

First District Court of Appeal *Preserving issues for Appeal*

K.J. v. Department of Children and Families, 2010 WL 1477567 9 (Fla. 1st DCA)

The mother appealed the trial court's order terminating her parental rights. The trial court's termination order was based upon § 39.806(1)(c) and § 39.806(1)(l). Section 39.806(1)(l), which took effect on July 1, 2008, provides that parental rights may be terminated if "[o]n three or more occasions the child or another child of the parent or parents has been placed in out-of-home care pursuant to this chapter, and the conditions that led to the child's out-of-home placement were caused by the parent or parents."

The mother argues that "termination under § 39.806(1)(l) was an improper retroactive application of the statute because two of the three removals occurred prior to the statute's effective date and that the evidence did not support termination under § 39.806(1)(c)."

The First District Court of Appeal (First DCA) held that because the mother failed to bring up the issue in the trial court, it was not preserved for appeal. The issue was not preserved because no motion for judgment of dismissal was filed. The First DCA certified conflict with the Fourth District Court of Appeals decision which held that that "such a motion is not required to preserve issues of sufficiency of the evidence for appellate review." *H.D. v. Dep't of Children & Families*, 964 So.2d 818, 819 (Fla. 4th DCA 2007), *rev. dismissed*, 985 So.2d 1059 (Fla.2008).

The First DCA affirmed the trial court's termination of parental rights as the mother did not preserve the issues for appeal.

Judge Hawkes, in his concurring opinion, discussed the issue of retroactivity. "The Legislature, within broad constitutional parameters, is always able to place consequences on individual behavior. Here, the Legislature concluded it is harmful for children to be removed from the same home numerous times; therefore, prior instances of out-of-home placement can be relied on in establishing grounds for the termination of parental rights."



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Second District Court of Appeal *Substantial Compliance with Case Plan*

In re E.C., 2010 WL 1049937 (Fla. 2d DCA)

The parents appealed the trial court's order terminating their parental rights to their youngest child. The termination was based on §39.801 (1)(e)1 - failure to substantially comply with their case plan. The parents argue that because the case plan included names of their older children, but not the youngest (who was born cocaine positive during the time the older children were in the care of the Department of Children and Families (the department)) their rights could not be terminated as to the youngest child.

The Second District Court of Appeal (Second DCA) affirmed the trial court's order. The case plan was approved by the court and relied upon by the parties throughout the proceedings even though it was not filed in the court file. The Second DCA concluded that the error was not fundamental based on the specific facts of the case. The parents never objected to the case plan not having the youngest child's name, and "it is clear that the parents were aware of the case plan and that they were aware that they were required to perform their tasks in order to be reunited with their children."

The Second DCA affirmed the trial court's order terminating parental rights.



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Third District Court of Appeal

Consent to Termination of Parental Rights

A.C. v. Department of Children and Families, 2010 WL 1460207 (Fla. 3d DCA)

The mother appealed the trial court's denial of her motion to withdraw, vacate, or set aside her consent to termination of parental rights. The Third District Court of Appeal (Third DCA) upheld the trial court's denial. The trial court properly held that there was no showing of fraud, duress, or undue influence in the mother's consent. When the affidavit of consent was originally signed, the trial judge "held a hearing on the consent to terminate her rights and questioned [mother] extensively as to whether she had voluntarily signed the consent to termination and whether she understood she was giving up her parental rights and her right to trial. The trial judge cautioned her that the prospective adoptive parent was not guaranteed and that she could not withdraw her consent. [Mother] acknowledged that she was not under the influence of drugs, alcohol or medication and that she understood all that was happening."

The Third DCA affirmed the trial court's denial of mother's motion.



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Fourth District Court of Appeal

Findings – Permanent Guardianship

C.A. v. Department of Children & Families, 27 So.3d 241 (Fla. 4th DCA 2010)

The trial court granted the Department of Children and Families' (the department) motion to terminate protective supervision and place the child in a permanent guardianship. On appeal the Fourth District Court of Appeal (Fourth DCA) held that "mother's non-compliance with reunification case plan by itself was insufficient to support child's placement into permanent guardianship." The trial court then placed the child in permanent guardianship and denied mother's motion for reunification. The mother appealed the trial court's order.

The Fourth DCA disagrees with the trial court's decision to place the child in permanent guardianship and deny reunification with the mother. The trial court bases its decision on the mother not completing her case plan. However, "a parent's non-compliance with a case plan is not a statutory ground for placement of a child in a permanent guardianship, although it is a factor that may be "relevant to the trial court's inquiry regarding the parent's fitness to care for the child and whether reunification is possible. See *C.A. v. Dep't of Children & Families*, 988 So.2d 1247, 1249 (Fla. 4th DCA 2008)."

