



Legal Briefs Newsletter

April/May 2006

Persons Required to Consent to Adoption

Dependency hearing is a "court proceeding" for purposes of § 63.062(1)

B.B. v. P.J.M., 2006 WL 1373243 (Fla. 1st DCA)

The trial court held that the incarcerated father had no legal basis to object to the mother's written consent for maternal grandparents to adopt out of wedlock child. The trial court entered an adoption order. The father appealed.

The First District Court of Appeal (First DCA) reversed the trial court and held that the father's identity as the child's biological father had been established by court proceedings and therefore his consent to the adoption was required by [§ 63.062\(1\), Fla. Stat. \(2005\)](#). The First DCA also held that the trial court violated the father's due process rights when it allowed the adoption to occur without his consent.

The First DCA held that the father was a person whose consent was required before the adoption could take place. The court found that the dependency hearing was a "court proceeding" because the issue of the child's father was material to the proceeding, and all the interested parties in the dependency proceeding agreed on the material fact that father was the biological father of child. Therefore, the First DCA concluded that the father met the requirements of § 63.062(1), Fla. Stat.(2005) and his consent to the adoption was required.

The First DCA reversed the trial court's adoption order. ¶



[Read the court opinion.](#)

Putative Father Registry [§ 63.054, Florida Statutes \(2004\)](#)

A.F.L., Jr. v. Department of Children and Families, 2006 WL 941803 (Fla. 5th DCA)

The child's biological father filed a motion to establish his parental rights and to contest the child's adoption in proceeding by the Department of Children and Families (the Department) to terminate parental rights (TPR) of the mother and legal father and allow maternal grandmother to adopt child. The trial court denied the biological father's motion and the biological father appealed.

The Fifth District Court of Appeal (Fifth DCA) held that because the biological father did not register with the Putative Father Registry, did not demonstrate a relationship with the child or financially support the child, and failed to seek parental rights to the child until she was nine months old, he failed to preserve his parental rights over the child.

The Fifth DCA held father failed to preserve claim of parental rights and affirmed the trial court's order denying the biological father's motion contesting the adoption by the maternal grandmother. ¶



[Read the court opinion](#)

Ineffective Assistance of Counsel

The Fourth DCA certified whether Florida recognizes a claim of ineffective assistance of counsel arising from a lawyer's representation of a parent(s) in a proceeding for the termination of parental rights, and if so, what procedure must be followed to pursue a claim of ineffective assistance of counsel?

E.T. v. Department of Children and Families, 2006 WL 1154827 (Fla. 4th DCA)

The trial court terminated the father's parental rights (TPR). The father filed a petition for writ of habeas corpus. He alleged that he had ineffective assistance of counsel after his parental rights were terminated. The trial court dismissed the petition and the father appealed.

The two issues before the Fourth District Court of Appeal (Fourth DCA) were (1) whether Florida recognizes a claim of ineffective assistance of counsel in TPR cases; and if so, (2) what is the proper mechanism for filing such a claim.

The Florida Supreme Court has held Florida's constitutional due process clause creates a right to appointed counsel in proceedings which can result in the permanent loss of parental custody. In Interest of D.B., 385 So.2d 83, 90-91 (Fla.1980). In *D.B.*, the supreme court held that a constitutional right to counsel in dependency proceedings arises in two situations: (1) when the proceedings may result in the permanent termination of parental rights; and (2) when the parent may be charged with criminal child abuse. Florida Statutes also provide for a court-appointed attorney in dependency proceedings. See § [39.013\(9\)\(a\), Fla. Stat. \(2002\)](#). In S.B. v. Department of Children and Families, 851 So.2d 689 (Fla.2003) the "supreme court distinguished a statutory right to counsel from a constitutional right. The former does not carry with it the concomitant right to effective assistance of counsel. However, a constitutional right to counsel does."

The issue remains whether Florida allows a collateral attack on effective assistance of counsel in TPR proceedings.

As the Fourth DCA stated, "neither our legislature nor our judicial system has authorized the use of a petition for habeas corpus for ineffective assistance of counsel claims in termination of parental rights cases nor have they created an alternative mechanism to pursue such a claim." The Fourth DCA affirmed the trial court's dismissal of the father's habeas corpus petition and certified the following questions to the Supreme Court of Florida for consideration. Does Florida recognize a claim of ineffective assistance of counsel arising from a lawyer's representation of a parent(s) in a proceeding for the termination of parental rights? If so, what procedure must be followed to pursue a claim of ineffective assistance of counsel? ¶5

No right to claim of ineffective assistance of counsel

E.S. v. Department of Children and Families, 2006 WL 1152716 (Fla. 1st DCA)

The trial court denied the father's writ of habeas corpus claiming ineffective assistance of counsel resulting in his child being adjudicated dependent.

