Florida Guardian ad Litem

Legal Briefs Newsletter
February 2017

A Note from Kelly Swartz, Director of Legal Services, Florida Guardian ad Litem Program

The Florida Guardian ad Litem Program is a powerful team of over 11,000 volunteers, 200 attorneys, and 500 staff members. Each day, GAL volunteers listen to the needs of each child and ensure their best interests are represented in court.

Our Child's Best Interest Attorneys are a critical part of ensuring children find a safe, permanent home - working in court to ensure each child has a voice. As Director of Legal Services for the Florida GAL Program, I travel across the state participating in case staffings; reviewing the work of our attorneys; and meeting the dedicated lawyers who work for the Florida GAL Program; I am impressed with their knowledge, skill, and tireless advocacy on behalf of Florida's dependent children. The influence of GAL attorneys is reflected in many of the cases in this edition of the Legal Briefs Newsletter. From E.Q. in which the court cited *Guardian ad Litem v. R.A.* reiterating the holding that a parent's right to select an adoptive resource does not trump what is in the child's best interest; to *Guardian ad Litem Program v. Department of Children and Families.* In this case, GAL attorneys appealed a termination of parental rights. The Fifth DCA cited a recent Florida Supreme Court case that the GAL Program was intensely involved in to apply a clarified least restrictive means test. See *S.M. v. Fla. Dep't of Children and Families*, 202 So. 3d 769 (Fla. 2016). GAL attorneys are passionate about their mission to represent the best interests of Florida's dependent children and are an indispensable part of the successes of the GAL Program.

Kelly Swartz, Director of Legal Services
Florida Guardian ad Litem Program

Register today for the
2017 Florida GAL Disabilities Training Conference
Register Online
The 2017 Disabilities Training Conference will be held in Orlando on May 4-5, 2017

Adoption Intervention

E.Q. v. Florida Department of Children and Families, 2017 WL 362540 (Fla. 3rd DCA)

A parent's right to select an adoptive resource does not trump a determination as to what is in the child's best interest.

Mother appealed an order denying her motion to transfer custody of the children to their paternal grandparents. The Third DCA affirmed the order.

The children were initially placed with pre-adoptive foster parents in January 2012. In November 2014, Mother filed a motion to transfer custody of the children from their foster home to the paternal grandparents. Mother was granted leave to intervene as an Adoptive Entity/Intermediary Party and to litigate the question of transfer.

Florida Statute § 63.082(6) permits intervention in a dependency case where parental rights have not been terminated and parents have executed a consent for placement with qualified adoptive parents. Subsection (6)(e) delineates the following four factors for the court to consider when determining whether a transfer of custody meets the best interests of child:

(1) The right of the parent to determine an appropriate placement for the child;
(2) The permanency offered;
(3) The child's bonding with any potential adoptive home that the child has been residing in; and
(4) The importance of maintaining sibling relationships if possible.

The Third DCA held that a parent's right to select a prospective adoptive parent is not absolute and must be considered along with what is in the child's best interest. Citing Guardian ad Litem Program v. R.A., 995 So. 2d 1083 (Fla. 5th DCA 2008), the Third DCA noted the standard for ordering a change in placement is whether the change is in the child's best interest. The court is not obligated to place a child with a relative if placement with the relative is not in the child's best interest.

In the instant case, the grandparents were in their 70s and the grandfather had health problems. The children had not had meaningful contact with the grandparents since prior to placement in 2012. The children were bonded to their foster parents and desired to remain with them.

Read the Opinion

Interpreting the *S.M.* Case - Least Restrictive Means

Guardian ad Litem Program v. Department of Children and Families, 2016 WL 7497280 (Fla. 5th DCA)

This is the first district court case applying the least restrictive means test since it was recently clarified by the Supreme Court of Florida. S.M. v. Fla. Dep't of Children and Families, 202 So. 3d 769, 778 (Fla. 2016).

The Guardian ad Litem Program appealed denial of Mother and Father's parental rights to their twins. Although the trial court found that the Department established grounds for termination of parental rights and found that termination of parental rights was in the children's best interest, the court denied termination under the least restrictive means analysis. The trial court found that giving Mother an additional six months to work on her case plan was equally safe for the children. The Fifth DCA reversed.

The Fifth District Court of Appeal turned to the recent Supreme Court case, which clarified conflicting applications of the least restrictive means test and adopted the Fourth District's position. Id. The Supreme Court held that the Fourth District properly put the focus on the Department's actions prior to filing the termination petition rather on what remained of the parent/child bond.

> The test is not whether under controlled circumstances, a parent can have contact with the child and develop an emotional bond, but whether a mother or a father can be a parent to the child, with all the responsibility and care that entails. If reunification is not possible because the father or mother cannot or will not assume responsibility as a parent to the child, as demonstrated, for example, by the repeated failure to comply with a case plan, then termination is the least restrictive means of preventing harm.

Id. at 780, quoting S.M. v. Dep't of Children and Families, 190 So. 3d 125, 129 (Fla. 4th DCA 2015).

In the instant case, the trial court's order denying termination held that the Department offered Mother several case plans. She failed to comply with any of the case plans. The Fifth DCA held that this finding alone meets the least restrictive means test. Additionally, the Fifth DCA held that the trial court improperly looked beyond the date of the petition to the possibility of Mother making improvements in six additional months. The trial court should have limited its focus only on the Department's efforts prior to the filing of the termination petition.

