

SUCCESSFULLY PROVING BEST INTEREST MAY 22, 2015



PRESENTERS:

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ROADMAP

BEST INTEREST ATTORNEYS

- ◆ Advocate for the child's best interest at all stages of the Dependency case.
- ◆ GAL Mission "*I am for the child*"

HYPO

Adam came into care 3 years ago due to medical neglect, and the parents were offered a reunification case plan. Adam is currently 16 years old, autistic, and nonverbal. Adam was housed in an acute psychiatric facility for two years. Adam used to engage in self harming conduct daily. However, one year ago, Adam was placed with his maternal aunt, who is a registered nurse. There are currently intensive wrap-around services in the home for the next 90 days. Adam's psychotropic medications have been substantially reduced, and he is not exhibiting any self harming behavior. Adam can use the bathroom alone, he attends regular school, and can sit through a movie. He uses some words now and communicates through a device.

The parents are not compliant with their case plan tasks. The mother has not visited Adam in years. The father visits at least once per week now that Adam lives with a relative. The father does not attend any of Adam's medical or therapeutic appointment; sporadically provides child support; and does not assist the aunt with any parental responsibilities during the visits. The father has an IQ of 72. He loves Adam, and will not relinquish his parental rights. Adam's aunt would like to adopt him, but is willing to consider a permanent guardianship.

How to be successful in your advocacy:

- Know the elements of the Manifest Best Interest
- Be informed about complex issues of children with disabilities
- Prepare for hearings

Know the elements required for Manifest Best Interest:

Manifest Best Interest: In accordance with Florida Statute § 39.802(4)(c), Florida Statute § 39.810(1)-11 , it is in the manifest best interest of the child for parental rights to be terminated for the following reasons:

- ◆ 1. Regarding any suitable permanent custody arrangement with a relative of the child.
- ◆ 2. Regarding the ability and disposition of the parent or parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child.
- ◆ 3. Regarding the capacity of the parent or parents to care for the child to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered upon the child's return home.
- ◆ 4. Regarding the present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.

- ◆ 5. Regarding the love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.
- ◆ 6. Regarding the likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.
- ◆ 7. Regarding the child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.
- ◆ 8. Regarding the length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- ◆ 9. Regarding the depth of the relationship existing between the child and the present custodian.
- ◆ 10. Regarding the reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- ◆ 11. Regarding the recommendations for the child provided by the child's guardian ad litem or the legal representative.

Guidelines for GAL questions for the MBI evidence

1. Lay a foundation for your witness, specifically, how is the witness able to testify as to MBI. What is their familiarity with the children/parents.

- ◆ GAL volunteer
- ◆ Caregiver
- ◆ Case manager
- ◆ Child's therapist
- ◆ Parent's therapist

Do not end questioning with a 'yes' or 'no' answer. (See *In re N.F.*, 82 So. 3d 1188 (Fla. 2DCA 2012): (perfunctory, parroted responses concerning MBI factors is insufficient). Elicit facts that support the 'yes' or 'no' answer.

2. Elicit facts concerning MBI throughout the trial, not just at the end when the GAL testifies.

- ◆ When inquiring about the parent's income, ask if the income is sufficient to provide for the children.
- ◆ If a child has disabilities, inquire if the parent is trained to handle those disabilities

- 3.** Treat each child separately. If the children are similarly situation, ask as much (ie, twins). Never assume the answer is obvious, always make sure the evidence is presented to the court.
- 4.** Follow the statute and be sure to cover all factors.

SUGGESTED MBI QUESTIONS

- ◆ 1. Would reunification with the parent result in a substantial risk of significant harm to child?
- ◆ 2. If the child were placed in permanent guardianship, would it result in a substantial risk of significant harm?
- ◆ 3. Why is adoption a preferred permanency option for the child?
- ◆ 4. Is it in the child's best interests to have stable, secure parents through adoption?
- ◆ 5. If adoption and permanent guardianship result in the same placement, which permanency option is preferred and why?

