FLORIDA GUARDIAN AD LITEM PROGRAM
The Voice for Florida's Abused & Neglected Children

LEGAL BRIEFS NEWSLETTER

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Termination of Parental Rights

Material Breach of a Case Plan

T.C. v. Department of Children and Families, 2007 WL 2119245 (Fla. 4th DCA)

The mother appealed the trial court's termination of her parental rights (TPR). The mother appealed on the grounds that termination was not appropriate because the time for completion of the case plan had not expired, and any failures on her part were the result of her incarceration and the Department of Children and Families' (the department) failure to provide services. The Fourth District Court of Appeal (Fourth DCA) affirmed the trial court's TPR based on the ground that the mother materially breached the case plan. The Fourth DCA held that it was unlikely that she would be able to substantially comply with her case plan before time for compliance expired.

Section 39.806(1)(e)2, Fla. Stat. (2006) allows for TPR where "[t]he parent has materially breached the case plan by making it unlikely that he or she will be able to substantially comply with the case plan before the time for compliance expires…In order to prove the parent has materially breached the case plan, the court must find by clear and convincing evidence that the parent is unlikely or unable to substantially comply ... before time expires...."

The mother did not avail herself of the services provided by the department; continued to use drugs and did not attend drug treatment; on multiple occasions left the department without a means of contacting her; and upon her release from jail, she only had two months to find stable housing and employment.

The Fourth DCA upheld the TPR and rejected "the mother's claim that the order of termination must be reversed because any breach or failures on her part were occasioned by her incarceration and [the department's] failure to provide her services during such time."

Egregious Conduct / Nexus

In re A.W., Jr., 2007 WL 2069470 (Fla. 2d DCA)

The father appealed the trial court's termination of parental rights (TPR) to his son. The father had shot and killed the mother with a gun. The trial court trial court terminated the father's rights based on §§ 39.806(1)(c) and (f), Fla. Stat.(2006).

The Second District Court of Appeal (Second DCA) reversed the TPR. "The trial court found that it is self-evident that a parent who kills a child's mother has engaged in conduct toward the child that demonstrates that continued involvement in the parent-child relationship threatens the child. However, the court made no finding that such is the case irrespective of the provision of services. Although there was testimony that there are services available to the Father whether he is incarcerated or not, there was no testimony that his continued involvement with A.W., Jr., threatens the child irrespective of the provision of those services." § 39.806(1)(c).

Additionally TPR under § 39.806(1)(f) requires the finding of a nexus between the father's egregious conduct and an adverse impact on the child. The Third DCA held that the trial court failed to make any findings regarding the required nexus.

The Third DCA also held that the trial court erred in failing to address the constitutional requirement that TPR be the least restrictive means of protecting the child from harm.

Abandonment

M.E. v. Department of Children and Families, 2007 WL 2001624 (Fla.1st DCA)

The incarcerated father appealed the trial court's termination of his parental rights (TPR) based on abandonment. § 39.806(1)(d), Fla. Stat. (2006). The paternity of the child was not determined until a year after the child was born. The Department of Children and Families (the department) filed the TPR petition before paternity was known.

The First District Court of Appeal (First DCA) reversed the trial court's TPR and held that termination due to voluntary abandonment, generally, cannot be based solely on the father's incarceration. Additionally, once the father knew of the child he actively opposed the TPR.

Existence of Long-Term Relative Placement Does Not Foreclose a Termination of Parental Rights

K.W. v. Department of Children and Families, 2007 WL 1730099 (Fla. 1st DCA)

The father appealed the termination of his parental rights (TPR) to his children. He argued that the TPR was premature and not the least restrictive means, because the trial court had not fully considered the possibility of long-term relative placement with the paternal grandparents.

The First District Court of Appeal (First DCA) rejected the father's argument and held that the least restrictive means test (measures short of termination be taken if they would enable the child to reunite safely with the parent) applies to the TPR and has no bearing on the children's placement.

