitlement to a portion of the value appreciation of a non-marital asset, and it gives the trial court the ability to deviate from the calculations based on equitable factors that may be present in any particular case that requires a measure of judicial discretion in order to achieve a fair allocation."

Leider v. Leider, 35 FLW D852 (Fla. 5th DCA 2010)

B. Valuation

First District

ERROR TO GRANT HUSBAND'S AMENDED MOTION FOR REHEARING AND TO REVISIT THE DISTRIBUTION OF PROPERTY WHERE MOTION ALLEGED THAT AN ECONOMIC RECESSION BEGAN IN DECEMBER 2007 WHICH CAUSED HUSBAND'S BUSINESS TO SUSTAIN A NET LOSS IN 2008 AND THAT THIS "NEWLY DISCOVERED EVIDENCE" WARRANTED A NEW TRIAL AND REVALUATION OF BUSINESS; A "CLOUDY CRYSTAL BALL" IS NOT A BASIS FOR A NEW TRIAL.

The trial court used October 31, 2007 as the date of valuation for the final judgment which was entered on August 25, 2008. The trial court awarded of the parties' principle asset, Jerry's Cajun Café and Market, Inc., to the husband, determining the value on that date to be $845,000, and ordered the husband to make a cash equalizing payment to the wife. The husband sought rehearing, conceding that the former wife established the value of the corporate entity by competent, substantial evidence and did not request an opportunity to present additional evidence or seek a different valuation date. Before the rehearing motion was heard, the husband filed an amended rehearing motion (in March, 2009) in which he claimed that "newly discovered evidence" showed that the 2007 economic recession had caused his business to sustain a net loss, warranting a new trial. On April 6, 2009 the trial court entered an order granting husband's motion for rehearing. The District Court reversed:

1. "Rehearing or new trial based on newly discovered evidence 'is warranted only where (1) it appears that the evidence is such that it will probably change the result if a new trial is grantED, (2) the evidence has been discovered since the trial, (3) the evidence could not have been discovered before the trial by the exercise of due diligence, (4) the evidence is material to the issue, and (5) the evidence is not merely cumulative or impeaching….' Importantly, the

allegedly 'newly discovered evidence' cannot simply show some change in circumstances since the trial."

2. "In the present case, the allegedly 'newly discovered evidence' - evidence of an economic recession that began in December of 2007, months or weeks after the valuation date, and operating results for the year 2008 - tends to prove a change in circumstances occurring after the October 31, 2007, date of valuation, and relates, at least in part, to events that transpired after the trial."

3. "Projections of future revenues and cash flows are, of course, pertinent, in assessing the value of a business. But, projections of future revenues, expenses and income necessarily depend, not only on known or knowable facts already in existence, but also on assumptions about the future that will not always, if ever, be entirely accurate…. Economic recessions, like other vagaries in the business cycle, are contingencies appraisers must take into account in valuing a business."

4. "The witnesses who appraised the business by assigning it a value as of October 31, 2007, made assumptions about the business's prospects then, doubtless informed by the actual experience between October 31, 2007, and mid-March of 2008, when they testified on the question. On August 25, 2008, when final judgment was entered, economic conditions had presumably changed again, and it is certainly true that the parties' experts might not have predicted the precise economic conditions on April 6, 2009, the day the order under review was entered, or, for that matter, the reported improvements in economic conditions since. But a cloudy crystal ball is no basis for a new trial."

Mistretta v. Mistretta, 31 So.3d 206 (Fla. 1st DCA 2010)

Second District

Third District

Fourth District

TRIAL COURT DID NOT ERR IN USING NET ASSET APPROACH TO ASCERTAIN VALUE OF MEDICAL PARTNERSHIP STOCK WHICH WAS SUBJECT TO RESTRICTIVE TRANSFER COVENANTS BY A SHAREHOLDERS' AGREEMENT; TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ACCEPTING FORMER WIFE'S EXPERT'S TESTIMONY AS TO VALUE OF HUSBAND'S MEDICAL PARTNERSHIP.

The husband and wife were married in 1988 and separated in 2007. They had two children who were ages 13 and 11 at the time of their separation. The husband is a physician who specializes in the treatment of cancer and blood disorders. Since 1996 he has been a part owner in Hematology Oncology Associates, owning the practice with three partners, all with equal shares. All of the partners signed a Shareholders Agreement. The trial court valued the husband's interest in the practice at $890,449.00, a value testified to by the wife's expert witness. On appeal, the husband contended that the trial court erred in failing to consider a restrictive transfer and designated stock value agreement in valuing his interest in the partnership. The Agreement prohibits any shareholder from selling, assigning or transferring or pledging their shares. If a triggering event were to occur (a shareholder becoming disabled, dying or

terminated from employment) the Agreement provides that the shareholder will receive a payment of $45,000 for his interest. The District Court affirmed:

1. "Due to the lack of cases in Florida regarding the effect of a restrictive shareholders' agreement on the valuation of a medical partnership, we find that the court was correct in adopting the reasoning of two out-of-state cases…. [The first] held that the sale price set by restrictive provisions on transfer of closely held stock was not conclusive as to the value…. The courts recognized, however, that restrictive transfer covenants affected value through impaired marketability and must be considered when a trial court determines the value of stock for purposes of equitable distribution…. [W]hen stock is subject to a restrictive transfer agreement the price fixed by such provisions will not control its value, but the restriction on transfer is a factor which affects the value of the stock for purposes of equitable distribution."

2. "The court [in the first of the cases] went on to affirm the trial court's finding that, considering the impact of the restrictive transfer agreement on the closely held stock, a net asset valuation was the most accurate method of ascertaining the true value of the stock to the shareholder."

3. "In the instant case, both parties submitted expert testimony as to the value of former husband's interest in his practice. Former wife's expert applied the net asset approach and valued former husband's interest in the medical practice at $890,449. Her expert examined the Agreement, decided that it created an artificial and unrealistic value, and determined that the net asset value method would be the most reasonable way to value former husband's stock. Former wife's expert also concluded, after considering all the circumstances, that it was not necessary to further discount the net asset value due to the restrictive agreement."

4. "Former husband's expert did alternative valuations for the practice. Former husband's expert first placed the value of the practice at $45,000, which is the amount former husband would receive if one of the triggering events in the Agreement occurred. Former husband's expert's second valuation applied the net asset approach and valued former husband's interest in the practice at $562,665. The difference between the experts' valuations is attributable to their handling of the practice's accounts receivable."

5. "A trial court's property valuation must be supported by competent, substantial evidence. Here, the trial court found the net asset value methodology for valuing closely held businesses…was the most reasonable method of determining the value of former husband's stock. While former husband argues the trial court erred in relying on former wife's expert's valuation because it failed to ascribe any monetary significance or 'discount' on the net asset value due to the restrictive agreement, neither did former husband's expert provide such a calculation. As such, the trial court was left with values it was given and determined that the value provided by former wife's expert was the most reasonable."

Garcia v. Garcia, 25 So.3d 687 (Fla. 4th DCA 2010)

TRIAL COURT ABUSED ITS DISCRETION IN VALUING MARITAL HOME AS OF DATE DISSOLUTION PETITION WAS FILED WHERE PROPERTY VALUES HAD SUBSTANTIALLY DECLINED SINCE THAT DATE.

The trial court valued the parties' residence at $320,000 at the date of filing of the petition for dissolution, with equity of $48,000 after deduction of the outstanding mortgage balance of $272,000. The District Court reversed:

1. "Scant evidence was presented as to the value of the home. The wife testified that fifteen months prior to the final hearing, the house was appraised at $375,000. However, since that time, property values had decreased 20-30% in Palm Beach County. She also offered in evidence the property appraiser's valuation of the home at $267,000 for the year 2007."

2. "In contrast, the husband testified that he believed that the property was worth more, because the parties had recently completed a pool addition and other improvements to the property which, despite any decline in property values, made it still worth at least $55,000 more than the wife's valuation."

3. "In fact, no one requested the court to value the property as of the date of the filing of the petition, nor did the parties offer testimony as to the value of the property as of that date. However, the court's valuation of the property as of the date of the filing of the petition at $320,000 approximates the husband's valuation of the home as of the date of the final hearing."

4. "Here, the trial court may have misspoken when it rendered its oral ruling stating that it valued the property as of the date of filing. It may have meant to identify the residence as a marital asset as of the date of filing and give it the final hearing valuation of which the husband testified, believing that the amenities which the parties added increased the value of the property above that to which the wife testified."

5. "Given the widely acknowledged real estate downturn and the undisputed evidence of the general decline of property values in Palm Beach County during the pendency of these divorce proceedings, selecting the date of the filing of the petition as the valuation date for the property would have been an abuse of discretion. Moreover, the court did not select a value consistent with that date. We reverse for the trial court to reconsider the date of valuation, even though the court may come to the same conclusion about the property's value."

Leonardis v. Leonardis, 30 So.3d 568 (Fla. 4th DCA 2010)

Fifth District

ERROR TO VALUE STOCK FOR THE PURPOSE OF EQUITABLE DISTRIBUTION, WITHOUT COMPETENT SUBSTANTIAL EVIDENCE; AN OFFER TO PURCHASE AT A CERTAIN PRICE, WITHOUT MORE, IS NOT EVIDENCE OF VALUE.

The Husband contended on appeal that the trial court erred in its valuation of his 51% interest in ATL, a closely held corporation. The trial court received evidence showing that a third party corporation (which, by the time of the trial, was defunct) proposed to purchase ATL for $3 million dollars. On this evidence, the trial court found that husbands 51% interest was worth $1,530,000 and distributed the stock to him as past of the equitable distribution. The ATL stock comprised about 93% of husband's equitable distribution. The District Court held:

1. "The parties do not dispute that the ATL stock is a marital asset subject to equitable distribution. Neither do the parties dispute that the trial court's valuation of the ATL stock must be supported by competent substantial evidence. Absent such evidence, the trial court's valuation constitutes an abuse of discretion."

2. "'Competent' evidence refers not to the quality of the evidence but rather to its admissibility. 'Substantial' evidence means that there must be some (more than a mere iota or scintilla) real, material, pertinent and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value."

3. "We conclude that the value placed on ATL by the trial court is not supported by competent substantial evidence. We do not dispute that the trial court, as the finder of fact, was free to accept or reject the testimony of the business valuation expert offered by the former husband. However, the letter of intent submitted by a defunct company, without any evidence to suggest that the interested party had performed any due diligence, entered into a binding contract or had the financial wherewithal to purchase ATL for $3,000,000 falls far short of competent substantial evidence."

Nunez v. Nunez, 29 So.3d 1191 (Fla. 5th DCA 2010)

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONSIDERING PARTIES' LENGTHY SEPARATION AS JUSTIFICATION FOR ADJUSTING DISTRIBUTION TO REFLECT (VALUE) ASSETS AND LIABILITIES AS OF THE DATE THE PARTIES "TRULY SEPARATED" EVEN THOUGH DOING SO RESULTED IN A SIGNIFICANT DISPARITY IN AWARDS.

The parties separated in 2001 without entering into a formal separation agreement, and filed for divorce six years later in 2007. When the parties separated the Husband had a 401K valued at about $6,000, the parties did not own a home and had few assets. As of the filing date, the 401K account grew to over $100,000, the Husband had acquired a Benefit Restoration Plan with a value of about $20,000, and had purchased a house which had about $100,000 in equity. For purposes of equitable distribution the trial court used the date of separation leaving wife with a net distribution of about $11,000 and husband with a net distribution of over $200,000. Wife appeals this order. The District Court held:

1. "Although the court indicated that it would have used the separation date to identify marital assets if it had been authorized to do so, it was constrained to designate marital assets using the filing date. Thus, the husband's house, entire 401K account, and Benefit Restoration Plan were designated marital assets."

2. "However, because the court concluded that the parties had 'truly separated' in April 2001, it decided to 'adjust the distribution to reflect the assets and liabilities as of that date.' Contrary to the wife's argument, this was not an abuse of discretion."

3. "Of course, since most of the assets to be distributed were accumulated by the husband after the separation date, this resulted in a significant disparity in the ultimate awards. The husband received a net distribution valued at $227,236.99. The wife's net distribution totaled only $11,724.49 (which included a $10,000.00 attorney's fee award).

Boyle v. Boyle, 30 So.3d 665 (Fla. 5th DCA 2010)

TRIAL COURT ERRED BY AMENDING FINAL JUDGMENT TO CHANGE VALUATION DATE AND VALUES OF RETIREMENT ACCOUNTS TO REFLECT A DOWNTURN IN THE ECONOMY BASED SOLELY ON HUSBAND'S BARE ASSERTIONS IN REHEARING MOTION.

In the Final Judgment the lower court awarded the Wife one-half of the marital portion of three retirement accounts, valued as of the trial date based on the evidence presented. But in the Amended Final Judgment, the court valued the accounts as of the date the Final Judgment was entered, to reflect a downturn in the economy as asserted by the husband in his rehearing motion. The District Court reversed:

1. "The court erred by changing the valuation date and values without any evidentiary basis."

2. "Although section 61.075(7), Florida Statutes, gives the trial court discretion to pick an equitable date to value assets, section 61.075(3) requires the trial court to establish a value based on competent, substantial evidence."

3. "The wife correctly argues that the husband's bare assertions in a motion for rehearing were not evidence. Although the value of the assets may well have dropped, as the husband asserted, he failed to present any evidence to support this assertion or the court's findings."

Lilly v. Lilly, 35 So.3d 1022 (Fla. 5th DCA 2010)

C. Pensions and Retirement Benefits

First District

Second District

Third District

Fourth District

Fifth District

D. Distribution

First District

ERROR TO ASSIGN TO WIFE IN EQUITABLE DISTRIBUTION MONEY SHE WITHDREW FROM PARTIES' BANK ACCOUNT PENDING RESOLUTION OF DISSOLUTION PETITION WHERE THERE WAS NO EVIDENCE THAT MONEY WAS WITHDRAWN FOR ANYTHING OTHER THAN REASONABLE LIVING EXPENSES.