MBI Case Law:

- ◆ In re N.F., 82 So. 3d 1188 (Fla. 2DCA 2012)
- ◆ TPR reversed for a failure to present clear and convincing evidence of case plan non-compliance. Of note was the appellate court's opinion concerning the MBI evidence:
 - ◆ “At one point during the case manager’s testimony, the Department’s attorney posed a litany of questions that simply parroted the manifest best interests factors set forth in [section 39.810, Florida Statutes \(2010\)](#). For example:
 - ◆ Q. Has the mother demonstrated the ability or disposition to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law?
 - ◆ See [§ 39.810\(2\)](#). The case manager answered this and the other questions derived from [section 39.810](#) with a simple “no.”¹ The Department did not elicit any facts that would explain the case manager’s negative conclusions.
 - ◆ The Department’s evidence from the guardian ad litem was equally perfunctory. The guardian who testified at the hearing had been assigned to the case after the petition for termination was filed, i.e., after the circuit court had suspended N.F.’s contact with the child, and therefore the guardian had never observed the mother and child together. The Department’s counsel asked the guardian if she had reviewed the case file, met with the child, and met with the mother, to which the guardian answered “yes.” The Department’s next question was: What is your recommendation for permanency for the child?” The guardian responded, simply, “termination of parental rights.” Again, the Department elicited no facts upon which this recommendation was grounded.”

● **In re K.A., 880 So. 2d 705 (Fla. 2d DCA 2004)**

- In cases where the State seeks to terminate parental rights to numerous children, the trial court cannot treat the children as an amorphous group in which the best interests of one will meet the interests of all; rather, the trial court must individually determine whether the termination of parental rights to each child is permitted by the statute, is the least restrictive means to protect that child, and is in that child's manifest best interests.

● **C.B. v. Department of Children & Families, 879 So. 2d 82 (Fla. 4th DCA 2004)**

- Termination of mother's parental rights, based on prospective abuse, was in child's best interest; mother did not have capacity to safely care for or protect child, child had bonded with his current parental substitute and siblings, there was little likelihood of child remaining in long-term foster care, and even if suitable relatives were available to care for child, in the past other relatives had given little credence to court orders to allow mother only supervised visits with child..

● **B.S. v. Department of Children and Families, 860 So. 2d 1038 (Fla. 5th DCA 2003)**

Termination of mother's parental rights was in children's manifest best interests, although children had special needs, and although children suffered from severe emotional and behavioral problems; evidence indicated that it was unlikely that children would remain in long-term foster care, children could be adopted, and children had demonstrated ability to form bonds with substitute care givers.

● **C.M. v. Department of Children and Family Services, 854 So. 2d 777 (Fla. 4th DCA 2003)**

- A termination of parental rights proceeding involves a two-step process: (1) the court must find by clear and convincing evidence that one of the statutory grounds has been proven, and (2) the court must determine what outcome is in the manifest best interest of the children Fla. Stat. § 39.806.

- **T.P. v. Department of Children and Family Services, 935 So. 2d 621 (Fla. 3d Dist. 2006)**
 - Substantial competent evidence supported trial court's determination that it was in manifest best interest of children to terminate father's parental rights, and that there were no less restrictive means to protect children; daughter was present in home at time father committed egregious abuse on her twin siblings, daughter became hysterical when twins were separated from her to attend supervised family visits, and father's statements regarding how he shook infant twins showed a lack of regard to their well-being, which supported finding that he posed substantial risk of significant harm to daughter.
- **R.W. v. Department of Children and Families, 925 So. 2d 424 (Fla. 5th DCA 2006)**
 - Trial court's finding that termination of mother's parental rights was in child's best interests was supported by clear and convincing evidence; child had a multiple serious medical conditions, mother repeatedly was unable to provide the necessary care required by child, and mother was unable to complete the agreed-upon case plans.
- **In re A.L.R., 918 So. 2d 395 (Fla. 2d DCA 2006)**
 - Trial court's failure to address whether termination of the parental rights of divorced father who was convicted in military court of sexually abusing his stepdaughters was in the manifest best interests of his daughter, or whether termination was the least restrictive means to protect daughter, required reversal of trial court's order terminating father's parental rights; trial court discussed daughter's best interests but did not refer to statute containing the manifest best interests standard or discuss the factors listed in statute, and trial court did not address at all whether termination was the least restrictive means of protecting daughter.