To be successful in a TPR proceeding, the trial court must also find that the TPR is in the child's *manifest best interest*. §39.810, Fla. Stat. (2006). The statute generally states that the court may *consider* relative placement in TPR proceedings. However, the statute "then qualifies this general point by stating that the availability of a 'placement with a relative may not receive greater consideration than any other factor weighing on the manifest best interest of the child and may not be considered as a factor weighing against termination of parental rights.' By the text of this statute, the possibility of a relative placement is plainly not a reason to delay a decision to terminate parental rights if termination is otherwise in the manifest best interest of the child."

The First DCA held that the availability of a relative placement may be more important in a case where the parent is temporarily incapable of taking care of their child. In this case, the father committed "atrocious" crimes against children for which he received a lengthy sentence (three consecutive life terms following conviction of sexual abuse of his children, step-children, and others). This is not the kind of case where the court should attempt to preserve the parent-child relationship through the placement of the child with a relative.

The First DCA affirmed the TPR.

Dependency

Prospective Neglect

L.P., v. Department of Children and Family Services, 2007 WL 2188630 (Fla. 3d DCA)

The mother's three children were adjudicated dependent by the trial court on the ground of prospective neglect due to the mother's cocaine use during the third trimester of her

pregnancy and thereafter. § 39.01(14)(f), Fla. Stat. (2006). The mother appealed. The Third District Court of Appeal (Third DCA) reversed the trial court's order adjudicating the children dependent because the Department of Children and Family Services (the department) failed to provide evidence of harm.

"[T]he issue in prospective neglect or abuse cases is whether future behavior will adversely affect the child and can **be clearly and certainly predicted**." P.S. v. Dep't. of Children & Family Servs., 825 So.2d 530, 531 (Fla. 2d DCA 1989)(emphasis added)(quoting Palmer v. Dep't of Health & Rehab. Servs., 547 So.2d 981, 984 (Fla. 5th DCA 1989))." Drug use alone is not enough to adjudicate a child dependent. Further, to be successful, the department would have to show a nexus exists between the mother's drug use and the physical, mental, or emotional injury to the children. The department failed to provide evidence regarding harm to the child in utero, or that her other children were not cared for by the mother.

The Third DCA reversed the trial court's dependency adjudication.

Evidence

S.A. v. Department of Children and Family Services, 2007 WL 2119130 (Fla.3d DCA)

During a dependency hearing the mother objected to a police officer being permitted to testify by telephone. Rule of Judicial Administration 2.530(d)(1) requires that all parties consent to witnesses testifying by phone. In this case the mother did not consent.. The Third District Court of Appeal (Third DCA) held that trial court erred by allowing the officer to appear by telephone.

However, the Third DCA held that the error was harmless. The Third DCA held even if the police officer had not been permitted to testify, the trial court would have found the children dependent.

Next, the mother appealed based on a witness being permitted to testify who was not listed as a witness. In accordance with Fla.R.Juv.P. 8.245(b)(2)(A),(E), the mother had the right to be notified in advance of trial that the Department of Children and Family Services would be calling a doctor to testify as to the results of the mother's mental examination. However, the trial court granted the relief requested by the mother's counsel's for time to interview the doctor before the doctor testified.

The Third DCA affirmed the trial court's dependency adjudication.

Dependency, Competency, Abandonment, Incarceration, Due Process

S.K. v. Department of Children and Families, 2007 WL 1756850 (Fla. 4th DCA)

The father appealed the dependency adjudication of his child. The father contends that his due process rights were violated because: (1) he was incompetent to participate in the proceedings and in his defense; and (2) the trial court failed to appoint an attorney ad litem to represent him.

The Fourth District Court of Appeal (Fourth DCA) upheld the dependency adjudication. The father was incarcerated for life, he had no contact with the child, his mental disability made him a danger to himself and others, and the father's mental disability prevented him from engaging in appropriate parenting behavior.

The Fourth DCA held that there is no rule or statute that requires an appointment of an attorney ad litem for a parent that is incompetent. Nor is the trial court required to wait until the parent's competency is restored to proceed with dependency adjudication.