The trial court "awarded" to the Wife the amount of funds she had withdrawn from the parties' bank accounts during the pendency of the proceedings below. Nothing in the record suggested that the Wife used the money she withdrew from the parties' bank account for anything other than reasonable living expenses pending the resolution of her petition for dissolution. The District Court held:

1. "Because there is nothing in the judgment to suggest that the former wife used the money she withdrew from the parties' bank account for other than reasonable living expenses pending resolution of her petition for dissolution of the marriage, the trial court erred when it assigned that money to her as part of the scheme of equitable distribution."

2. "Accordingly, we reverse the trial court's scheme of equitable distribution. On remand, the trial court shall again address the issue of equitable distribution without taking into

account money used by either party during pendency of the dissolution proceeding for reasonable livings expenses."
Annas v. Annas, 29 So.3d 1209 (Fla. 1st DCA 2010)

TRIAL COURT'S AWARD OF A SPECIAL EQUITY TO THE WIFE IN THE PARTIES' MARITAL HOME COULD NOT BE SUPPORTED AS AN UNEQUAL DISTRIBUTION OF THE PARTIES' MARITAL ASSETS.

The trial court determined a special equity in favor of the Wife. The Wife alternatively argued that the award could be support as an unequal distribution. The District Court reversed, holding:

1. "The former wife argues that the distribution of marital property was equitable nevertheless and should be affirmed for that reason."

2. "But we conclude that the record in this case will not permit us to affirm on this alternate basis [because] the decree under review contained no findings on statutory factors that could support the unequal distribution of marital property for any reason(s) other than the special equity on which the trial court improperly relied."
Davis v. Davis, 32 So.3d 743 (Fla. 1st DCA 2010)

Second District

TRIAL COURT ERRED IN ORDERING UNEQUAL DISTRIBUTION OF ASSETS ON GROUND OF HUSBAND'S MISCONDUCT WITHOUT ADEQUATE FINDINGS REGARDING THE RELATIONSHIP BETWEEN THE MISCONDUCT AND THE DISPUTED ASSETS.

The trial court determined that an equal equitable distribution would be unfair because the husband had engaged in deliberate and transparent efforts to temporarily diminish assets by not planting the fall tomato crop after the wife did not give him the $50,000 he asked for from the $99,000 wife had withdrawn from the line of credit on the marital home. On appeal, the District Court found that there was evidence in the record to support unequal distribution but reversed and remanded because they were unable to reconcile the trial court's inconsistent findings.

1. "The Former Husband's primary source of income came from the substantial dividends he received as a shareholder in Tomatoes of Ruskin, Inc. (TOR), a tomato packing corporation. He also received income from working as a foreman for his father, who was a TOR shareholder, and from farming his own crops. The Former Husband's shareholder agreement with TOR provided that the Former Husband would not participate in the profits for a crop if he failed to qualify as a producer for that crop."

2. "In May 2004, the Former Wife….withdrew approximately $99,000 from the line of credit on the marital home. The Former Husband asked the Former Wife for $50,000 of the funds to plant the fall tomato crop and when she did not give him the money, he elected not to plant the crop. The TOR shareholders subsequently voted to redeem the Former Husband's shares. The Former Husband claimed that the resulting loss of the TOR dividends caused his income to fall by ninety percent."

3. "In the final judgment, the trial court rejected the Former Husband's contention that the Former Wife's withdrawal of funds prevented him from planting a crop. The court determined that the Former Husband 'deliberately stopped farming for the specific purpose of suppressing his income in the divorce proceeding.' The court concluded, however, that the failure to plant the fall 2004 crop was not the legal cause of the redemption of the TOR shares and that 'there was no act of the Husband that actually caused the redemption to occur.' The court found that it appeared that TOR wrongfully redeemed the Former Husband's shares on the basis of a single family failure to plant a crop and assigned the Former Wife with the cause of action, if any, against TOR."

4. "Although the court did not expressly find that the Former Husband's conduct caused the redemption of the TOR shares, the court determined that an equal equitable distribution would be unfair because 'the Husband and the Husband's father engaged in deliberate and transparent efforts to temporarily demolish assets.'"

5. "A party's misconduct 'will not justify an unequal distribution of assets absent evidence demonstrating a sufficient relationship between the misconduct and the dissipation of assets.'"

6. "Although it appears that there is evidence in the record to support an unequal distribution, we are unable to reconcile the trial court's inconsistent findings regarding the Former Husband's failure to plant the fall 2004 crop and the redemption of his TOR shares. Therefore, we reverse the equitable distribution and remand for the trial court to consider the existing evidence and to make adequate and consistent findings regarding the equitable distribution of the parties' marital assets and liabilities."

Diehl v. Diehl, 25 So.3d 1289 (Fla. 2nd DCA 2010)

TRIAL COURT DID NOT ERR IN REFUSING TO AWARD INTEREST ON AN UNPAID EQUITABLE DISTRIBUTION WHERE THE PARTIES UNNECESSARILY DELAYED LITIGATION FOR AT LEAST FOUR YEARS.

The divorce proceedings below began in 2000. In 2002, a Final Judgment was entered which was reversed on appeal as to four specific and discrete issues: (1) the rehabilitative alimony awarded needed to be increased to cover the cost of proposed training as established by the existing record; (2) the trial court needed to consider the tax consequences created by the award of alimony based on the evidence in the record and also such additional evidence as may be necessary; (3) the equitable distribution needed to be adjusted to give the Wife an additional $6,250; and (4) the trial court needed to make findings concerning the income the Wife could reasonably be expected to receive from her liquid assets and then adjust permanent alimony to reflect these findings. For reasons not made clear on the record, the parties waited four years to bring these matters to the trial court. The trial court (now a new judge) ruled as to these issues: (1) the rehabilitative alimony was increased by $1,624.80; (2) after considering testimony regarding tax consequences, no change in the alimony award was warranted; (3) the Wife was entitled to an additional $6,250 in equitable distribution, and (4) permanent alimony was reduced to $2,940 after considering prospective income from liquid assets. As to the additional equitable distribution, the trial court refused to award the Wife interest for the 6 years this money was in the husband's possession. As to this issue on appeal, the District Court held:

1. "We… affirm the trial court's decision to deny interest on the $6250 adjustment to equitable distribution…. As explained in our opinion in 2003, the $6250 error in equitable

distribution was essentially a mathematical oversight by the trial judge in the judgment of dissolution that was rendered in July 2002. The parties apparently complied with the equitable distribution in that judgment. Thus, at all time since July 2002 until the entry of the order on remand, [the Husband] had use of the $6250 and the ability to earn interest on that amount."

2. "In isolation, the decision to deny interest on this adjustment seems questionable. On the other hand, the trial court was bothered by the fact that the parties had made these issues far more difficult to decide by delaying their resolution for over four years."

3. "The trial court did not award interest on the $6250, but it also did not adjust the $42,090 overpayment of alimony to account for interest. It is obvious that the net effect of these combined decisions actually favors [the Wife]."

4. "Although we might have expected the trial court to award interest if the matter had returned to it in the Winter of 2004, we cannot conclude that the trial court abused its discretion by declining to calculate interest on the various adjustments required on remand in this case."

Sharon v. Sharon, 35 So.3d 962 (Fla. 2nd DCA 2010)

Third District

BY AWARDING WIFE EQUALIZATION PAYMENT BASED ON PAY-DOWNS MADE ON MORTGAGES ON MARITAL HOME TITLED IN HUSBAND'S NAME AND ALSO CONSIDERING THE SAME PAY-DOWNS IN ITS RATIONALE TO AWARD WIFE LUMP SUM ALIMONY BASED ON MARITAL CONTRIBUTIONS SHE MADE TO A NON-MARITAL ASSET, COURT ESSENTIALLY "DOUBLE-DIPPED."

The trial court awarded the wife $1.25 million as a lump sum alimony award, based on the marital contributions she made to the husband's non-marital asset (the former marital residence), as well as the appreciation of those contributions. But, the trial court also awarded the wife $173,469 as an equitable distribution award based on the same contributions. The District Court reversed the equitable distribution award:

1. "The trial court considered the forensic accountant figures [as to mortgage pay-downs] in calculating an equitable distribution award of $173,469 to the wife. However, the trial court also considered those same figures in its rationale to award the wife $1.25 million as a lump sum alimony award, based on the marital contributions she made to the non-marital asset, as well as the appreciation of those contributions."

2. "At issue are the pay-downs on the three mortgages on the residence. Consequently, the equitable distribution award of $173,469 partially allows the wife to essentially double-dip from her contributions to this asset and is error."

3. "Therefore, the $174,469 equitable distribution award must be recalculated by eliminating the mortgage pay-downs from the calculation."

Valladares v. Junco-Valladares, 30 So.3d 519 (Fla. 3rd DCA 2010)

TRIAL COURT PROPERLY APPORTIONED MOST OF PARTIES' DEBT TO FORMER HUSBAND WHO WRONGFULLY WITHDREW, AND THEN DISSIPATED, FUNDS FROM A LINE OF CREDIT; NO ERROR IN COURT USING THE AMOUNT WHICH BANK AGREED TO RECEIVE (RATHER THAN FACE AMOUNT) BECAUSE THE REDUCTION BENEFITED BOTH PARTIES.

A line of credit was used by the parties during their marriage to further their real estate investments; both parties were jointly and severally liable for that debt. The trial court found that husband wrongfully withdrew, and then dissipated, approx $110,000 from the line of credit. On appeal, the Wife contended that the trial court should have apportioned the face amount of the indebtedness to the Bank (rather than the substantially lower amount the Bank agreed to accept). The District Court held:

1. "For two independently sufficient reasons, we affirm the final judgment. First, the trial judge entered the judgment after four days of trial that included evidence relating to the line of credit with the Bank. No transcript or reconstructed record of the testimony was filed here, with the result that 'the appellate court cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory.'"

2. "Second, it is undisputed that the line of credit with the Bank was originally used by the parties during the marriage to further their real estate investments. The former husband and the former wife were jointly and severally liable for that debt. The trial court found that the former husband wrongfully drew, and then dissipated, approximately $110,000 from the line of credit."

3. "The equitable distribution of the parties' liabilities (no less than the distribution of their assets) is within the trial court's broad discretion. The trial court apportioned most of that debt to the former husband."

4. "The former wife's argument that the trial court should apportion the face amount of the indebtedness to the Bank (rather than the substantially lower amount the Bank agreed to accept) is obviously inequitable. The trial court correctly reasoned that the arrangement with the Bank resulted in a savings redounding to the benefit of both parties, and the liability was appropriately apportioned in … the final judgment."

Campbell v. Campbell, 30 So.3d 679 (Fla. 3rd DCA 2010)

Fourth District

PORTION OF FINAL JUDGMENT PROVIDING THAT IF WIFE DID NOT BUY OUT HUSBAND'S EQUITY IN MARITAL HOME WITHIN NINETY DAYS, HUSBAND WOULD BE ENTITLED TO SUM CERTAIN WHEN HOME ULTIMATELY SOLD HAD IMPROPER EFFECT OF SETTING HUSBAND'S INTEREST AT A SUM CERTAIN, REGARDLESS OF ANY APPRECIATION OR DEPRECIATION IN VALUE BEFORE HOME WAS ULTIMATELY SOLD.

The trial court's oral rulings determined the husband's equity in the house amounted to $24,000, based upon its valuation of the home at $320,000, less the mortgage balance then outstanding in the amount of $272,000. The trial court permitted the wife to buy out the husband's equity within ninety days, if the wife did not purchase the husband's equity then the

wife would be entitled to credit for the husband's share of mortgage payments, taxes, insurance, and other extraordinary repairs at the time of sale. On appeal, it was determined that the plain language of the final judgment set the husband's interest at a sum certain, regardless of the ultimate sale price. The District Court reversed:

1. "The plain language of the final judgment in this case has the clear effect of setting the husband's interest at a sum certain, regardless of the ultimate sale price."

2. "Pursuant to the language of the final judgment as written, the former husband's interest in the home is frozen at $24,000 - regardless of any appreciation or depreciation of the value of the home before it is ultimately sold. This could constitute a benefit or a detriment to the wife, depending on the value of the home when sold."

3. "When the court reconsiders the final judgment, it can allow a time for the wife to purchase the husband's interest at a sum certain. However, should the wife elect not to buy out the husband's interest, then the wife should be allowed exclusive possession of the home until the youngest child attains his majority, consistent with the provisions in the final judgment. Should compelling financial circumstances require the house's sale prior to the date of the last child's majority, the parties can either agree to a sale or the wife can petition the court to permit its sale or partition. Pursuant to the court's rulings, the parties should either equally divide the proceeds of any sale after the wife receives credit for the husband's share of any mortgage, taxes, insurance, and necessary repairs she has paid."

Leonardis v. Leonardis, 30 So.3d 568 (Fla. 4th DCA 2010)

Fifth District

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONSIDERING PARTIES' LENGTHY SEPARATION AS JUSTIFICATION FOR ADJUSTING DISTRIBUTION TO REFLECT (VALUE) ASSETS AND LIABILITIES AS OF THE DATE THE PARTIES "TRULY SEPARATED" EVEN THOUGH DOING SO RESULTED IN A SIGNIFICANT DISPARITY IN AWARDS.

The parties separated in 2001 without entering into a formal separation agreement, and filed for divorce six years later in 2007. When the parties separated the Husband had a 401K valued at about $6,000, the parties did not own a home and had few assets. As of the filing date, the 401K account grew to over $100,000, the Husband had acquired a Benefit Restoration Plan with a value of about $20,000, and had purchased a house which had about $100,000 in equity. For purposes of equitable distribution the trial court used the date of separation leaving wife with a net distribution of about $11,000 and husband with a net distribution of over $200,000. Wife appeals this order. The District Court held:

1. "Although the court indicated that it would have used the separation date to identify marital assets if it had been authorized to do so, it was constrained to designate marital assets using the filing date. Thus, the husband's house, entire 401K account, and Benefit Restoration Plan were designated marital assets."