- ◆ **Department of Children and Family Services v. M.J., 889 So. 2d 986 (Fla. 4th DCA 2004)**
 - ◆ There was clear and convincing evidence that termination of mother's parental rights was warranted and in the best interests of the children; evidence indicated that father's sexual deviancy placed children at extreme risk and that mother refused to protect children from father.

HOW TO ADVOCATE FOR A DISABLED CHILD' S BEST INTEREST:

- ◆ The court can order mental health evaluations and developmental services for the children at anytime they are needed.
 - ◆ Judicial Reviews and other hearings.
 - ◆ Staffings (FST / Advocacy/ Permanency etc...)
 - ◆ Include in reports to the court

Accurate Diagnosis

- ◆ Good Examiner you can check credentials online
- ◆ Accurate information did the information come from someone with a bias
- ◆ Adequate information were medical records and background info provided (school / parents/ GAL/ others)
- ◆ Did the examination of the child include testing and an interview of the child

Medication after the diagnosis

- ◆ There must be a court order or parental consent
- ◆ If no parental consent, the GAL will have a voice before a court order can be obtained
- ◆ Review the medication report and forward to your CAM and volunteer
- ◆ Obtain a 2nd opinion or use the med consult option if needed
- ◆ GAL team should review the medication report for appropriateness and with close attention to the diagnosis and other details
- ◆ Follow up should include checking to see that the order is signed and that the prescription is filled.

PREPARING FOR AN IMPORTANT HEARING

- ◆ Review statutes and rules
- ◆ Review related case law, stay on top of latest cases
 - ◆ Case summaries and Legal Briefs Newsletter available at
 - ◆ www.guardianadlitem.org
- ◆ Identify factors to be considered
- ◆ Identify elements that must be established by evidence at the hearing
- ◆ Prepare a timeline
- ◆ Chart your evidence

Elements in Proving TPR Grounds	Proof - Evidence	Possible Source	How GAL will show
Abandonment: Abandonment as defined in § 39.01(1), or when the identity or location of the parent or parents is unknown and cannot be ascertained by diligent search within 60 days. § 39.806(1)(b)			
While being able	List of services provided while incarcerated, proof of financial ability, job, etc	Case manager GAL Volunteer	Testimony exhibits
Parent Made No Effort to Support; AND	Child support; Sent “necessaries”; gave authorization for medical treatment; tried to pick up child	Service Worker; GAL Volunteer or CC Foster Parent or Custodian	Testimony exhibits
No Communication; OR	Visitation; letters; phone calls; internet	Service Worker; GAL Volunteer or CC Foster Parent or Custodian	
Engaged in egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct that threatens the life, safety, or physical, mental or emotional health of the child or the child’s sibling (<i>prospective abuse</i>) § 39.806(1)(f)			

Elements in Proving TPR Grounds	Proof - Evidence	Possible Source	How GAL will show
Egregious Conduct <i>Can be one incident if it is so severe as to endanger the life of the child</i>	Conduct		
Harmed child or placed child at imminent risk of harm	Terrible pain no one could miss inflicted injury		
There must be a nexus between the conduct and the abuse, neglect , or specific harm to the child		Expert Testimony Police Reports Witness to Egregious Behavior	