The Fourth DCA held that the father was provided due process and the dependency proceeding was fundamentally fair.

Jurisdiction - Service

N.L. v. Department of Children and Family Services, 2007 WL 1827244 (Fla. 3d DCA)

The trial court entered an order adjudicating the child dependent. The mother appealed. The mother argued that the trial court did not have jurisdiction over her because she had not been served with the dependency petition either personally or by diligent search. The Department of Children and Family Services (the department) stated to the trial court that service on the mother's counsel was "effective service on the mother." The department "also argued that the mother's failure to appear constituted consent to the dependency order."

The Third District Court of Appeal (Third DCA) reversed the trial court's dependency adjudication and held that the trial court lacked jurisdiction to enter the order adjudicating the child dependent, absent personal service of dependency petition on mother or affidavit of diligent search.

The Third DCA also held that the service of the dependency petition on mother's counsel was ineffective to accomplish personal service on mother. The initial dependency petition must be served personally or through affidavit of diligent search. § 39.502(3)-(9), Fla. Stat. (2006).

Finally, the Third DCA held that a default adjudication of dependency on the basis of mother's failure to appear at filing hearing was impermissible "where no authority supported inclusion in summons of warning to effect that failure to respond or appear at hearing would constitute consent to adjudication of dependency." Such a warning is authorized for an arraignment hearing, but not a filing hearing. See Fla. R. Juv. P. 8.225(c)(1); § 39.506(3), Fla. Stat. (2006).

The Third DCA reversed.

Hearsay

C.A. v. Department of Children and Families, 958 So.2d 554 (Fla. 4th DCA 2007)

The father appealed the trial court's dependency adjudication. The Department of Children and Families (the department) alleged that the child "has been abused, abandoned, or neglected or is in imminent danger of illness or injury as a result of abuse, abandonment, or neglect." The mother consented to the dependency adjudication. The father appeals on two grounds: (1) that the hearsay testimony of the child's mother should not have been admitted into evidence; and (2) trial court's finding of dependency is unsupported by the evidence introduced at trial.

Hearsay Statements: The Fourth District Court of Appeal (Fourth DCA) held that it was error to admit the testimony of the child's mother, given to the court by the caseworker, that the father and mother had done drugs in the household. A statement that is offered against a party are admissible and not hearsay if they are:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject.

§ 90.803(18)(a)-(c), Fla. Stat. (2006). The statement in this case, was made by the mother against the father's interests – not the mother's interests as she had already consented to the dependency. The Fourth DCA held that the error was not harmless as the trial court based the dependency primarily on the mother and father's drug use.

The Fourth DCA held that even if the father had a drug use problem, the father's drug use, standing alone, was insufficient to adjudicate the child dependent. There was no evidence presented that the drug use affected the father's ability to parent, or that the child suffered any harm – emotionally or physically – as a result of drug use.

Putative Father Registry

Florida Supreme Court

Heart of Adoptions, Inc. v. J.A., 2007 WL 2002660 (Fla.)

The Second District Court of Appeal certified the following question:

IN A PROCEEDING ON A PETITION FOR TERMINATION OF PARENTAL RIGHTS PENDING ADOPTION, MAY THE UNMARRIED BIOLOGICAL FATHER'S RIGHTS IN RELATION TO THE CHILD BE TERMINATED BASED ON THE UNMARRIED BIOLOGICAL FATHER'S FAILURE TO PROPERLY FILE A CLAIM OF PATERNITY WITH THE FLORIDA PUTATIVE FATHER REGISTRY?

The Florida Supreme Court (Supreme Court) held "that the rights of an unmarried biological father in relation to the child, who is known or identified by the mother as the potential father and who is locatable by diligent search, may be terminated based on his failure to file a claim with the Florida Putative Father Registry only if the father was served with notice under § 63.062(3)(a), Florida Statutes (2005), and he fails to comply with the requirements of that subsection within the thirty-day period."