2. "However, because the court concluded that the parties had "truly separated" in April 2001, it decided to 'adjust the distribution to reflect the assets and liabilities as of that date.' Contrary to the wife's argument, this was not an abuse of discretion."

3. "Of course, since most of the assets to be distributed were accumulated by the husband after the separation date, this resulted in a significant disparity in the ultimate awards.

The husband received a net distribution valued at $227,236.99. The wife's net distribution totaled only $11,724.49 (which included a $10,000.00 attorney's fee award)."
Boyle v. Boyle, 30 So.3d 665 (Fla. 5th DCA 2010)

E. Judgment

First District

Second District

TRIAL COURT DID NOT ERR IN REFUSING TO AWARD INTEREST ON AN UNPAID EQUITABLE DISTRIBUTION WHERE THE PARTIES UNNECESSARILY DELAYED LITIGATION FOR AT LEAST FOUR YEARS.

The divorce proceedings below began in 2000. In 2002, a Final Judgment was entered which was reversed on appeal as to four specific and discrete issues: (1) the rehabilitative alimony awarded needed to be increased to cover the cost of proposed training as established by the existing record; (2) the trial court needed to consider the tax consequences created by the award of alimony based on the evidence in the record and also such additional evidence as may be necessary; (3) the equitable distribution needed to be adjusted to give the Wife an additional $6,250; and (4) the trial court needed to make findings concerning the income the Wife could reasonably be expected to receive from her liquid assets and then adjust permanent alimony to reflect these findings. For reasons not made clear on the record, the parties waited four years to bring these matters to the trial court. The trial court (now a new judge) ruled as to these issues: (1) the rehabilitative alimony was increased by $1,624.80; (2) after considering testimony regarding tax consequences, no change in the alimony award was warranted; (3) the Wife was entitled to an additional $6,250 in equitable distribution, and (4) permanent alimony was reduced to $2,940 after considering prospective income from liquid assets. As to the additional equitable distribution, the trial court refused to award the Wife interest for the 6 years this money was in the husband's possession. As to this issue on appeal, the District Court held:

1. "We… affirm the trial court's decision to deny interest on the $6250 adjustment to equitable distribution…. As explained in our opinion in 2003, the $6250 error in equitable distribution was essentially a mathematical oversight by the trial judge in the judgment of dissolution that was rendered in July 2002. The parties apparently complied with the equitable distribution in that judgment. Thus, at all time since July 2002 until the entry of the order on remand, [the Husband] had use of the $6250 and the ability to earn interest on that amount."
2. "In isolation, the decision to deny interest on this adjustment seems questionable. On the other hand, the trial court was bothered by the fact that the parties had made these issues far more difficult to decide by delaying their resolution for over four years."
3. "The trial court did not award interest on the $6250, but it also did not adjust the $42,090 overpayment of alimony to account for interest. It is obvious that the net effect of these combined decisions actually favors [the Wife]."

4. "Although we might have expected the trial court to award interest if the matter had returned to it in the winter of 2004, we cannot conclude that the trial court abused its discretion by declining to calculate interest on the various adjustments required on remand in this case." ***Sharon v. Sharon***, 35 So.3d 962 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

TRIAL COURT ERRED BY AMENDING FINAL JUDGMENT TO CHANGE VALUATION DATE AND VALUES OF RETIREMENT ACCOUNTS TO REFLECT A DOWNTURN IN THE ECONOMY BASED SOLELY ON HUSBAND'S BARE ASSERTIONS IN REHEARING MOTION.

In the Final Judgment the lower court awarded the Wife one-half of the marital portion of three retirement accounts, valued as of the trial date based on the evidence presented. But in the Amended Final Judgment, the court valued the accounts as of the date the Final Judgment was entered, to reflect a downturn in the economy as asserted by the husband in his rehearing motion. The District Court reversed:

1. "The court erred by changing the valuation date and values without any evidentiary basis."

2. "Although section 61.075(7), Florida Statutes, gives the trial court discretion to pick an equitable date to value assets, section 61.075(3) requires the trial court to establish a value based on competent, substantial evidence."

3. "The wife correctly argues that the husband's bare assertions in a motion for rehearing were not evidence. Although the value of the assets may well have dropped, as the husband asserted, he failed to present any evidence to support this assertion or the court's findings." ***Lilly v. Lilly***, 35 So.3d 1022 (Fla. 5th DCA 2010)

F. Procedure

First District

Second District

Third District

Fourth District

Fifth District

G. Fault

First District

Second District

TRIAL COURT ABUSED ITS DISCRETION IN UNEQUALLY DIVIDING PARTIES' LIQUID ASSETS BASED ON THE INCORRECT FINDING THAT THE HUSBAND HAD DISSIPATED MARITAL ASSETS; PERSONAL USE OF A VACANT RESIDENCE IN LIEU OF RENTING IT IS NOT "DISSIPATION."

Prior to the dissolution hearing, husband and wife resolved the majority of issues between them. The trial court was asked to consider only the wife's claim for permanent and retroactive alimony and her claim that the liquid marital assets should be distributed unequally due to the husband's dissipation of certain marital assets during the marriage. At the close of the dissolution proceedings, the trial court awarded the wife permanent alimony payable as lump sum as well as retroactive alimony. It also found that the husband had dissipated marital assets, and it charged those dissipated assets to the Husband in its equitable distribution scheme. The husband first contended that the trial court abused its discretion by awarding the wife $261,240 in permanent alimony payable as a lump sum. The argument has two components: first, whether the wife was entitled to permanent alimony, payable as a lump sum; and second, whether the amount of the award was supported by evidence. As to the unequal distribution, the District Court held:

1. "This court has explained that the dissipation of marital assets occurs when 'one spouse use[d] marital funds for his or her own benefit and for the purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.' To include a dissipated asset in the equitable distribution scheme 'there must be evidence of the spending spouse's intentional dissipation or destruction of the asset.' Simple mismanagement or squandering of an asset in a manner of which the other spouse disapproves does not constitute dissipation. Neither does an imprudent or unwise investment decision."

2. "Here, the trial court found that the Husband had dissipated assets by flying back and forth from Massachusetts to Florida to see his paramour while he was working in Massachusetts. The trial court also found that the Husband's decision to loan funds to his paramour constituted dissipation. Finally, the trial court found that the Husband's decision to allow his paramour to live in [a] residence [owned by the parties] rent-free constituted a dissipation of assets because the parties could have otherwise rented that residence to obtain additional income."

3. "We agree with the trial court that the Husband's decision to expend marital funds solely for the purpose of providing airfare to and from Massachusetts for himself and his paramour might be considered dissipation of marital assets . . . . However, the other two components of the trial court's dissipation award do not constitute dissipation as defined."

4. "The undisputed evidence in this case is that the Husband's paramour had repaid these [borrowed] funds prior to the dissolution hearing. Since the funds were repaid, they were no longer 'dissipated' funds that should be redistributed."

5. "Finally, the Husband's decision not to charge his paramour rent for [the residence] cannot properly be considered dissipation. No one disputes that the Clubview Circle residence had been standing vacant and for sale for two years before the Wife petitioned for dissolution.

At that point, she required the Husband to move out of the marital home…. He then moved himself and his paramour into the Clubview Circle residence. Since the… residence had never been rented, the Husband's decision to move into it with this paramour did not deprive the Wife of income she would have otherwise received. Further, there is no evidence that the Husband's occupancy of the residence resulted in any destruction of the residence. The Husband's decision to live in an otherwise vacant residence rather than renting it out does not constitute dissipation of the asset. At most, it constituted a decision not to increase marital income, which might be construed as an imprudent investment decision - not dissipation."
Buoniconti v. Buoniconti, 36 So.3d 154 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT PROPERLY APPORTIONED MOST OF PARTIES' DEBT TO FORMER HUSBAND WHO WRONGFULLY WITHDREW, AND THEN DISSIPATED, FUNDS FROM A LINE OF CREDIT; NO ERROR IN COURT USING THE AMOUNT WHICH BANK AGREED TO RECEIVE (RATHER THAN FACE AMOUNT) BECAUSE THE REDUCTION BENEFITED BOTH PARTIES.

A line of credit was used by the parties during their marriage to further their real estate investments; both parties were jointly and severally liable for that debt. The trial court found that husband wrongfully withdrew, and then dissipated, approx $110,000 from the line of credit. On appeal, the Wife contended that the trial court should have apportioned the face amount of the indebtedness to the Bank (rather than the substantially lower amount the Bank agreed to accept). The District Court held:

1. "For two independently sufficient reasons, we affirm the final judgment. First, the trial judge entered the judgment after four days of trial that included evidence relating to the line of credit with the Bank. No transcript or reconstructed record of the testimony was filed here, with the result that 'the appellate court cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory.'"

2. "Second, it is undisputed that the line of credit with the Bank was originally used by the parties during the marriage to further their real estate investments. The former husband and the former wife were jointly and severally liable for that debt. The trial court found that the former husband wrongfully drew, and then dissipated, approximately $110,000 from the line of credit."

3. "The equitable distribution of the parties' liabilities (no less than the distribution of their assets) is within the trial court's broad discretion. The trial court apportioned most of that debt to the former husband."

4. "The former wife's argument that the trial court should apportion the face amount of the indebtedness to the Bank (rather than the substantially lower amount the Bank agreed to accept) is obviously inequitable. The trial court correctly reasoned that the arrangement with the Bank resulted in a savings redounding to the benefit of both parties, and the liability was appropriately apportioned in … the final judgment."

Campbell v. Campbell, 30 So.3d 679 (Fla. 3rd DCA 2010)

Fourth District

Fifth District

IX. MARITAL HOME

A. Payment of Expenses of Ownership/Right to Credit for Payment

First District

Second District

Third District

Fourth District

Fifth District

B. Miscellaneous

First District

Second District

Third District

Fourth District

Fifth District

X. PATERNITY

A. Genetic Testing

First District

Second District

Third District

Fourth District

Fifth District

B. Miscellaneous

First District

Second District

TRIAL COURT ERRED IN SUMMARILY DISMISSING BIOLOGICAL FATHER'S PATERNITY PETITION REGARDING CHILD BORN WHILE MOTHER WAS MARRIED TO ANOTHER MAN FOR LACK OF STANDING WHERE BIOLOGICAL FATHER HAS SHOWN WILLINGNESS TO PARENT AND SUPPORT THE CHILD AND LEGAL FATHER HAS NOT AND WHERE MOTHER HAS DECLINED TO INSTITUTE PROCEEDINGS TO DIVEST LEGAL FATHER OF HIS PARENTAL RIGHTS.

The father, L.J., is the undisputed biological father of a child born to the mother, A.S., while she was married to M.A., a foreign national. The mother and M.A. were married on October 22, 2002, and the mother instituted divorce proceedings less than two months thereafter. While the divorce proceedings were pending, the mother and L.J. had intimate relations that resulted in the conception of the child at issue. Thereafter, L.J. was regularly involved in the child's life, exercised visitation and paid child support. The father, L.J., regularly attempted to obtain a paternity determination but met with dismissals of his actions for lack of standing because the child had been born during the mother's marriage to another man and the mother's refusal to institute an action to terminate or disavow the legal father's rights despite the fact that the legal father was, according to the mother, "no where to be found." The District Court reversed:

1. "We agree with the circuit court that L.J. has suffered from 'truly an unfortunate chain of events,' so much so that to deny him an opportunity to succeed in this endeavor will certainly create a manifest injustice both of him and his child."

2. "The child at issue here has a biological father willing, able, indeed eager, to parent and support his offspring; a legal father who apparently is not; and a mother who apparently wishes to deprive the child of a real father by declining to institute proceedings to divest her ex-husband of his legal parental rights."

3. "[W]e conclude the circuit court erred in dismissing L.J.'s petition with prejudice based on lack of standing as a matter of law and without a hearing to afford L.J. the opportunity to establish his standing…. Give what we understand to be the background of this case, that should be a first hurdle easily overcome. Once his standing is established, the substantive issues of paternity, custody and other relief can be decided."

L.J. v. A.S., 25 So.3d 1284 (Fla. 2nd DCA 2010)

Third District

ERROR TO ENTER SUMMARY JUDGMENT ON GROUND THAT ACTION WAS BARRED BY §742.14, FLORIDA STATUTES, WHEN THERE WAS GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE PARTIES WERE A "COMMISSIONING COUPLE."

The Father and the Mother, who had been close friends, agreed to have a child through artificial insemination. The Father donated the sperm used for the artificial insemination and the Mother gave birth to the child. The child's birth certificate listed the names of both the Mother and the Father. Two years later, the Mother moved to California with the child and the Father filed an action for paternity. The Father alleged that he and mother together planned for and purposely conceived the child intending that they both would act as the child's parents. The Father also alleged that he played an active role during the pregnancy and lifetime of the child (then, two years). The Mother alleged that Father was simply a sperm donor and a part of the child's life at her discretion. The Mother asserted that section 742.14, Florida Statutes (2008) barred the action because the Father was simply a sperm donor. The Father argued that the parties were a commissioning couple and not subject to that statute. The trial court entered a summary judgment for the Mother. The District Court held:

1. "Section 742.14 provides: 'The donor of any egg, sperm, or pre-embryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement . . . , shall relinquish all maternal or paternal rights and obligations with respect to the donation of the resulting children.' "

2. "Section 742.13, Florida Statutes (2008), defines 'a commissioning couple' as 'the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parties.'"

3. "Here, the parties do not have a written contract governing their relationship. In fact, the father alleged an oral agreement to co-parent the child."

4. "We find that it is possible for the court to conclude that the parties are a commissioning couple. However, there are genuine issues of material fact that cannot be determined on summary judgment. Accordingly, we reverse final summary judgment, and remand for further proceedings consistent with this opinion."