OBJECTIONS

- ◆ Objections are necessary to ensure rules of evidence are followed and to preserve the record for appeal.
- ◆ Objections should be made after the question is asked, before the answer is given.
 - ◆ Try not to interrupt a question; however, if it is significant, and you feel the witness will answer before you can object, it may be better to interrupt to stop the flow.
- ◆ Interrupt the question even if it is incomplete if it is apparently improper.
- ◆ ***How to object:***
 - ◆ “Objection” and state legal basis.
 - ◆ i.e. “objection – hearsay.”
 - ◆ Objection – relevance.
 - ◆ Better practice to state legal grounds and not to argue for the objection to be sustained or overruled unless the court elicits such argument.
 - ◆ Do not coach your opponent’s witness, and don’t permit your opponent to coach his or her own witness during an objection debate. Ask for a sidebar.

- ◆ Be sure to get a ruling, if not ruled upon, ask the judge to rule for the record to avoid waiver on appeal.
- ◆ Have the answer struck if applicable
- ◆ If your opponent is successful at objecting to one of your questions, have another plan to get facts into evidence. Anticipate objections and be prepared to overcome them.

COMMON OBJECTIONS

- ◆ Be familiar with common objections, both how to use them and how to overcome them:
- | | | |
|----------------------------------|-----|----------------------------|
| 1. Ambiguous | 7. | Conclusion |
| 2. Argumentative | 8. | Confusing |
| 3. Asked and answered | 9. | Counsel testifying |
| 4. Assumes facts not in evidence | 10. | Cumulative |
| 5. Beyond scope of direct/cross | 11. | Foundation (aka predicate) |
| 6. Compound question | 12. | Hearsay |

COMMON OBJECTIONS CONT.

- | | | | |
|-----|----------------------|-----|--------------|
| 13. | Improper impeachment | 17. | Opinion |
| 14. | Irrelevant | 18. | Privilege |
| 15. | Leading | 19. | Speculation |
| 16. | Narrative | 20. | Unresponsive |

EXPERT WITNESSES

The Daubert Standard

Presented in detail by Laura Lawson and Vanessa Cordero Thursday afternoon.

QUALIFYING A WITNESS AS AN EXPERT USING THE DAUBERT STANDARD

On July 1, 2013, Florida Rule of Evidence 90.702 was amended to reflect Federal Rule of Evidence 702.

- ❖ Florida Rule of Evidence 90.702 - Testimony by experts: a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
 1. The testimony is based upon sufficient facts or data;
 2. The testimony is the product of reliable principles and methods; and
 3. The witness has applied the principles and methods reliably to the facts of the case.

- ◆ The amendment rejected the admission of “pure opinion” testimony based simply on the expert’s experience and training where there are not sufficient safeguards to determine the reliability of the opinion. AKA the Daubert standard.
- ◆ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 588-94 (1993).
- ◆ The focus now should be whether that expert’s opinion will be admitted into evidence.
- ◆ Focus on what was used by the expert to form the basis of the opinion:
 - ◆ - Methodology
 - ◆ - Practices
 - ◆ - Theories
 - ◆ - Accepted industry standards
- ◆ The expert witness must be able to explain the theory that the opinion testimony is based on. Link the opinion to the industry standards that the expert relies on.
- ◆ The witness should state why the relied upon theory works.
- ◆ Daubert addresses more hard science, whereas most dependency cases focus more on social sciences and mental health science.

IMPEACHMENT OF THE WITNESS

INCONSISTENT STATEMENTS – LAYING A FOUNDATION

- Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is given an opportunity to question the witness on the matter.
- If a witness denied making or does not acknowledge making the prior inconsistent statement, extrinsic evidence of the statement is admissible, this does not apply regarding to party opponent (F.E.C. 90.803)
- A prior statement that is written down must be viewed by the witness before they are questioned about the statement.

CRIME AS THE BASIS FOR IMPEACHMENT

- To be used for impeachment a conviction must be for a felony or misdemeanor involving dishonesty or a false statement. Florida Code does not require the trial court to balance probative value of a felony conviction not involving dishonesty or false statements against unfair prejudice.
- A party cannot ask specifics about the convictions unless the witness is untruthful about the whether he/she has such prior convictions and how many convictions exist.