Contents of Notice

The Supreme Court held that "an adoption entity must serve an unmarried biological father, who is known or identified by the mother as a potential father and who is locatable through diligent search, with a notice of the intended adoption plan. Pursuant to statute, that plan must advise him that he has thirty days in which to file a claim of paternity with the Florida Putative Father Registry and to file an affidavit of commitment in the court, which are both required in order to establish and preserve his right to be made a party to any proceeding to terminate parental rights and to establish that his consent is required to the proposed adoption. If the unmarried biological father, after being notified of the Registry requirements, does not file a claim with the Registry within the thirty-day period, his rights may be terminated without his consent based on his noncompliance."

Miami Herald Media Co. v. S.-P,D., 2007 WL 1827221 (Fla. 3d DCA)

The trial court closed all proceedings in this case at the request of the temporary guardian and Guardian ad Litem. The Miami Herald Media Co. appealed. The Third District Court of Appeal (Third DCA) held that the trial court failed to satisfy the requirements necessary to close proceedings. A dependency hearing may be closed if it is proven by competent substantial evidence that the public interest or the welfare of the child is best served by so doing." § 39.507(2), Fla. Stat. (2006).

The Third DCA quashed the trial court's order closing the proceeding without prejudice.

2007 Legislative Session Update

Deborah Lacombe, Deputy General Counsel, Florida Guardian ad Litem Program

HB 77 establishes section 39.0139, the "Keeping Children Safe Act" and creates a rebuttable presumption of detriment to a child if certain offenses related to sexual abuse or sex-related crimes have been committed or alleged. If a person meets the criteria listed, they may visit or have contact with a child only after a hearing and order by the court.

HB 229 / SB 1612 gives the Statewide Guardian ad Litem Office authority to create a direct-support organization (DSO) a not-for-profit corporation organized and operated to conduct programs and activities, including fundraising, for the Program's benefit.

HB 509 / SB 564 creates a Children's Cabinet to develop and implement a shared vision among the branches of government to improve child and family outcomes.

HB 803 / SB 362 creates § 409.1663, providing adoption benefits for qualifying adoptive employees of state agencies of up to $10,000 for special needs children or $5,000 for children placed in the permanent custody of the department or with a licensed child-placing agency.

SB 1088 / HB 7083 creates the Office of Criminal Conflict and Civil Regional Counsel to represent people in criminal and delinquency cases and in those cases where people are entitled to court appointed counsel under the federal or state constitution or as authorized by general law under chapters 39, 390, 392, 397, 415, 743, 744, 984 and § 393.12.

SB 2114 / HB 1215

- Section 322.09, allows caseworkers to sign a minor's application for a learner's driver's license without assuming liability for any damages caused by the minor.
- Section 409.1451, expands eligibility for independent living transition services (including the Road to Independence Program) to children who "after reaching 16 years of age were adopted from foster care or placed with a court-approved dependency guardian and have spent a minimum of 6 months in foster care within the 12 months immediately preceding such placement or adoption."
- Mandates all children eligible for subsidized independent living services be formally evaluated for placement in such an arrangement.
- Revises eligibility for the Road to Independence Program to encompass young adults who have earned a standard high school diploma or its equivalent, a special diploma or special certificate.
- Creates § 743.044, to allow removal of disability of non-age of minors to secure depository financial services such as checking and savings accounts when children have reached 16 and meet certain statutory criteria.

Website Resources

Sexual Abuse Issues & the Keeping Children Safe Act
Presented by Karen Oehme, J. D., Program Director, Clearinghouse on Supervised Visitation & Sonia Crockett, J.D. Listen to the audio recording of the July training on the Guardian ad Litem website. Also available on the website are practice aids; including a summary of the training and Keeping Children Safe Act.

www.GuardianadLitem.org

Clearinghouse on Supervised Visitation, Florida State University, College of Social Work
This site includes training and resources for supervised visitation programs, the judges who refer cases to them, and other community stakeholders interested in family safety.

Also on the site is a comprehensive and interactive training regarding sexual abuse referrals and supervised visitation.

http://familyvio.csw.fsu.edu

Kempe Children's Center
Provides information for parents and other consumers regarding child abuse.
www.kempecenter.org