Janssen v. Alicea, 30 So.3d 680 (Fla. 3rd DCA 2010)

Fourth District

ERROR TO DENY GRANDMOTHER'S PETITION FOR TEMPORARY CUSTODY OF HER GRANDCHILD ON THE BASIS THAT FATHER'S PATERNITY HAD NOT BEEN ESTABLISHED WHEN THE PATERNITY OF THE FATHER HAD ALREADY BEEN TWICE VOLUNTARILY ACKNOWLEDGED.

The birth certificate of the child at issue, R.L.K., named Sylenia Thomas and Rodney Kennedy as her parents. In 2008 Thomas and Kennedy executed a document giving all rights and legal guardianship to the paternal grandmother who then filed a chapter 751 petition for temporary custody. The trial court denied the petition based on a finding that Kennedy's name

on the birth certificate was insufficient to establish paternity and required the father to file a paternity action. The District Court held:

1. "Subsection (4) [of Section 742.10] goes on to provide that once the sixty-day period referenced in subsection (1) has passed, the 'signed voluntary acknowledgment of paternity shall constitute and establishment of paternity and may be challenged in court only on the basis of fraud, duress, or material mistake of fact.'"

2. "In order for the hospital to have listed Kennedy as the father on the birth certificate Kennedy (and the child's mother) was required to sign an affidavit acknowledging paternity . . . . Second, in the signed and notarized October 2008 document purporting to give 'all rights' and 'legal guardianship' of R.L.K. to the paternal grandparents, Kennedy (and the mother) again acknowledged his paternity."

3. "These unchallenged voluntary acknowledgements of paternity have established paternity in Kennedy. No further proceedings under chapter 742 were required, or permitted, to establish Kennedy's paternity."

Mohorn v. Thomas, 30 So.3d 710 (Fla. 4th DCA 2010)

Fifth District

XI. PROCEDURAL MATTERS

A. Service and Jurisdiction

First District

Second District

Third District

Fourth District

ERROR TO DENY RESTITUTION TO HUSBAND FOR SUPPORT MONIES, ATTORNEY'S FEES AND COSTS PREVIOUSLY PAID TO WIFE BASED ON COURT'S MISTAKEN VIEW THAT IT LACKED AUTHORITY TO ORDER RESTITUTION FOLLOWING APPELLATE COURT'S REVERSAL OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

The issue on appeal was whether the trial court had jurisdiction to order restitution for the Husband on remand after the appellate court had previously determined that the trial court lacked personal jurisdiction over him to determine issues of support and equitable distribution. The District Court held:

1. "We find that the trial court did, in fact, have the jurisdiction to order restitution, if the court wanted to grant such relief in its discretion."

2. "There are two different and valid approaches to this issue. On one hand, the wife points to those cases which state that support paid pendente lite cannot be recovered by the payor

spouse if that spouse is ultimately successful on appeal. Pendente lite payments to the spouse are to 'sustain the party while the litigation ensues' and the appellant is not 'entitled to restitution' even if the payments are later found to be 'erroneous.' However [the case so stating] involved a request for restitution on an award later determined to be 'erroneous' rather than a request for restitution based on the trial court's lack of jurisdiction."

3. "On the other hand, other cases explain that the trial court should exercise its inherent jurisdiction to resolve outstanding issues like restitution."

4. "We find that both [types of cases] are valid and offer to the trial court the flexibility to grant or deny restitution of alimony, costs, and attorney's fees based on the proper exercise of the trial court's discretion. We do find that the trial court had jurisdiction to grant or deny restitution after due consideration."

Marshall v. Marshall, 39 So.3d 358 (Fla. 4th DCA 2010)

Fifth District

B. Discovery

First District

Second District

Third District

Fourth District

Fifth District

LAW FIRM PROPERLY DISQUALIFIED WHERE MOTHER IN A PATERNITY ACTION ILLEGALLY OBTAINED A USB FLASH DRIVE BELONGING TO THE FATHER WHICH CONTAINED PRIVILEGED MATERIAL AND FIRM SPENT OVER 100 HOURS REVIEWING THE DOCUMENTS.

The Mother in hotly contested paternity proceedings illegally obtained a USB flash drive belonging to the Father which contained literally thousands of pages of documents including communications between the Father and his counsel, work product, private medical records and confidential business information of the Father and his clients. The Mother's lawyers spent over 100 hours reviewing the files then filed all of the documents in the court file and sought relief based upon the contents of the files. The trial court disqualified the firm and the District Court affirmed:

1. "While recognizing that disqualification of a party's chosen counsel is an extraordinary remedy that should be resorted to sparingly, disqualification is appropriate where a party obtains an unfair informational or tactical advantage through the disclosure of privileged information to that party's counsel."

2. "Given the nature of the information obtained by the [Mother's lawyers] from the USB drive, it cannot be reasonably disputed that an informational and tactical advantage was obtained by the Mother."

3. "For the benefit of other attorneys facing a similar dilemma, we note that the Florida Bar Commission on Professional Ethics has opined that when an attorney receives confidential documents he or she knows or reasonably should know were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issue. If the client refuses to consent to disclosure, the attorney must withdraw from further representation."

Castellano v. Winthrop, 27 So.3d 134 (Fla. 5th DCA 2010)

ERROR TO COMPEL PRODUCTION OF FINANCIAL RECORDS OF NON-PARTY TO A DISSOLUTION PROCEEDING, ABSENT SHOWING OF COMPELLING NEED FOR RECORDS SUFFICIENT TO DEFEAT PRIVACY RIGHTS OF NON-PARTY.

A non-party to a dissolution proceeding appealed from an order compelling her to produce her financial records. The District Court reversed:

1. "We conclude that Respondent failed to show a compelling need for the records sufficient to defeat Petitioner's privacy rights."

2. "We also conclude that the trial court erred by imposing sanctions against Petitioner, a non-party, absent a finding of contempt."

Morell v. Booth, 29 So.3d 429 (Fla. 5th DCA 2010)

C. Pleadings and Motions

First District

ERROR TO REDUCE CHILD SUPPORT WHERE NO PLEADING WAS FILED SEEKING MODIFICATION AND FORMER WIFE WAS NOT GIVEN APPROPRIATE NOTICE OR OPPORTUNITY TO DEFEND THE REDUCTION OF SUPPORT.

In a case which apparently involved the enforcement of a settlement agreement, the trial court apparently reduced the Husband's child support obligation. The District Court held:

1. "No pleading was filed seeking that relief and the former wife was not given appropriate notice or an opportunity to defend that reduction of child support."

2. "The mere mention of child support in a proceeding does not authorize the trial court to modify child support without notice nor does that mere mention constitute the implied consent to try the issue."

Brown v. Holmes, 31 So.3d 955 (Fla. 1st DCA 2010)

Second District

Third District

ERROR TO ORDER RETURN TO HUSBAND OF FUNDS HE VOLUNTARILY AND UNCONDITIONALLY PAID TO WIFE TO REDUCE A SELF-ACKNOWLEDGED DEBT TO HER WHERE THE RELIEF WAS NOT PLED AND WAS NOT JUSTIFIED.

In a short opinion with no specific facts described in the majority opinion (one judge dissented), the District Court reversed the trial court's judgment which had "returned" to the Husband the sum of $400,000 that he had voluntarily and unconditionally paid to the Wife to reduce a self-acknowledged debt to her: "because (a) that relief was never plead, asserted, claimed in any other fashion, or a subject of the trial… and (b) cannot substantively be justified." ***Rotta v. Rotta***, 34 So.3d 107 (Fla. 3rd DCA 2010)

Fourth District

Fifth District

D. Constitutional Issues

First District

ERROR TO REDUCE CHILD SUPPORT WHERE NO PLEADING WAS FILED SEEKING MODIFICATION AND FORMER WIFE WAS NOT GIVEN APPROPRIATE NOTICE OR OPPORTUNITY TO DEFEND THE REDUCTION OF SUPPORT.

In a case which apparently involved the enforcement of a settlement agreement, the trial court apparently reduced the Husband's child support obligation. The District Court held:

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Brown v. Holmes, 31 So.3d 955 (Fla. 1st DCA 2010)

Second District

Third District

Fourth District

ERROR TO GRANT HUSBAND'S MOTION TO DISQUALIFY WIFE'S ATTORNEYS, ON GROUND THAT WIFE HAD "HACKED" INTO HUSBAND'S E-MAIL ACCOUNT AND FORWARDED TO HER ATTORNEY AN E-MAIL FROM THE HUSBAND TO HIS ATTORNEY, WITHOUT ALLOWING WIFE TO TESTIFY AND PRESENT OTHER EVIDENCE ON THE FACTUAL QUESTION OF WHETHER THE HUSBAND FAILED TO TREAT THE E-MAIL AS CONFIDENTIAL THEREBY WAIVING PRIVILEGE; WIFE'S DUE PROCESS RIGHTS VIOLATED.

The Husband sought to disqualify Wife's second attorney based on the attorney having read emails between the Husband and his attorney. The Husband testified that during the parties' marriage, he and the Wife had access to each other's e-mail accounts. After the Husband filed for divorce, he changed the password on his account. He testified that the Wife somehow "hacked" into his account and found an e-mail from him to his attorney. The Wife's sister forwarded the e-mail to the Wife's attorney who, recognizing that it was an attorney-client communication, sent it to the Husband's attorney. Nevertheless, the Husband moved to disqualify the Wife's attorney, claiming that the Wife had obtained an unfair advantage. After the Husband rested, the trial court began addressing the issues and Wife's attorney interjected that the court had not allowed the Wife to testify regarding how she obtained the e-mail. Nevertheless, the trial court ordered the Wife's attorney disqualified. The District Court reversed:

1. "The wife raises several arguments, the first of which is dispositive. The wife contends that the court violated her right to due process by not allowing her to testify and present other evidence on the factual question of whether the husband failed to treat the e-mail as confidential, thereby waiving the privilege. The husband responds that whether he failed to treat the e-mail as confidential is irrelevant because there was no question the wife had the e-mail forwarded to her attorney, thus rendering her testimony unnecessary."

2. "We agree with the wife that she did not receive due process. Due process requires that a party be given the opportunity to be heard and to testify and call witnesses on the party's behalf and the denial of this right is fundamental error."

3. "The wife's evidence may have been relevant to her argument that the husband failed to treat the e-mail as confidential and waived any privilege claim over it. Even if the wife's evidence would not have impressed the court, a party has the right to present evidence and to argue the case at the conclusion of all the testimony. Thus, it is necessary to grant the wife's petition, quash the order disqualifying her counsel, and remand for continuation of the hearing, at which the wife may present her evidence."

Minakan v. Husted, 27 So.3d 695 (Fla. 4th DCA 2010)

Fifth District

E. Final Judgments

First District

TRIAL COURT ERRED IN DENYING WIFE'S MOTION TO ENFORCE PARTIES' CONSENT FINAL JUDGMENT; WHERE FINAL JUDGMENT OF DISSOLUTION PROVIDES FOR THE TRANSFER OF ASSETS, IT IS THE RESPONSIBILITY OF THE SPOUSE IN POSSESSION OF THOSE ASSETS TO EFFECTUATE THE TRANSFER.

The parties entered into a Consent Final Judgment which, in pertinent part, required the Husband to pay to the Wife a total of $65,470 in cash and to also transfer to the Wife 50% of the shares of an Oppenheimer Mutual Fund. The Husband was required to do so by August 1st. Prior to the deadline, the Husband sent the Wife two checks totaling $24,700 and $24,327, thus leaving a balance owed of $16,443 as to the cash payment. On July 31st, the Husband sent a letter authorizing his broker to transfer 100% of the shares in the mutual fund to the Wife. At the time, the Fund had a value of $29,477.84. In other words, the Husband was attempting to apply the cash value of his 50% of the Fund ($14,738.92) toward the outstanding balance due on the required cash payment. Before he authorized the transfer of the Fund, the Husband had advised his counsel that he did not have enough cash to pay the $16,443 owed to the Wife. An exchange of emails then took place between the parties' counsel. The Husband's attorney asked the Wife's attorney if she would accept stock from the Fund toward the outstanding balance and the Wife's attorney replied that it did not matter how the Wife got her money "as long as she got all of it." On August 1st, the Wife wrote to the broker of the Fund accepting only her 50% of the Fund. Since the two authorization letters did not match, the broker did not transfer any shares of the Fund to the Wife. The Wife then filed an enforcement motion which the trial court denied, finding that the Wife could have accepted the Husband's offer to transfer the entire Fund to her. The District Court reversed:

1. "First, the authorization letter sent by the Husband, unlike the one sent by the Wife, did not comply with the terms of the Final Judgment. Second, the Husband made no further effort to assure the Fund assets were transferred."

2. "Clearly, to avoid responsibility, an individual must be able to demonstrate that the failure of the transfer to occur was due to factors beyond their control. In essence, the Husband would be able to show, that in spite of his efforts, it was impossible to transfer the assets. Certainly, this is not the case here."

Seawell v. Hargarten, 28 So.3d 152 (Fla. 1st DCA 2010)

ERROR TO GRANT HUSBAND'S AMENDED MOTION FOR REHEARING AND TO REVISIT THE DISTRIBUTION OF PROPERTY WHERE MOTION ALLEGED THAT AN ECONOMIC RECESSION BEGAN IN DECEMBER 2007 WHICH CAUSED HUSBAND'S BUSINESS TO SUSTAIN A NET LOSS IN 2008 AND THAT THIS "NEWLY DISCOVERED EVIDENCE" WARRANTED A NEW TRIAL AND REVALUATION OF BUSINESS; A "CLOUDY CRYSTAL BALL" IS NOT A BASIS FOR A NEW TRIAL.