The First District Court of Appeal (First DCA) held that, based on the Florida Supreme Court decision in S.B. v. Department of Children and Families, 851 So.2d 689 (Fla.2003) the father had no right to pursue the collateral attack on his counsel's performance. In S.B.v. Dep't., the Supreme Court of Florida held:

"We conclude that in civil dependency proceedings which do not involve the possibility of criminal charges against the parent or the permanent termination of parental rights, there is no right to pursue a collateral proceeding questioning the competency of court-appointed counsel."

The First DCA affirmed the trial court's order denying the petition for writ of habeas corpus. ¶



[Read the court opinion](#)

Dependency

A.R. v. Department of Children and Families, 2006 WL 1140906 (Fla. 1st DCA)

The First District Court of Appeal held that the refusal to immediately consent to the insertion of a child's feeding tube is an insufficient basis for dependency adjudication. ¶



[Read the court opinion](#)

Dependency – No Competent Substantial Evidence

J.B., III v. Department of Children and Families, 2006 WL 1027006 (Fla. 1st DCA)

The trial court found the child dependent based on small amounts of marijuana and residual amounts of cocaine in several areas of the child's house. The father appeals the trial court's dependency adjudication.

The father argues that mere exposure to small quantities of illicit drugs, standing alone, cannot support a finding of dependency.

The First District Court of Appeal (First DCA) reversed the trial court's finding of dependency and held that mere exposure of child to small quantities of illicit drugs, standing alone, cannot support a finding of dependency. In addition, the First DCA held the following:

Dependency based on abuse: Exposing a child to controlled substances constitutes "harm" in only two situations: (1) when a mother's use of a controlled substance during her pregnancy demonstrably adversely affects the child; or (2) when a parent's "continued chronic and severe use of a controlled substance" demonstrably adversely affects the child. See § 39.30(g), Fla. Stat. (2004). Because the record lacks competent, substantial evidence that the child suffered harm pursuant to [§ 39.01\(30\), Fla. Stat. \(2004\)](#), the trial court's adjudication of dependency based on a finding of abuse must be reversed.

Dependency based on neglect. The trial court's basis for finding the child was neglected was that "if [it was] not for law enforcement and [DCF], the child would have been left completely alone and unattended." Evidence that a 12-year-old child was left alone or could have been left alone is insufficient by itself to establish neglect.

Imminent Risk: If there is no nexus between the parent's alleged behavior and the likelihood a child will suffer abuse and neglect, then a finding that abuse or neglect is "impending" or "about to occur" cannot be upheld.

The First DCA held that the trial court's dependency adjudication was not supported by competent, substantial evidence. ¶



[Read the court opinion](#)

Termination of Parental Rights

Department of Children and Families v. A.S., 2006 WL 1144443 (Fla. 5th DCA)

The Department of Children and Families (the Department) filed a petition for dependency and termination of parental rights (TPR) based on prior involuntary TPR of child's siblings. The trial court found the child dependent but dismissed the termination petition. The Department appealed the dismissal.

The Department may petition for termination on the ground that the parental rights of the parent to a sibling have been terminated involuntarily. [§ 39.806\(1\)\(i\), Florida Statutes\(2005\)](#). The Fifth District Court of Appeal (Fifth DCA) stated that the question is whether parental rights to a sibling are “involuntarily” terminated within the meaning of § 39.806(1)(i) when the parents fail to appear for the adjudicatory hearing in the prior proceeding and the trial court enters the termination order pursuant to [§ 39.801\(3\)\(d\), Florida Statutes \(2005\)](#). The Fifth DCA held the trial court erred in dismissing the Department's petition based on §39.806(1)(i).

The Fifth DCA held “when a parent fails to personally appear at the adjudicatory hearing does not transform that involuntary proceeding into a voluntary proceeding. Thus, in a subsequent termination proceeding the Department may properly allege § 39.806(1)(i) as grounds for termination.” The Fifth DCA further held that the Legislature never intended that presumed, implied, or constructive consent under § 39.801(3)(d) would transform an involuntary proceeding into one that is voluntary.