The Fourth DCA held that "trial court made no findings, either orally or in writing, that reunification would endanger the child's safety, well-being, and physical, mental, and emotional health, and there is no competent substantial evidence in the record to support such a determination."

The Fourth DCA reversed and remanded with instructions that the motion for reunification be granted and the department's supervision reinstated.



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Presence of Child at Hearing, Right to Jury Trial, and Incarceration as a Ground for Termination of Parental Rights

W.S. v. Department of Children and Families, 2010 WL 1329709 (Fla. 4th DCA)

The father appealed the trial court's termination of his parental rights. The father raised three issues on appeal.

First, the father claims that the trial court erred in denying his motion to have the child present at trial. Florida Rule of Juvenile Procedure 8.255(b) provides "the child has a right to be present at the hearing unless the court finds that the child's mental or physical condition or age is such that a court appearance is not in the best interest of the child." The Fourth District Court of Appeal (Fourth DCA) held that the trial court properly denied the father's motion to have his child present in court. The trial court found, after expert testimony, that the child's appearance in court would have been detrimental to the child.

Second, the father contends that the trial court's decision to terminate his parental rights was based in part on his incarceration. Incarceration alone cannot be grounds for termination of parental rights. See *In re J.B.*, 923 So.2d 1201 (Fla. 2d DCA 2006). The Fourth DCA held that the trial court only stated that the father was incarcerated because of his neglect of the child. Incarceration was not the ground for termination.

Finally, the father argues that he should have been entitled to a jury trial. The Fourth DCA held that dependency proceedings are not afforded the same protections as criminal proceedings. "[The] supreme court has already determined that such proceedings are not entitled to the protections of a criminal trial, because the procedures and goals in place in child dependency and termination proceedings are different than those for criminal prosecutions. See *S.B. v. Dep't of Children and Families*, 851 So.2d 689, 693 (Fla.2003). In addition, the right to trial by jury under Article I, Section 22, is limited to those types of proceedings in which a trial by jury existed prior to the adoption of our constitution. See *O'Neal v. Fla. A & M Univ. ex rel. Bd. of Trs. for Fla. A & M Univ.*, 989 So.2d 6, 8-9 (Fla. 1st DCA 2008)."

The Fourth DCA affirmed the trial court's order terminating the father's parental rights.



Read the Opinion

Parent's Right to Introduce Evidence at Shelter Hearing

L.M.B. v. Department of Children and Families, 28 So.3d 217 (Fla. 4th DCA 2010)

The mother filed a writ of certiorari after the trial court entered a shelter order. The mother argued that the trial court denied her the opportunity to present evidence at the shelter hearing.

The Fourth District Court of Appeal (Fourth DCA) held that the trial court denying the mother an opportunity to present evidence at the shelter hearing was a departure from the essential requirements of law. "The Florida Legislature has provided parents with a statutory right to present evidence at shelter hearings. § 39.402(8)(c)3., Fla. Stat. (2009) (providing that at a shelter hearing, the court shall "[g]ive the parents or legal custodians an opportunity to be heard and to present evidence"). See also § 39.402(5)(b)1., Fla. Stat. (2009) (providing that parents must be given notice that "[t]hey will be given an opportunity to be heard and to present evidence at the shelter hearing")."

The Department of Children and Families (the department) argues that the right to present evidence as to probable cause is not clear because there is a conflict between the Rules of Juvenile Procedure. Fla. R. Juv. P. 8.305(b)(3) states: "The issue of probable cause shall be determined in a nonadversarial manner, applying the standard of proof necessary for an arrest warrant." Fla. R. Juv. P. 8.305(b)(4) states: "At the hearing, all interested persons present shall have an opportunity to be heard and

present evidence on the criteria for placement provided by law.” If parents were not permitted to introduce evidence the shelter hearing would be a pointless formality.

The Fourth DCA denied the mother’s petition because she had already consented to an adjudication of dependency.



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Fifth District Court of Appeal *Findings – Permanent Guardianship*

R.T., Sr. v. Department of Children and Families, 27 So.3d 195 (Fla. 5th DCA 2010)

The father appealed the trial court’s order terminating the Department of Children and Families’ (the department) protective supervision over his daughter and placing her in the permanent guardianship of her older half-brother. The father argued that the trial court’s order did not comply with § 39.6221(2)(a), Fla. Stat. (2008). Section 39.6221(2)(a) requires that the trial court “list the circumstances or reasons why the child’s parents are not fit to care for the child and why reunification is not possible by referring to specific findings of fact made in its order adjudicating the child dependent or by making separate findings of fact...”