The trial court used October 31, 2007 as the date of valuation for the final judgment which was entered on August 25, 2008. The trial court awarded of the parties' principle asset, Jerry's Cajun Café and Market, Inc., to the husband, determining the value on that date to be $845,000, and ordered the husband to make a cash equalizing payment to the wife. The husband sought rehearing, conceding that the former wife established the value of the corporate entity by competent, substantial evidence and did not request an opportunity to present additional evidence or seek a different valuation date. Before the rehearing motion was heard, the husband filed an amended rehearing motion (in March, 2009) in which he claimed that "newly discovered evidence" showed that the 2007 economic recession had caused his business to sustain a net loss, warranting a new trial. On April 6, 2009 the trial court entered an order granting husband's motion for rehearing. The District Court reversed:

1. "Rehearing or new trial based on newly discovered evidence 'is warranted only where (1) it appears that the evidence is such that it will probably change the result if a new trial is granted, (2) the evidence has been discovered since the trial, (3) the evidence could not have been discovered before the trial by the exercise of due diligence, (4) the evidence is material to the issue, and (5) the evidence is not merely cumulative or impeaching….' Importantly, the allegedly 'newly discovered evidence' cannot simply show some change in circumstances since the trial."

2. "In the present case, the alleged 'newly discovered evidence' - evidence of an economic recession that began in December of 2007, months or weeks after the valuation date, and operating results for the year 2008 - tends to prove a change in circumstances occurring after the October 31, 2007, date of valuation, and relates, at least in part, to events that transpired after the trial."

3. "Projections of future revenues and cash flows are, of course, pertinent, in assessing the value of a business. But, projections of future revenues, expenses and income necessarily depend, not only on known or knowable facts already in existence, but also on assumptions about the future that will not always, if ever, be entirely accurate…. Economic recessions, like other vagaries in the business cycle, are contingencies appraisers must take into account in valuing a business."

4. "The witnesses who appraised the business by assigning it a value as of October 31, 2007, made assumptions about the business's prospects then, doubtless informed by the actual experience between October 31, 2007, and mid-March of 2008, when they testified on the question. On August 25, 2008, when final judgment was entered, economic conditions had presumably changed again, and it is certainly true that the parties' experts might not have predicted the precise economic conditions on April 6, 2009, the day the order under review was entered, or, for that matter, the reported improvements in economic conditions since. But a cloudy crystal ball is no basis for a new trial."

Mistretta v. Mistretta, 31 So.3d 206 (Fla. 1st DCA 2010)

Second District

ENTRY OF ORDER OR JUDGMENT THAT MERELY APPROVES REPORT OF GENERAL MAGISTRATE RECOMMENDING THAT A FINAL JUDGMENT OF DISSOLUTION BE ENTERED IS INSUFFICIENT.

The trial court approved the recommendations of the general magistrate with respect to the parties' petitions for dissolution of marriage. On appeal, the Second District affirmed without discussion but wrote to address concern with the form of the circuit court's order disposing of the parties' marriage and to suggest that the circuit court adopt a new form:

1. "[T]he entry of an order or judgment that merely approves the report is insufficient. While the GM makes recommendations for the circuit court to follow, it is the circuit court's responsibility to reduce the recommendation to a proper court order or judgment…. Merely stating that the GM's report is approved does not constitute a judgment."

2. "Thus, in an action for dissolution of marriage, the 'appropriate action' on the GM's report is generally entry of a final judgment dissolving the marriage and addressing the remaining recommendations."

3. "Upon our initial review of the circuit court's order in this case, we questioned whether the order was final because it does not expressly state that the marriage between the parties is dissolved. The GM's report 'RECOMMENDED that the Final Judgment of Dissolution of Marriage be entered, dissolving the marriage of the parties and ordering the recommended relief set forth above.'"

4. "The circuit court entered an order approving the GM's report and recommendations but did not state that the marriage between the parties is dissolved…. Under some circumstances, such an omission could have serious consequences. In an action for dissolution of marriage, an order that does not either dismiss the action with prejudice or dissolve the marriage of the parties will generally not be 'final' for appellate purposes because it does not put an end to the judicial labor."

5. "However, despite this irregularity, we conclude the subject order is sufficient to dissolve the parties' marriage. First, in assessing the sufficiency of a circuit court's order to dissolve a marriage, this court and two of our sister courts have disregarded technical deficiencies in the order where the intent to effect a dissolution of marriage was clear. In this case reading the circuit court's order in conjunction with the GM's report leaves no doubt that the circuit court intended to dissolve the parties' marriage."

6. "Second, the circuit court's order not only 'confirmed' and 'ratified' the GM's report and recommendations, it also provided that they are 'made an Order of this Court.' By specifically designating the report and recommendations as its own order, the circuit court effectively entered an order in accordance with the GM's recommendations."

7. "We believe that parties obtaining a dissolution of marriage – whether or not their cases are referred to a GM – should received a final judgment signed by a circuit judge expressly stating that their marriage is dissolved."

Norris v. Norris, 28 So.3d 953 (Fla. 2nd DCA 2010)

Third District

TRIAL COURT DID NOT ABUSE DISCRETION IN DENYING WIFE'S MOTION TO SET ASIDE ORDER GRANTING MOTION TO ENFORCE MEDIATED SETTLEMENT AGREEMENT; STANDARD OF REVIEW TO SET ASIDE A JUDGMENT FROM A MEDIATED AGREEMENT IS "GROSS ABUSE OF DISCRETION."

The husband and wife were married in 1978 and entered into a prenuptial agreement which provided that the past, present and future property of each spouse would remain the separate property of the respective spouse. In 2006 the husband died while divorce proceedings were pending. The wife sought an elective share of the estate along with other property. The trial court ordered mediation, the parties settled the case and the trial court approved the agreement. When the wife later failed to comply with the terms of the agreement, the personal representative of the estate moved to enforce the settlement. The wife appeared at the hearing and testified that she wanted more time to consult with an attorney and to investigate the settlement and the prenuptial agreement. The court granted the motion to enforce. The wife did not appeal. Instead, she retained new counsel who filed an emergency motion to stay the proceedings, a motion for rehearing and a motion to set aside the order of enforcement. The motions were denied and the wife appealed, seeking rescission of the settlement agreement. The District Court held:

1. "Because her appeal is directed to the order denying her motion for rehearing and a denial of her motion to set aside the order granting the motion to enforce the mediated settlement, the standard of review is gross abuse of discretion."

2. "We additionally note that there is a more stringent standard of review, however, when the final judgment to be vacated follows a mediated settlement agreement."

Rachid v. Perez, 26 So.3d 70 (Fla. 3rd DCA 2010)

Fourth District

TRIAL COURT DID NOT ERR BY ENTERING A FINAL JUDGMENT PREPARED BY HUSBAND'S ATTORNEY WHERE PARTIES WERE PROVIDED WITH OPPORTUNITY TO SUBMIT PROPOSED ORDERS, JUDGE MODIFIED PROPOSED ORDER, JUDGE PARTICIPATED ACTIVELY IN HEARING, AND MADE PRELIMINARY ORAL FINDINGS AT THE CONCLUSION OF CONTEMPT HEARING.

At the conclusion of a contentious and lengthy hearing regarding time-sharing and the Wife's purported interference with the child's contact with the Husband, the trial judge made certain oral rulings including statements regarding how the court could rule. The court requested proposed judgments from each party. The Husband submitted such a judgment, the Wife did not. The District Court found that the trial court did not abuse its discretion or err in entering the order drafted by the Husband's counsel and rejected the Wife's claim that such was in violation of the *Perlow v. Berg-Perlow*:

1. "This contention is without merit for four reasons. First, unlike the judge in *Perlow*, the court here provided the parties with an opportunity to submit proposed orders. He did not discourage [the Wife] from doing so."

2. "Second, unlike the judge in *Perlow*, the judge in this case modified [the Husband's] proposed order. For example, he deleted all of the paragraphs that would have awarded [the Husband] primary residential responsibility. Also, the judge removed paragraphs that ordered [the Wife's] counsel to personally pay Pacetti's attorney's fees because of her misconduct."

3. Third, the judge here participated actively in the hearing, several times asking questions of the witnesses."

4. "Fourth, the judge in this case made preliminary oral findings at the conclusion of the contempt hearing, ostensibly to guide the parties in drafting their proposed orders."

Ginnell v. Pacetti, 31 So.3d 217 (Fla. 4th DCA 2010)

TRIAL COURT CORRECTLY HELD THAT, IN FAMILY LAW, AN ERROR THAT AFFECTS THE SUBSTANCE OF A JUDGMENT CANNOT BE CORRECTED UNDER RULE 1.540(a).

On remand from a prior appeal, the Husband's alimony obligation was reduced form $2,000 per month to $1 per month, but the order was silent as to the effective date of this modification. More than five months after the order, the Husband filed a motion to 'clarify' the order after finding out that the child support ledger showed past due alimony amounts exceeding $60,000. The Husband petitioned the court to amend its modification order to make the $1 per month alimony retroactive to three years prior, which was the original intent. A month later, the Husband filed a motion for relief from judgment under Florida Rule of Civil Procedure 1.540(a), which reasserted the same facts and request for relief contained in the earlier motion to clarify. The trial court denied the motion. The District Court affirmed:

1. "We construe the order as denying the motion because the former husband had waived the issue of retroactive application of the new alimony determination by failing to raise it in a timely motion for rehearing or to alter or amend the judgment under Florida Rule of Civil Procedure 1.530, which provides a deadline of ten days."

2. "In a family law case, the length of time that an obligation is to be paid is an error that affects the substance of a judgment; not a 'clerical' mistake that can be corrected under rule 1.540(a)."

3. "The former husband did not timely bring a motion under rule 1.530. Nor did he raise the issue of retroactivity of the alimony payments in a timely filed appeal. We affirm the trial court's order denying the rule 1.540(a) motion."

Brown v. Cannady-Brown, 36 So.3d 166 (Fla. 4th DCA 2010)

PROVISIONS OF JUDGMENT RELATING TO ALIMONY AWARDED TO WIFE WERE INADEQUATE; COURT'S FINDING THAT HUSBAND'S INCOME RANGED FROM $7,000 TO $12,000 PER MONTH WAS UNCERTAIN AND INADEQUATE; FINDINGS AS TO WIFE'S NEED INADEQUATE; REMAND FOR NEW TRIAL BECAUSE OF EXCESSIVE LAPSE IN TIME BETWEEN TRIAL AND ENTRY OF JUDGMENT.

The parties were married for eleven years. The Husband was self-employed in his own business; the Wife was not employed. The parties settled all issues in their divorce case except alimony and attorney's fees. The evidence at trial showed that that the parties lived a comfortable life during the marriage. The Wife did not work during the marriage, and Husband acknowledged that Wife had been a good mother and homemaker until, at the end of the marriage, Wife engaged in numerous adulterous affairs. More than two years after the trial, the court entered an order awarding the Wife $1,800.00 per month in alimony, finding that the $1,000 per month in temporary alimony the wife had been receiving was inadequate. The District Court held:

1. "The final judgment is sparse. On the issue of need and ability to pay, there are only three findings: the Husband's net income was between $7,000 and $12,000 per month; that Wife has illnesses that prevent her from working full time and that she has 'substantial' medical and drug expenses."

2. "We find the judgment to be inadequate in several respects. The finding of such a wide range for Husband's income is too uncertain, and is not warranted by the evidence. There is a lack of findings on Wife's need, an issue greatly disputed at trial, making it impossible for this Court to make any meaningful review. These deficiencies are combined with a twenty-eight month delay between the trial and entry of the judgment and appear to be related."

3. "Even though the trial court was eventually provided a transcript, it is doubtful, with the passage of so much time, that issues of credibility and weight of evidence could accurately be recalled. Loath as we are to require parties to incur the cost and delay of a retrial, it is necessary in this case, and the parties are partly responsible for the delay. A new hearing of all alimony issues, including whether the Wife's adultery should affect the amount of alimony awarded is required."

Eckert v. Eckert, 29 So.3d 381 (Fla. 5th DCA 2010)

TRIAL COURT ERRED BY AMENDING FINAL JUDGMENT TO CHANGE VALUATION DATE AND VALUES OF RETIREMENT ACCOUNTS TO REFLECT A DOWNTURN IN THE ECONOMY BASED SOLELY ON HUSBAND'S BARE ASSERTIONS IN REHEARING MOTION.

In the Final Judgment the lower court awarded the Wife one-half of the marital portion of three retirement accounts, valued as of the trial date based on the evidence presented. But in the Amended Final Judgment, the court valued the accounts as of the date the Final Judgment was entered, to reflect a downturn in the economy as asserted by the husband in his rehearing motion. The District Court reversed:

1. "The court erred by changing the valuation date and values without any evidentiary basis."

2. "Although section 61.075(7), Florida Statutes, gives the trial court discretion to pick an equitable date to value assets, section 61.075(3) requires the trial court to establish a value based on competent, substantial evidence."

3. "The wife correctly argues that the husband's bare assertions in a motion for rehearing were not evidence. Although the value of the assets may well have dropped, as the husband asserted, he failed to present any evidence to support this assertion or the court's findings."

Lilly v. Lilly, 35 So.3d 1022 (Fla. 5th DCA 2010)

F. Judges and Special and General Masters

First District

Second District

TRIAL COURT ABUSED ITS DISCRETION IN DENYING MOTHER'S REQUEST FOR CONTINUANCE OR TO APPEAR TELEPHONICALLY WHERE SEVERAL DAYS BEFORE SCHEDULED HEARING, MOTHER FAXED REQUEST TO HAVE HEARING RESCHEDULED OR TO APPEAR TELEPHONICALLY BECAUSE SHE WAS CARING FOR PREMATURE INFANT AND WOULD FIND IT DIFFICULT TO TRAVEL TO FLORIDA FROM ANOTHER STATE.

Several days before the scheduled modification hearing, the mother faxed a request to have the hearing rescheduled or appear telephonically because she was caring for a premature infant and it would be difficult to travel to Florida from South Carolina. The hearing officer denied this motion and the hearing took place absent the mother. At the appellate level, the Department of Revenue (DOR) filed a confession of error, acknowledging that the trial court, through its hearing officer, abused its discretion. The District Court agreed:

1. “As a general proposition, in the family law context a trial court errs if it fails to allow a party to offer evidence as to ability to pay."