Read the Opinion

Witness Testimony - Right to Confront Witness

S.D. v. Department of Children and Families, 2017 WL 52636 (Fla. 3rd DCA)

Dependency proceedings are civil in nature. The constitutional right to confront witnesses does not apply.

Father appealed termination of his parental rights based on his alleged lack of consent to a witness testifying via Skype, the lack of a notary to administer the oath prior to the witness' Skpye testimony and alleged violation of his right to confront a witness. The Third DCA affirmed.

Father's adult daughter testified via Skype at trial. Father originally consented to his daughter testifying by telephone or Skype but revoked his consent three days prior to trial. The trial court heard argument on the revocation of consent and determined Father failed to show good cause to revoke consent so close to trial, that he waived his right to object to her Skype testimony and that testimony via Skype protected his right to confrontation.

The Third DCA agreed with the trial court that Father waived his right to object to his daughter's telephonic testimony. The right to confront witnesses is not implicated in a civil dependency proceeding. Moreover, the testimony via Skype gave Father the opportunity to cross-examine the witness. As to the issue of the notary, the Department corrected this by reopening the case to swear in the witness.

Read the Opinion

Immigration - Determination of Dependency

M.P.L. v. Department of Children and Families, 2017 WL 192024 (Fla. 4th DCA)

Establishing dependency based on being a child with "no parent or legal custodians capable of providing supervision and care." § 39.01(15)(e), Fla. Stat. (2015)

Judge Forst's dissent noted the textual discrepancy between Florida Statute § 39.01(15)(e), which limits a child's caregiver to "parents or legal custodians," and Florida Statute § 39.01(15)(g), which lists "parent, legal custodian, or responsible adult relative." The dissent found that the trial court's likening of "legal custodian" to "caregiver" when addressing subsection (15)(e) was a mistake and a violation of the separation of powers. Judge Forst noted had the legislature intended to include caregivers or adult relatives in subsection (15)(e), the legislature would have done so as it did in subsection (15)(g).

Judge Forst believed M.P.L. met her burden of establishing dependency pursuant to Florida Statute § 39.01(15)(e) as being a child with "no parent or legal custodians capable of providing supervision or care." M.P.L. left an abusive father in Guatemala and was living with a sister in Florida. The sister was not a legal custodian pursuant to subsection (15)(e).

Read the Opinion

Parental Drug Use as a Basis for Dependency

M.S. v. Department of Children and Families, 2017 WL 456892 (Fla. 5th DCA)

Father appealed an adjudication order, which found his children dependent based on his recent drug-related arrests. No evidence was presented as to the circumstances of the arrests or how the arrests harmed the children. The Fifth DCA found evidence of drug use alone is insufficient to support an adjudication of dependency. The Fifth DCA reversed and remanded.

Read the Opinion

Evidence - Supreme Court Declined to Adopt the Daubert Amendment

In Re: Amendments to the Florida Evidence Code, 2017 WL 6337700 (Fla.)

The Supreme Court of Florida declined to adopt several legislative amendments, including an amendment (Daubert Amendment) replacing the Frye standard for admitting expert opinion evidence with the Daubert standard.

The Daubert Amendment amended Florida Statutes § 90.702 and 90.704 (2012) and changed the standard of admissibility for scientific expert evidence.

Previously, Florida applied the Frye standard, which applies to expert testimony based on new scientific evidence and requires that it "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993), quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). The United States Supreme Court held in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), that Federal Rule of Evidence 702 superseded Frye's test. Federal Rule 702 provides that an expert witness may testify as to his/her opinion if the following is met:

> (a) The expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data;
> (c) The testimony is the product of reliable principals and methods; and
> (d) The expert has reliably applied the principals and methods to the facts of the case.

The Court in Daubert held that application of Federal Rule 702 requires the court to ensure that all scientific evidence is "not only relevant, but reliable." Id. at 579.

First, the legislature amended 90.702 to mirror Federal Rule of Evidence 702, specifically eliminating the provision which stated "the opinion is admissible only if it can be applied to evidence at trial." Second, the legislature added the following language to 90.704: "Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their

probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

The Florida Bar's Code and Rules of Evidence Committee recommended that the Supreme Court decline to adopt the amendments and raised what the Supreme Court felt to be "grave constitutional concerns:" the right to a jury trial and access to the courts. The Court published the Committee's report for comment. The Court received fifty-six comments in favor of the Committee's request and one hundred and thirty-one comments in opposition to the Committee's recommendation. Based on the existence of constitutionality concerns, without addressing them specifically, the Court declined to adopt the Daubert Amendment.

Read the Opinion

Available Now - GAL Volunteer Pre-Service Training Course with Interpreters and Closed Captioning

The Florida Guardian ad Litem Program is proud to announce a new series of guardian ad litem volunteer pre-service training videos - **GAL Volunteer Training Course with Interpreters and Closed Captioning** for the hearing impaired community. These videos are available as a resource for those potential GAL volunteers who have a hearing impairment and would like a sign language interpreter in their efforts to become a GAL volunteer. Learn more by visiting the **Florida Statewide Guardian ad Litem Program website.**

Florida Statewide Guardian ad Litem Program | Questions or Comments Email Liz Damski | Guardian ad Litem Website

JOIN OUR MAILING LIST

Like us on Facebook