The Fifth District Court of Appeal (Fifth DCA) held that the trial court’s order stating that reunification was not in the child’s best interest was legally insufficient. The guardianship order “fails to comply with the statutory requirement for written findings because the order does not refer to specific findings of fact set forth in the trial court’s dependency order nor contain separate findings of fact regarding the issue of reunification.”

The Fifth DCA reversed and remanded the trial court’s order terminating protective supervision and placing child in a permanent guardianship.



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Custody Given to Non-offending Parent when the Offending Parent has a Case Plan Goal of Reunification

M.M. v. Department of Children and Families, 2010 WL 979589 (Fla. 5th DCA)

The mother appealed the trial court’s final order awarding permanent custody of her two middle children to their non-offending father under § 39.521(3), Fla. Stat. (2007), and terminating jurisdiction over her dependency case. The order was entered after a hearing on the mother’s motion for reunification. Both the mother and the Department of Children and Families agreed that the mother had substantially complied with her case plan. The trial court never determined her compliance.

The Fifth District Court of Appeal (Fifth DCA) held that “it is reversible error to permanently award custody to a non-offending parent when the offending parent has a case plan goal of reunification and has either substantially complied with the plan, or where the time for compliance has not yet expired—at least without a finding that reunification would be detrimental to the children. E.g., K.E. v. Dep’t of Children and Families, 958 So.2d 968, 972 (Fla. 5th DCA 2007); R.H. v. Dep’t of Children and Families, 948 So.2d 898, 900 (Fla. 5th DCA 2007); D.G. v. Dep’t of Children and Families, 903 So.2d 1042 (Fla. 5th DCA 2005); D.S. v. Dep’t of Children and Families, 900 So.2d 628, 631-32 (Fla. 5th DCA 2005).”

The Fifth DCA reversed and remanded the trial court’s order.



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Substantial Compliance

R.A. v. Department of Children and Families, 2010 WL 1240978 (Fla. 5th DCA)

The father appealed the trial court's order terminating his parental rights. The Department of Children and Families (the department) sheltered the child due to the mother's incarceration and the father's admitted inability to provide adequate care. The father had a case plan of reunification. The department filed a petition for termination of the father's parental rights. The trial court found that the father had failed to substantially comply with his case plan pursuant to § 39.806(1)(e), Fla. Stat. (2007) and terminated his parental rights.

Fifth District Court of Appeal (Fifth DCA) held that "substantial compliance" is a term of art and not merely a determination of whether or not the case plan has been completed. Substantial compliance' means that the circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child's parent." § 39.01(71) (emphasis added); see E.R. v. Dep't of Children & Family Servs., 937 So.2d 1196, 1198 (Fla. 3d DCA 2006)." The father had obtained stable housing and employment, regularly visited the child, completed parenting class, and was paying child support. While substance abuse was part of the father's history, there was no indication that the father's substance abuse caused harm to the child.

The Fifth DCA reversed and remanded.



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Website Resources

Legal Resources

[The National Center for Adoption Law & Policy at Capital University Law School](http://www.law.capital.edu/adoption/) publishes a weekly electronic summary of adoption and child welfare cases as well as a weekly summary of the latest news in child welfare. Subscribe by visiting their website at www.law.capital.edu/adoption/

[Child Welfare Information Gateway.](http://www.childwelfare.gov/systemwide/laws_policies/)

http://www.childwelfare.gov/systemwide/laws_policies/

The Legal Issues and Laws portion of this website provides many helpful publications and tools, including a State Statute search, federal and state laws, and other legal information.

[Foster Care Reform Litigation Docket](http://www.youthlaw.org/publications/fc_docket/)

http://www.youthlaw.org/publications/fc_docket/

This publication from the National Center for Youth Law provides basic information on 71 child welfare reform cases nationwide that are currently in active litigation, a pending settlement agreement, or are significant in some other respect.

[Major Federal Legislation Concerned With Child Protection, Child Welfare, and Adoption](http://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.cfm)

<http://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.cfm>

This publication from the Child Welfare Information Gateway summarizes the major provisions of key Federal laws regarding child protection, child welfare, and adoption and includes a timeline of Federal child welfare legislation.

[The Legal Resource section of the Florida Statewide Guardian ad Litem website](http://guardianadlitem.org/att_main.asp), offers searchable case summaries and library, archived Legal Briefs Newsletter (2004-present), archived Practice Bulletins, the Guardian ad Litem Dependency Practice Manual, audio recordings of past attorney training calls (2006- present), legislative updates, links to helpful websites, and Chapter 39 Florida Statutes. On this page you can also sign up to have the Legal Briefs Newsletter and Practice Bulletin delivered to your in-box. http://guardianadlitem.org/att_main.asp

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