2. "In light of this, and given the facial validity of the mother's request and DOR's confession of error, we conclude that the trial court abused its discretion in denying the mother's request for a continuance or a telephonic hearing."

Miller v. Miller, 37 So.3d 281 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

ERROR TO DENY HUSBAND'S EXCEPTIONS TO REPORT AND RECOMMENDATION OF GENERAL MAGISTRATE ON GROUND THAT THEY WERE UNTIMELY WHERE EXCEPTIONS WERE TIMELY FILED WHEN MAILING DAYS WERE TAKEN INTO ACCOUNT.

On October 20, 2008 the trial court entered a final judgment of dissolution of marriage, adopting the recommendations of the general magistrate. By separate order, the trial court struck Husband's exceptions as untimely filed. On appeal, the court reversed finding that husband's exceptions were not untimely: "Because the general magistrate entered and served his report on Thursday, October 2, 2008, and Husband mailed (served) his exceptions via express mail to the clerk of the court on October 16, 2008, his exceptions were not untimely."
Calderon v. Calderon, 28 So.3d 688 (Fla. 5th DCA 2010)

ERROR TO ENTER ORDER ON REPORT AND RECOMMENDATION OF MAGISTRATE, FINDING FORMER HUSBAND IN CONTEMPT, WITHOUT HEARING ON EXCEPTIONS AND WITHOUT BENEFIT OF TRANSCRIPTS OF HEARING BEFORE MAGISTRATE.

The husband appeals the trial court's Order on the Report and Recommendation on the wife's Motion for Contempt. The District Court held:

1. "The trial court apparently overlooked the Exceptions to the magistrate's Report and Recommendations timely filed by the former husband and found the former husband in willful contempt for failing to make all child support payments due and for failing to reimburse the former wife for certain identified expenses of the children."
2. "The order was issued without a hearing on the former husband's Exceptions and without the court's benefit of the transcripts of the hearings before the magistrate, which transcripts were in the process of being prepared for the court's use."
3. "Accordingly, we reverse and remand this case to the trial court to conduct an appropriate hearing on the exceptions to the magistrate's report filed by the former husband."

Silver v. Silver, 35 So.3d 1012 (Fla. 5th DCA 2010)

G. Miscellaneous

First District

TRIAL COURT ERRED IN DENYING WIFE'S MOTION TO ENFORCE PARTIES' CONSENT FINAL JUDGMENT; WHERE FINAL JUDGMENT OF DISSOLUTION PROVIDES FOR THE TRANSFER OF ASSETS, IT IS THE RESPONSIBILITY OF THE SPOUSE IN POSSESSION OF THOSE ASSETS TO EFFECTUATE THE TRANSFER.

The parties entered into a Consent Final Judgment which, in pertinent part, required the Husband to pay to the Wife a total of $65,470 in cash and to also transfer to the Wife 50% of the shares of an Oppenheimer Mutual Fund. The Husband was required to do so by August 1st. Prior to the deadline, the Husband sent the Wife two checks totaling $24,700 and $24,327, thus leaving a balance owed of $16,443 as to the cash payment. On July 31st, the Husband sent a letter authorizing his broker to transfer 100% of the shares in the mutual fund to the Wife. At the time, the Fund had a value of $29,477.84. In other words, the Husband was attempting to apply the cash value of his 50% of the Fund ($14,738.92) toward the outstanding balance due on the required cash payment. Before he authorized the transfer of the Fund, the Husband had advised his counsel that he did not have enough cash to pay the $16,443 owed to the Wife. An exchange of emails then took place between the parties' counsel. The Husband's attorney asked the Wife's attorney if she would accept stock from the Fund toward the outstanding balance and the Wife's attorney replied that it did not matter how the Wife got her money "as long as she got all of it." On August 1st, the Wife wrote to the broker of the Fund accepting only her 50% of the Fund. Since the two authorization letters did not match, the broker did not transfer any shares of the Fund to the Wife. The Wife then filed an enforcement motion which the trial court denied, finding that the Wife could have accepted the Husband's offer to transfer the entire Fund to her. The District Court reversed:

1. "First, the authorization letter sent by the Husband, unlike the one sent by the Wife, did not comply with the terms of the Final Judgment. Second, the Husband made no further effort to assure the Fund assets were transferred."

2. "Clearly, to avoid responsibility, an individual must be able to demonstrate that the failure of the transfer to occur was due to factors beyond their control. In essence, the Husband would be able to show, that in spite of his efforts, it was impossible to transfer the assets. Certainly, this is not the case here."

Seawell v. Hargarten, 28 So.3d 152 (Fla. 1st DCA 2010)

WHERE PARTIES PARTICIPATED IN A FULL WEDDING CEREMONY WITHOUT OBTAINING A MARRIAGE LICENSE, AND SUBSEQUENTLY APPLIED FOR AND RECEIVED A MARRIAGE LICENSE WHICH WAS NEITHER SOLEMNIZED NOR RETURNED TO CLERK OF COURT TO BE MADE PART OF OFFICIAL RECORDS OF COUNTY, THE MARRIAGE WAS NOT VALID.

Ms. Hall and Dr. Maal were engaged to be married. The week before the wedding, the couple was scheduled to get a marriage license, but Dr. Maal refused because Ms. Hall had not yet signed the prenuptial agreement. The couple agreed to go forth with the ceremony. The parties had children, were named as husband and wife on their mortgage, but filed separate tax returns. One year later the parties applied for a license, but the license was neither solemnized nor returned to the clerk to be made part of the record. As part of a series of actions for dissolution, the question of whether a valid marriage existed was brought before the court. The District Court originally held that there was a valid marriage but, en banc, determined otherwise:

1. "Couples who desire to be married must apply for a license. There is a fee for getting a marriage license and that fee is reduced for attending premarital counseling. The license is valid for 60 days. The officiant at the ceremony must certify that the marriage was solemnized. The certified marriage license must be returned to the clerk or issuing judge within 10 days and the clerk or judge is required to keep a court record of certified marriage licenses."

2. "In the case before us, the parties did not proceed in good faith. 'Good faith' is defined as 'an honest belief. . . .Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder on inquiry. . . . [It] describe[s] the state of mind denoting honesty of purpose. . . and, generally speaking means being faithful to one's duty or obligation.'"

3. "Although there is little doubt that Ms. Hall genuinely wanted to be married, she could not have reasonably believed she achieved that aim after engaging in a wedding ceremony in full knowledge that neither she nor Dr. Maal had ever applied for a marriage license."

4. "To the extent that the dissent would hold that a marriage ceremony without a license, coupled with living together and 'acting married,' results in a valid license, it would recreate a species of common-law marriage in violation of section 741.211, Florida Statutes (2002)."

Hall v. Maal, 32 So.3d 682 (Fla. 1st DCA 2010)

Second District

TRIAL COURT ERRED IN ALLOWING FIRST WIFE TO INTERVENE IN A CLOSED DIVORCE CASE BETWEEN HUSBAND AND SECOND WIFE.

The Husband was a former NFL football player entitled to an NFL retirement plan. The Husband's first wife received no alimony but was awarded a one-half in the retirement plan as of May 1,1986. Thereafter, the husband married his second wife and the parties had four children. They were later divorced in Tampa in 2002. The Florida judgment found that the Husband had abandoned his family and, since it was unlikely that he would pay child support, the final judgment provided that the husband's benefits in the NFL retirement plan could be used to pay child support for the children. A QDRO was prepared and entered in 2002. Thereafter, the first wife had a QDRO prepared (in 2003) which was entered by a Texas court. In 2009, the first wife filed a motion to intervene in the Florida case, seeking to have the Florida court enforce the Texas QDRO. The second wife filed an objection, noting that the Florida case had been closed

for seven years and that the first wife had no standing to seek relief by intervention. The District Court held:

1. "It may come as no surprise that neither former wife has presented this court with a statute or precedent that squarely resolves the matter."

2. "[W]e agree with [the second wife] that the dissolution proceeding was completely concluded and that it did not present a lawsuit in which [the first wife] was free to intervene."

3. "A Florida court must give full faith and credit to a valid Texas judgment, and a Texas court must honor a Florida judgment in the same manner. Nothing suggests that either of these judgments is void or improper. Somehow the two judgments need to be reconciled with one another in a court that has jurisdiction over both former wives, and in a proceeding that either binds the plan administrator or that presents a resolution that the plan administrator is willing to follow. It may be that the parties could obtain a resolution if they cooperate in an action for declaratory relief. This court merely holds that a motion to intervene in the closed Florida divorce is not the correct procedure to reach the needed resolution."

Armstrong v. Armstrong, 35 So.3d 132 (Fla. 2nd DCA 2010)

Third District

WIFE'S CLAIM THAT AGREEMENT SHOULD BE RESCINDED BECAUSE OF UNILATERAL MISTAKE PROPERLY DENIED WHERE WIFE DID NOT ESTABLISH THE LEGAL BASIS FOR SUCH RELIEF.

The husband and wife were married in 1978 and entered into a prenuptial agreement which provided that the past, present and future property of each spouse would remain the separate property of the respective spouse. In 2006 the husband died while divorce proceedings were pending. The wife sought an elective share of the estate along with other property. The trial court ordered mediation, the parties settled the case and the trial court approved the agreement. When the wife later failed to comply with the terms of the agreement, the personal representative of the estate moved to enforce the settlement. The wife appeared at the hearing and testified that she wanted more time to consult with an attorney and to investigate the settlement and the prenuptial agreement. The court granted the motion to enforce. The wife did not appeal. Instead, she retained new counsel who filed an emergency motion to stay the proceedings, a motion for rehearing and a motion to set aside the order of enforcement. The motions were denied and the wife appeal, seeking rescission of the settlement agreement. The District Court held:

1. "[The wife's] argument is without merit as the record does not support the legal remedy of rescission on the basis that the settlement agreement was the product of unilateral mistake."

2. "Under Florida law, the party seeking rescission based on unilateral mistake must establish that: (1) the mistake was induced by the party seeking to benefit from the mistake; (2) there is no negligence or want of due care on the part of the party seeking a return to the status quo; (3) denial of release from the agreement would be inequitable; and (4) the position of the opposing party has not so changed that granting the relief would be unjust."

3. "Here, [the wife] does not claim that any party misled or induced her to enter into the settlement agreement. Rather, she contends that her attorney misled or induced her. Thus, her claim fails as a matter of law. [The wife] also cannot demonstrate that there was 'no negligence

or want of due care' on her part because she had an obligation to read and know the legal parameters regarding the validity and application of the prenuptial agreement prior to mediation."

4. "Additionally, [the wife] was represented by counsel at mediation, and she failed to demonstrate that denial of rescission would be inequitable or that granting relief would be unjust. Thus, we conclude that even if [the wife] had properly preserved her claim of unilateral mistake, on appellate review her claim would have failed on the merits."

Rachid v. Perez, 26 So.3d 70 (Fla. 3rd DCA 2010)

Fourth District

ERROR TO GRANT HUSBAND'S MOTION TO DISQUALIFY WIFE'S ATTORNEYS, ON GROUND THAT WIFE HAD "HACKED" INTO HUSBAND'S E-MAIL ACCOUNT AND FORWARDED TO HER ATTORNEY AN E-MAIL FROM THE HUSBAND TO HIS ATTORNEY, WITHOUT ALLOWING WIFE TO TESTIFY AND PRESENT OTHER EVIDENCE ON THE FACTUAL QUESTION OF WHETHER THE HUSBAND FAILED TO TREAT THE E-MAIL AS CONFIDENTIAL THEREBY WAIVING PRIVILEGE; WIFE'S DUE PROCESS RIGHTS VIOLATED.

The Husband sought to disqualify Wife's second attorney based on the attorney having read emails between the Husband and his attorney. The Husband testified that during the parties' marriage, he and the Wife had access to each other's e-mail accounts. After the Husband filed for divorce, he changed the password on his account. He testified that the Wife somehow "hacked" into his account and found an e-mail from him to his attorney. The Wife's sister forwarded the e-mail to the Wife's attorney who, recognizing that it was an attorney-client communication, sent it to the Husband's attorney. Nevertheless, the Husband moved to disqualify the Wife's attorney, claiming that the Wife had obtained an unfair advantage. After the Husband rested, the trial court began addressing the issues and Wife's attorney interjected that the court had not allowed the Wife to testify regarding how she obtained the e-mail. Nevertheless, the trial court ordered the Wife's attorney disqualified. The District Court reversed:

1. "The wife raises several arguments, the first of which is dispositive. The wife contends that the court violated her right to due process by not allowing her to testify and present other evidence on the factual question of whether the husband failed to treat the e-mail as confidential, thereby waiving the privilege. The husband responds that whether he failed to treat the e-mail as confidential is irrelevant because there was no question the wife had the e-mail forwarded to her attorney, thus rendering her testimony unnecessary."

2. "We agree with the wife that she did not receive due process. Due process requires that a party be given the opportunity to be heard and to testify and call witnesses on the party's behalf and the denial of this right is fundamental error."

3. "The wife's evidence may have been relevant to her argument that the husband failed to treat the e-mail as confidential and waived any privilege claim over it. Even if the wife's evidence would not have impressed the court, a party has the right to present evidence and to argue the case at the conclusion of all the testimony. Thus, it is necessary to grant the wife's petition, quash the order disqualifying her counsel, and remand for continuation of the hearing, at which the wife may present her evidence."