BUSINESS RECORDS

What types of documents do we use in Dependency as Business Records?

- ◆ Prepare the witness if you intend to introduce business records.
 - ◆ Example: visitation reports.

REFRESHING THE WITNESS' MEMORY ON DIRECT (Fla. Stat. §90.613).

- ◆ Witness knows the facts, but has a memory lapse on the stand.
- ◆ Witness knows that a report or exhibit will help to jog his or her memory.
- ◆ Witness is provided with the report or exhibit for review.
- ◆ Witness states that his or her memory is now refreshed.
- ◆ Witness testifies to what he or she knows (without the aid of the report).

REFRESHING THE WITNESS' MEMORY ON DIRECT (Fla. Stat. §90.613).

- ◆ If the witness has no present memory of the information after reviewing the document, the witness will not be permitted to read from the report.
- ◆ Exception: if there is an applicable hearsay rule.

REFRESHING THE WITNESS' MEMORY ON DIRECT (Fla. Stat. §90.613).

- ◆ Examples of documents that may be used to refresh a GAL's recollection
- ◆ GAL's monthly visitation report.
- ◆ GAL's judicial review or status report to the court.

REFRESHING THE WITNESS' MEMORY ON DIRECT **(Fla. Stat. §90.613).**

- ◆ Opposing counsel is entitled to inspect the document and cross-examine the witness based on the document.

- ◆ Opposing counsel may introduce portions of the report into evidence based on its relation to the witness' testimony.

REFRESHING THE WITNESS' MEMORY ON DIRECT (Fla. Stat. §90.613).

◆ **OBJECTIONS TO REFRESHING RECOLLECTION**

- ◆ The witness has not actually demonstrated a failure of memory.
- ◆ The witness is reading from the document used to refresh their recollection, but the document is not in evidence.

ADMITTING VIDEOTAPES AND MOTION PICTURES (Fla. Stat. §90.401(3))

- ◆ The video is relevant.
- ◆ The witness is familiar with the scene.
- ◆ The witness explains why he or she is familiar with the scene.
- ◆ The witness recognizes the object or scene in the video.
- ◆ The witness recognizes the voices, locations, and persons depicted on the video.
- ◆ The video is a “fair and accurate representation” of a material fact or issue.



► QUESTIONS?

HYPO

Adam came into care 3 years ago due to medical neglect, and the parents were offered a reunification case plan. Adam is currently 16 years old, autistic, and nonverbal. Adam was housed in an acute psychiatric facility for two years. Adam used to engage in self harming conduct daily. However, one year ago, Adam was placed with his maternal aunt, who is a registered nurse. There are currently intensive wrap-around services in the home for the next 90 days. Adam's psychotropic medications have been substantially reduced, and he is not exhibiting any self harming behavior. Adam can use the bathroom alone, he attends regular school, and can sit through a movie. He uses some words now and communicates through a device.

The parents are not compliant with their case plan tasks. The mother has not visited Adam in years. The father visits at least once per week now that Adam lives with a relative. The father does not attend any of Adam's medical or therapeutic appointment; sporadically provides child support; and does not assist the aunt with any parental responsibilities during the visits. The father has an IQ of 72. He loves Adam, and will not relinquish his parental rights. Adam's aunt would like to adopt him, but is willing to consider a permanent guardianship.

- ◆ If the GAL recommends a goal of permanent guardianship, how would you prepare for the evidentiary hearing?
- ◆ Who are your witnesses?
- ◆ What evidence would you present?

If the GAL recommends a goal of adoption, how would you prepare for a TPR trial?

- ◆ What are the legal grounds?
- ◆ What evidence will you present?
- ◆ Who are your witnesses?

**The Department and the GALP are not in agreement
regarding the appropriate permanency option for Adam.
How do you resolve the conflict?**



► QUESTIONS?

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