Minakan v. Husted, 27 So.3d 695 (Fla. 4th DCA 2010)

ERROR TO DENY RESTITUTION TO HUSBAND FOR SUPPORT MONIES, ATTORNEY'S FEES AND COSTS PREVIOUSLY PAID TO WIFE BASED ON COURT'S MISTAKEN VIEW THAT IT LACKED AUTHORITY TO ORDER RESTITUTION FOLLOWING APPELLATE COURT'S REVERSAL OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

The issue on appeal was whether the trial court had jurisdiction to order restitution for the Husband on remand after the appellate court had previously determined that the trial court lacked personal jurisdiction over him to determine issues of support and equitable distribution. The District Court held:

1. "We find that the trial court did, in fact, have the jurisdiction to order restitution, if the court wanted to grant such relief in its discretion."

2. "There are two different and valid approaches to this issue. On one hand, the wife points to those cases which state that support paid pendente lite cannot be recovered by the payor spouse if that spouse is ultimately successful on appeal. Pendente lite payments to the spouse are to 'sustain the party while the litigation ensues' and the appellant is not 'entitled to restitution' even if the payments are later found to be 'erroneous.' However [the case so stating] involved a request for restitution on an award later determined to be 'erroneous' rather than a request for restitution based on the trial court's lack of jurisdiction."

3. "On the other hand, other cases explain that the trial court should exercise its inherent jurisdiction to resolve outstanding issues like restitution."

4. "We find that both [types of cases] are valid and offer to the trial court the flexibility to grant or deny restitution of alimony, costs, and attorney's fees based on the proper exercise of the trial court's discretion. We do find that the trial court had jurisdiction to grant or deny restitution after due consideration."

Marshall v. Marshall, 39 So.3d 358 (Fla. 4th DCA 2010)

Fifth District

LAW FIRM PROPERLY DISQUALIFIED WHERE MOTHER IN A PATERNITY ACTION ILLEGALLY OBTAINED A USB FLASH DRIVE BELONGING TO THE FATHER WHICH CONTAINED PRIVILEGED MATERIAL AND FIRM SPENT OVER 100 HOURS REVIEWING THE DOCUMENTS.

The Mother in hotly contested paternity proceedings illegally obtained a USB flash drive belonging to the Father which contained literally thousands of pages of documents including communications between the Father and his counsel, work product, private medical records and confidential business information of the Father and his clients. The Mother's lawyers spent over 100 hours reviewing the files then filed all of the documents in the court file and sought relief based upon the contents of the files. The trial court disqualified the firm and the District Court affirmed:

1. "While recognizing that disqualification of a party's chosen counsel is an extraordinary remedy that should be resorted to sparingly, disqualification is appropriate where a

party obtains an unfair informational or tactical advantage through the disclosure of privileged information to that party's counsel."

2. "Given the nature of the information obtained by the [Mother's lawyers] from the USB drive, it cannot be reasonably disputed that an informational and tactical advantage was obtained by the Mother."

3. "For the benefit of other attorneys facing a similar dilemma, we note that the Florida Bar Commission on Professional Ethics has opined that when an attorney receives confidential documents he or she knows or reasonably should know were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issues. If the client refuses to consent to disclosure, the attorney must withdraw from further representation."

Castellano v. Winthrop, 27 So.3d 134 (Fla. 5th DCA 2010)

TRIAL COURT ABUSED DISCRETION BY EXTENDING REHABILITATIVE ALIMONY WHERE PARTIES HAD ENTERED INTO STIPULATION BY WHICH WIFE WITHDREW HER CLAIM FOR SUCH A REMEDY; COURT ERRED IN FAILING TO HONOR STIPULATION.

In 2003 the former trial judge ordered the Husband to pay rehabilitative alimony to the Wife for 36 months during which time she was to enter into and complete a dental hygienist program. The original judge also specifically denied permanent alimony because he considered the parties' ten year marriage to have been short-term. The Wife enrolled in the program and was advancing until the Husband undertook a series of actions specifically designed to undermine her progress (which were never explained in the opinion), which forced her to drop out of the program. The Wife then sought to have the rehabilitative alimony either extended or converted into an award of permanent alimony. Before the matter came to trial however, the parties stipulated that the Wife would not seek the extension; instead she would seek only the conversion to permanent alimony. Neither party, however, told the trial judge about their stipulation. At the conclusion of the trial, the successor judge awarded an extension of rehabilitative alimony and specifically denied a conversion to permanent based on res judicata (i.e., the original trial judge had denied the award). Both parties then moved for rehearing and explained that neither wanted the extension. The judge denied rehearing and the District Court held:

1. "This is a troubling case. It is troubling because the trial judge fashioned a fair and equitable result after carefully considering the evidence presented to him. Unfortunately, it appears that the relief fashioned was not what either party wanted, and neither seems to have told the court during the course of the trial that the request for the relief that was granted had been withdrawn by stipulation. Thus, we are compelled to reverse."

2. "We begin by noting that in every case the issues in a cause are made solely by the pleadings…. [T]he parties here had a clear procedural foundation allowing them to amend the former wife's claim by a written stipulation, even without leave of court."

3. "Furthermore, stipulations narrowing the issues, or as in this case, modifying the former wife's supplemental counter-petition so as to drop her alternative request to extend her rehabilitative alimony plan, are of value to the legal system as they simplify the issues, limit or shorten litigation, save costs to the parties, and preserve judicial economy and resources."

4. "Accordingly, we conclude that the trial court erred in failing to grant the motions for rehearing to the extent that he did so on the basis that he had to approve this particular stipulation for it to be effective."

5. "We reiterate, however, that the parties should unquestionably have called the trial court's attention to the existence of the stipulation during the course of the trial. Nevertheless, once the court was made aware of the removal of the request for extended rehabilitative alimony from the pleadings, the rehearing should have been granted."

Rickenbach v. Rickenbach, 32 So.3d 732 (Fla. 5th DCA 2010)

ERROR FOR COURT TO REFUSE TO ALLOW A COURT REPORTER TO BE PRESENT WHEN COURT CONDUCTED INTERVIEW WITH CHILDREN IN CHAMBERS, WHEN CHILDREN'S TESTIMONY WAS NECESSARY FOR MOTHER TO MEET HER BURDEN OF PROOF AS TO VISITATION MODIFICATION.

The Mother moved to temporarily halt visitation between the parties' two children and their father. She alleged that the Father was abusing alcohol and therefore was posing a risk to the children. The Mother requested and was granted leave for the minor children to attend and testify at the hearing. However, during the trial, the court required that the children testify, in chambers, without a court reporter present. The Mother objected, arguing that she needed the children's testimony, on the record, to meet her burden of proof. The trial court refused to conduct the interview with the children and then denied the Mother's motion to halt visitation with the father. The District Court held:

1. "[The Mother] was entitled to have the children's testimony transcribed. This is because due process requires the party seeking to modify visitation demonstrate that there has been a material change in circumstances and that modification is required to protect the child's best interest. The only avenue for [the Mother's] proof in this case is through the children's testimony."

2. "We also reject [the Father's] argument that [the Mother] conceded to the interview being conducted without a court reporter because her motion did not specifically request the children's testimony be transcribed if taken *in camera*. Neither the family law rules, nor the rules of civil procedure require a party to request the testimony be transcribed in a motion to allow children to testify."

Hickey v. Burlinson, 33 So.3d 827 (Fla. 5th DCA 2010)

XII. SPECIAL EQUITY

First District

TRIAL COURT ERRED IN FINDING A SPECIAL EQUITY IN FAVOR OF THE FORMER WIFE IN THE PARTIES' MARITAL HOME WHICH WAS JOINTLY TITLED AT THE TIME OF THE FILING OF THE PETITION FOR DISSOLUTION OF MARRIAGE.

The trial court determined a special equity in favor of the Wife. The District Court reversed, holding:

1. "Under section 61.075(5)(a)(5), Florida Statutes (2007), it was presumed that real property the parties to a dissolution proceeding held as tenants by the entireties was a marital asset, even where the real property was originally the sole property of one of the parties to the marriage."

2. "Before the statute was amended to abolish special equity outright, it placed the burden on the party asserting a claim of special equity to prove an absence of donative intent in the event of an interspousal conveyance: the party claimed a special equity and seeking to have the property declared a non-marital asset [had] the burden of overcoming this presumption by proving that a gift was not intended."

3. "This presumption, which went unacknowledged in the decree under review, was not overcome here."

Davis v. Davis, 32 So.3d 743 (Fla. 1st DCA 2010)

Second District

Third District

Fourth District

Fifth District

XIII. TAX CONSIDERATIONS

First District

Second District

TRIAL COURT ERRED IN FAILING TO CONSIDER THE RELEVANT TAX CONSEQUENCES OF ITS ALIMONY AWARD.

The divorce proceedings below began in 2000. In 2002, a Final Judgment was entered which was reversed on appeal as to four specific and discrete issues: (1) the rehabilitative

alimony awarded needed to be increased to cover the cost of proposed training as established by the existing record; (2) the trial court needed to consider the tax consequences created by the award of alimony based on the evidence in the record and also such additional evidence as may be necessary; (3) the equitable distribution needed to be adjusted to give the Wife an additional $6,250; and (4) the trial court needed to make findings concerning the income the Wife could reasonably be expected to receive from her liquid assets and then adjust permanent alimony to reflect these findings. For reasons not made clear on the record, the parties waited four years to bring these matters to the trial court. The trial court (now a new judge) ruled as to these issues: (1) the rehabilitative alimony was increased by $1,624.80; (2) after considering testimony regarding tax consequences, no change in the alimony award was warranted; (3) the Wife was entitled to an additional $6,250 in equitable distribution, and (4) permanent alimony was reduced to $2,940 after considering prospective income from liquid assets. As to the trial court's refusal to consider the potential tax ramifications of the alimony award, the District Court held:

1. "[I]n our prior opinion we mandated that the trial court consider the tax consequences on remand and that it should, if necessary, obtain additional evidence on this topic. The trial court's order contains no findings or any significant legal discussion of the tax implications of the award of alimony. Indeed, the order reflects that the trial court believed it was obligated only to consider the tax implications of the income derived from the liquid assets that the parties received in equitable distribution."

2. "We do not rule out the possibility that the trial court could decline to adjust the alimony to account for the effects of taxation, but the order on remand contains no reasoned decision on this subject and appears to have addressed the wrong issue of taxation."

Sharon v. Sharon, 35 So.3d 962 (Fla. 2nd DCA 2010)

Third District

Fourth District

Fifth District

XIV. MISCELLANEOUS

A. Injunctions

First District

Second District

TRIAL COURT ERRED IN GRANTING A MOTION FOR INJUNCTION WHERE MOTION AND ORDER WERE DEFICIENT UNDER RULE 1.610 AND NO IRREPARABLE HARM WAS SHOWN.

Sometime after the petition for dissolution was filed, the Husband moved out of the marital home, taking with him virtually all of the furniture (leaving only the Wife's and the children's

bedroom sets). The Wife then filed a "Verified Ex-Parte Emergency Motion for Exclusive Use and Possession of the Former Marital Residence." The circuit court held an ex-parte hearing the day the motion was filed and gave the Wife exclusive use and possession of the marital home and gave the Husband 24 hours to return the personal property taken from the home. The District Court held:

1. "A trial court should only order relief in an ex parte proceeding where there exists an immediate threat of irreparable injury that forecloses the opportunity to give reasonable notice."

2. "In this case, the Wife's motion failed to demonstrate either an immediate threat of irreparable injury or a reason notice could not be given."

3. "With respect to the Wife's motion for an order granting her exclusive use and possession of the marital home, the Wife had already moved into the marital home and the Husband had vacated the residence before the motion was filed. So, as a practical matter, the Wife had exclusive use and possession of the marital home when the motion was filed. In addition, the Wife did not seek entry of the order to prevent the Husband from removing personal property from the marital home. The personal property had previously been removed and taken elsewhere. Therefore, assuming that the Wife would suffer an injury as a result of the Husband's actions, the injury had already occurred. Giving notice to the Husband would neither have accelerated the injury nor have permitted it to occur."

4. "To the extent that the order grants injunctive relief, we observe that almost none of the required procedures were followed…. Here, the Wife's motion was neither verified nor supported by affidavits…. Also, the motion did not contain the attorney's certification…. Furthermore, the order itself is defective because it contains no explanation of the reasons for its entry other that '[t]he Emergency Motion is well taken….' Finally, it does not appear that the trial court required the Wife to post a bond…."

Hunter v Hunter, 36 So.3d 148 (Fla. 2nd DCA 2010)

ERROR FOR TRIAL COURT TO GRANT PETITION FOR DOMESTIC VIOLENCE INJUNCTION BASED ON OBSERVATIONS DURING CUSTODY HEARING IN DISSOLUTION OF MARRIAGE.

The Wife's Petition for Injunction and the parties' dissolution of marriage action were assigned to the same judge. In the injunction case, the Wife claimed that Husband made threats against her and her children, including statements made during the previous custody hearing (in which the judge in the injunction case also presided). During the hearing for the injunction, the Wife only briefly explained the instances of violence; instead, the lower court based its decision on its observations during the three-day custody hearing, the details of which were not a part of the injunction record. The District Court held:

1. "The primary allegation made by [the Wife] concerned a statement that [the Husband] made in the courtroom… during the trial on the custody issue."

2. "In reversing the trial court's decision, we are not deciding whether this evidence would be sufficient to grant a permanent injunction… Rather, we reversed because the trial court granted the petition based on its observations during the three-day custody hearing, which are not part of the record in this case."

3. "Because the petition to modify in the dissolution proceedings is treated as a distinct and separate legal proceeding, there is no record to support the court's ruling in this case and, thus, we are compelled to reverse the order."

4. "In granting the domestic violence injunction, the trial court overlooked the fact that it had two separate proceedings pending before it."

5. "The court had the ability to take judicial notice of the records and proceedings and proceedings in the dissolution/custody proceeding…. To do so, however, in the absence of any special rules of procedures for this type of unified proceeding, the court was required to follow the procedures in section 90.204, which require a court to give the parties notice of his or her intent to rely upon these record and to make these records part of the record in that proceeding."

6. "We reverse the order granting the petition for domestic violence because it was entered based on evidence from the custody hearing that is not part of this record."

Coe v. Coe, 39 So.3d 542 (Fla. 2nd DCA 2010)

Third District

Fourth District

TRIAL COURT ERRED IN DENYING LEGALLY SUFFICIENT MOTION TO DISSOLVE PERMANENT INJUNCTION FOR DOMESTIC VIOLENCE WITHOUT A HEARING; STANDARD FOR SUCH MOTION UNCLEAR IN THE CASE LAW.

The trial court apparently denied the Appellant's motion to dissolve a permanent domestic violence injunction without a hearing. The District, while not deciding the applicable standard for such a motion, held:

1. "Case law has not set forth the applicable legal standard of determining whether a domestic violence injunction should be vacated or modified. Some cases seem to require the movant to allege and prove a change in circumstances…. However, other cases have focused on the 'at any time' language in the statutory text, finding that the trial court should have held an evidentiary hearing to allow the movant to present evidence regarding the initial procurement of the injunction."

2. "Here, the court gave no reasons for its summary denial. Even assuming that appellant was required to allege a change in circumstances in order to state a legally sufficient motion, appellant alleged in his motion that there was a change in circumstances because the injunction has served its purpose; he had not attempted to contact his ex-girlfriend for years; he has been incarcerated on unrelated charges; and the injunction was impacting his ability to participate in certain prison work programs."

3. "Because appellant's motion was legally sufficient, the trial court should have afforded appellate a meaningful opportunity to be heard rather than summarily denying his motion."

Colarusso v. Lupetin, 28 So.3d 238 (Fla. 4th DCA 2010)

ERROR TO ENTER INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE BASED ON A DISPUTED EVENT THAT OCCURRED THREE YEARS PRIOR.

The Appellant sought review of an injunction entered against him for protection against domestic violence, sought by his child's mother. The Mother filed for injunction in July 2008 citing an alleged domestic violence incident that was said to have occurred in 2005, although police were never notified. The Mother admitted that the Appellant had not made any threats or

physically harmed her since 2005 but was concerned because she planned on filing for child support. The Appellant denied the 2005 incident, admitted a prior criminal history of marijuana possession and assault without violence on a law enforcement officer, denied owning any firearms, and testified that he thought the motive for the injunction was that he now had a new girlfriend. The District Court held:

1. "A court may issue an injunction when it appears that the petitioner is either a victim of domestic violence or 'has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence.'"

2. "In determining whether the victim's fear is reasonable, 'the trial court must consider the current allegations, the parties' behavior within the relationship, and the history of the relationship as a whole.'"

3. "Here, [the Mother] failed to present sufficient evidence that she had a reasonable fear of imminent danger of domestic violence. Her only basis for requesting the injunction was a disputed incident three years before and a subjective fear that her anticipated request for child support might cause [the Appellant] to become angry. The Mother never alleged any recent violence or threats of violence."

4. "The trial court is also required to consider current behavior. Here, [the Appellant's] current behavior consisted of civility between the parties in determining visitation and child support issues. There had been no violence or threat of violence in the past three years. The only concerns expressed were [the Appellant's] temper, his verbal response when the mother refused to allow their son to go to Orlando, and her worry that [the Appellant] placed blame on the mother. This is simply insufficient to support an objective reasonable fear of imminent violence."

Malchan v. Howard, 29 So.3d 453 (Fla. 4th DCA 2010)

Fifth District

B. Privilege and Work Product

First District

Second District

Third District

Fourth District

Fifth District

LAW FIRM PROPERLY DISQUALIFIED WHERE MOTHER IN A PATERNITY ACTION ILLEGALLY OBTAINED A USB FLASH DRIVE BELONGING TO THE FATHER WHICH CONTAINED PRIVILEGED MATERIAL AND FIRM SPENT OVER 100 HOURS REVIEWING THE DOCUMENTS.

The Mother in hotly contested paternity proceedings illegally obtained a USB flash drive belonging to the Father which contained literally thousands of pages of documents including communications between the Father and his counsel, work product, private medical records and confidential business information of the Father and his clients. The Mother's lawyers spent over 100 hours reviewing the files then filed all of the documents in the court file and sought relief based upon the contents of the files. The trial court disqualified the firm and the District Court affirmed:

1. "While recognizing that disqualification of a party's chosen counsel is an extraordinary remedy that should be resorted to sparingly, disqualification is appropriate where a party obtains an unfair informational or tactical advantage through the disclosure of privileged information to that party's counsel."

2. "Given the nature of the information obtained by the [Mother's lawyers] from the USB drive, it cannot be reasonably disputed that an informational and tactical advantage was obtained by the Mother."

3. "For the benefit of other attorneys facing a similar dilemma, we note that the Florida Bar Commission on Professional Ethics has opined that when an attorney receives confidential documents he or she knows or reasonably should know were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issues. If the client refuses to consent to disclosure, the attorney must withdraw from further representation."

Castellano v. Winthrop, 27 So.3d 134 (Fla. 5th DCA 2010)

ERROR TO COMPEL PRODUCTION OF FINANCIAL RECORDS OF NON-PARTY TO A DISSOLUTION PROCEEDING, ABSENT SHOWING OF COMPELLING NEED FOR RECORDS SUFFICIENT TO DEFEAT PRIVACY RIGHTS OF NON-PARTY.

A non-party to a dissolution proceeding appealed from an order compelling her to produce her financial records. The District Court reversed:

1. "We conclude that Respondent failed to show a compelling need for the records sufficient to defeat Petitioner's privacy rights."

2. "We also conclude that the trial court erred by imposing sanctions against Petitioner, a non-party, absent a finding of contempt."

Morell v. Booth, 29 So.3d 429 (Fla. 5th DCA 2010)

C. Contempt and Sanctions

First District

Second District

Third District

TRIAL COURT ERRED IN HOLDING HUSBAND IN CIVIL CONTEMPT WHERE THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE THAT HE HAD THE PRESENT ABILITY TO PAY THE PURGE CONDITION.

The Husband was ordered to pay alimony of $1,700 per month and child support of $1,693 monthly as well as the $70,000 second mortgage on the former marital residence awarded to the Wife. In 2001, the Husband was held in contempt for failing to make the required payments, failing to attend a hearing, willfully fleeing the court's jurisdiction by moving to Israel and dissipating marital assets. The Husband was ordered to recover funds from an account he had improperly transferred to his sister. After an arrest in 2002, the Husband purged his contempt and began paying $800 per month toward his child support and alimony obligations. In 2007, the Wife moved for contempt. Three hearings were held where the Husband testified that he worked at his sister's jewelry shop for approximately $2,000 per month and had access to the store's bank account (containing $25,000), although all transactions not considered "day-to-day" required the approval of his sister. The Wife testified that the Husband was a talented jewelry designer who used to make $100,000 per year and had the ability to earn more than his present income. The court found that the Husband had complete dominion over the operation of the store, including access to its bank account. The court issued a civil contempt order containing a purge provision in the amount of $25,000 and ordered that the husband be taken into custody. The District Court reversed:

1. "In *Bowen v. Bowen*…. the Florida Supreme Court identified a two-step procedure for establishing a civil contempt in family support matters. First, the court must determine whether the defaulting party has willfully violated the court order; and second the court must determine an appropriate remedy. If incarceration is ordered, the court must make a separate, affirmative, finding that the defaulting party has the present ability to pay the purge condition."

2. "The finding that the former husband had the ability to pay the purge amount was based on the former husband's access to his sister's business account, the assistance previously provided by his sister, and his sister's ability to pay the purge amount. The finding that the former husband had the ability to pay the purge amount due to his access to his sister's business account was error. We also find that the facts contained in this record do not support reliance on the financial resources or good graces of the former husband's family for satisfaction of the former husband's debts."

3. "The evidence introduced below is that the business was purchased by the former husband's sister and that the former husband is working at the business as an employee under a written employment agreement. He is not a signatory on the lease nor on any of the business accounts, and he possess no ownership interest in the business…. Other than his salary

(approximately $25,000 a year), he receives no other money from the business…. [T]here is no evidence to support a finding that the former husband could pay the purge amount by *legally* accessing the business account in question."

4. "Next, we turn to the finding that the former husband's family holds the 'key' to the former husband's freedom. We recognize that under certain limited circumstances, this Court has relied on the assets of close friends and family members in determining whether a contemnor has the present ability to pay a purge amount….[T]he record in the instant case does not provide the same support for determining the former husband's ability to pay the support arrearages or the purge amount specified in the contempt order based on either the assets contained in his sister's business bank account or his ability to obtain them directly from his sister. The record is devoid of any evidence that the sister's business is covering the former husband's personal expenses; the sister is willing to pay his debts, particularly a debt that is roughly equal to his annual salary; or that the former husband has any ownership interest in the business."

5. "In the present case, the magistrate found the former husband's testimony not credible, but that does not excuse the requirement to identify an appropriate source of funds from which he could pay the purge amount."

Aburos v. Aburos, 34 So.3d 131 (Fla. 3rd DCA 2010)

Fourth District

ERROR TO ENTER ORDER AUTHORIZING SUSPENSION OF DRIVER'S LICENSE AND MOTOR VEHICLE REGISTRATION FOR FAILURE TO PAY CHILD SUPPORT WITHOUT DETERMINING CONTEMNOR'S PRESENT ABILITY TO PAY AND WITHOUT INCLUDING PURGE PROVISION.

The trial court, adopting the magistrate's findings, entered an order, in pertinent part, directing the clerk to reduce the delinquency by $154,450, but also finding the former husband delinquent and directing the clerk to process the suspension of his driver's license and motor vehicle registration. The District Court held:

1. "Florida Family Law Rule of Procedure 12.615 governs civil contempt proceedings in support matters related to family law cases and limits the use of civil contempt sanctions under the rule to those used to compel compliance with a court order and those use to compensate a movant for losses sustained as a result of a contemnor's willful failure to comply with a court order."

2. "Revocation of a delinquent child support obligor's driver's license and motor vehicle registration is a possible sanction to obtain compliance."

3. "In the instant case, the trial court erred in neglecting to include a purge provision in its contempt order that authorized the immediate revocation of the husband's driver's license and motor vehicle registration. Prior to setting a purge provision, the trial court will need to determine the former husband's present ability to pay such an amount. The findings should be included in the order."

Porush v. Porush, 23 So.3d 1284 (Fla. 4th DCA 2010)

COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING THAT HUSBAND LACKED THE ABILITY TO PAY $2 MILLION PURGE AMOUNT; SUCCESSOR JUDGE PRESIDING OVER CONTEMPT HEARING VIOLATED LAW OF THE CASE DOCTRINE BY RECONSIDERING PREDECESSOR JUDGE'S PRIOR CLARIFICATION WHICH WAS AFFIRMED ON APPEAL.

In an earlier appeal, the District Court had directed the trial court to determine what portion of a purge amount set in a contempt matter was necessary for support and the Husband's ability to pay. The trial judge who had entered the original final judgment entered an order providing that the first two of three payments labeled as "equitable distribution" were really meant as support. The Husband appealed from the clarification order which was affirmed on appeal. The Husband then declared bankruptcy and when that proceeding was concluded, the Wife again moved to hold the Husband in contempt for his failure to make the first two payments. She sought a purge amount of $2 million dollars. The case was then assigned to a successor judge. At the contempt hearing it was established that the Husband rents a furnished apartment, does not own a car and travels only when he has enough frequent flyer miles. He works as a real estate broker and claimed a total monthly income of $9,733 less expenses of $13,359. He claimed $411,109 in assets and more than $10 million dollars in liabilities, the latter which included $8 million dollars owed to the Wife in "support." In its Order on the contempt motion, the trial judge found that the Husband lacked the ability to pay the $2 million dollar purge sought by the Wife and then revisited the court's earlier finding that the first two payments were in the nature of support, finding that the payments were property distribution payments. The Wife appealed, contending that the trial court erred in revisiting the court's earlier adjudication and erred in finding that the Husband lacked the ability to pay the purge. The District Court held:

1. "We affirm the finding that he [husband] lacked the ability to pay a purge of $2 million as she [wife] requested because it is supported by substantial competent evidence."

2. "All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case. The substantive nature of the payments thereupon became the law of the case under Florida law."

3. "We reject this argument [that the clarification order was solely for the bankruptcy proceedings] because the federal court requested that it [the clarification order] be made under Florida law, not the Bankruptcy Code. We also reject his [husband's] argument on appeal that the manifest injustice exception to the law of the case doctrine would be applicable in this case. There is nothing manifestly unjust about requiring him to comply with a final judgment whose benefits he has accepted."

4. "The issue is settled. The first two payments are support. He has failed to make these payments. Contempt is available to enforce compliance. On remand we direct the trial court to determine an appropriate form and amount of purge."

Cummings v. Cummings, 37 So.3d 287 (Fla. 4th DCA 2010)

Fifth District

ERROR TO FIND FATHER IN CONTEMPT FOR FAILURE TO PAY CHILD SUPPORT AND TO ORDER FATHER INCARCERATED UNTIL PAYMENT OF PURGE AMOUNT WITHOUT MAKING FINDING THAT FATHER POSSESSED PRESENT ABILITY TO COMPLY WITH PURGE.

The Father sought habeas corpus release after being sentenced to 179 days for civil contempt for failing to pay court-ordered child support and failing to complete a court-ordered Batterer's Intervention Program. The District Court agreed that because no written order was rendered, release was mandated and ordered his immediate discharge.

1. "Under the facts of this case, no written order was rendered beyond a court minutes action document. According to the court minutes, [the Father] was held in civil contempt and a purge amount was set at $1,115.75."

2. "It is well settled that an order of civil contempt for failure to pay child support requires findings on willful failure to pay ordered amounts. If incarceration is ordered as a result of the contempt, the court must make the affirmative finding that the contemnor possesses the present ability to comply with the purges."

Grant v. Kopp, 27 So.3d 190 (Fla. 5th DCA 2010)