The Fifth DCA certified:

“We acknowledge that our opinion conflicts with the decisions of the Second District Court in *In re A.D.C.*, 854 So. 2d 720 (Fla. 2d DCA 2003), and *In re T.S.*, 855 So. 2d 679 (Fla. 2d DCA 2003), *disagreed with on other grounds by Florida Dep't of Children & Families v. F.L.*, 880 So. 2d 602 (Fla. 2004) (addressing the constitutionality of section 39.806(1)(i)). Accordingly, we certify direct conflict with those decisions.” 



[Read the court opinion](#)

Abandonment

J.K. v. Department of Children, 925 So.2d 1138 (Fla. 5th DCA 2006)

The Department of Children (the Department) filed a petition to terminate the mother's parental rights (TPR) and later amended the petition to include the child's father (who was later identified by the mother and then married the mother). The mother informed the father that he might be the father after the child was adjudicated dependent and TPR proceedings had already begun as to the mother. The mother and father married. The Department amended the TPR petition to include the father based on the theory that he knowingly jeopardized the child's welfare by marrying the mother who was not in compliance with her case plan. [§ 39.806\(1\)\(c\), Florida Statutes \(2005\)](#).

The trial court rejected the Department's argument for termination, but terminated the father's parental rights on the grounds of abandonment because he had not affirmatively pursued the possibility that he was the father of a child with the mother. The father appealed.

The Fifth District Court of Appeal (Fifth DCA) reversed the trial court's order terminating the father's rights to the child based on abandonment. The Department never pled nor proved abandonment, nor was the issue of abandonment tried by consent of the parties. There was no substantial competent evidence because there was no evidence that established willful rejection on the father's part of parental obligations. 



[Read the court opinion](#)

Foster Children & Developmental Disabilities

Russell v. Agency for Persons with Disabilities, 2006 WL 1210200 (Fla. 1st DCA)

A developmentally disabled child in state's foster care system appealed a final order of the Department of Children and Families (the Department), Office of Appeal Hearings, denying her placement on “crisis tier” of waiting list for services through developmental services

home and community based waiver program that was administered by [Agency for Persons with Disabilities \(APD\)](#).

The APD agreed that the child is a danger to herself and others, but argues that she can be served through the services available under [Chapter 409](#) (foster care services) and [Chapter 394](#) (providing for comprehensive child mental health services), and therefore it is not necessary to provide services under [Chapter 393](#) (The Developmental Disabilities Prevention and Community Services Act). The child argues that there is no basis for the argument that the services she needs “should be” available from the Department.

The First DCA held:

“There is no legal or factual basis for the [APD] position that the services she is requesting are available from another source or are actually provided by [the Department]. Therefore, we hold that [the child] qualifies to be placed on the second priority of the crisis tier of the waiting list. We remand for the [APD] to determine her placement within the second priority crisis list. In making that placement, [APD] may *not* rely upon the criterion that “other supports or services are available to assist in addressing [child] behaviors” as a factor in that placement, because neither the facts nor the law support such a determination.” 



[Read the court opinion](#)

Legislative Update

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

While there were only a handful of bills which impact dependency court, the bills that passed make major changes to Chapter 39 and will significantly change practice in abuse and neglect proceedings. [Senate Bill 1080](#) (HB 7123) substantially amends Chapter 39 to conform Florida's statutes to the [Adoptions and Safe Families Act \(ASFA\)](#). This is a bill that all practitioners should read and study, as it not only contains language for technical compliance, but is designed to expedite permanency for children. Some of the major changes include:

All sections regarding permanency are rewritten. Permanency goals are redefined and prioritized as: reunification, adoption, permanent guardianship, placement with a fit and willing relative and another planned permanent living arrangement. The statutes provide specific findings required by the court before each permanency option can be finalized. Section 39.5085 is amended to ensure that children placed in permanent guardianships with relatives can receive relative caregiver funds. The revisions provide for regular judicial reviews of children placed with fit and willing relatives to continually evaluate the possibility of adoption or legal guardianship of the child.

DCF is required to adopt rules no later than July 1, 2007 to ensure that the [Indian Child Welfare Act](#) and the [Multi-Ethnic Placement Act](#) are enforced in Florida.

A major rewrite of the case plan section was undertaken to reorganize and streamline the procedure. Concurrent planning is defined and use of this concept is authorized throughout the chapter. New procedures for amendment of case plans are added, including burdens of proof. Emphasis is also placed on providing current health, mental health and education information for the child in both the case planning and judicial review processes.

Language added to § 39.522 provides that when considering post-disposition change of custody, the court shall consider the child's continuity in the same out-of-home placement as a factor in determining best interests.

Section 39.8055 is created to specify when DCF is required to file a termination of parental rights and the federally recognized exceptions to that rule. The court's ability to order a TPR and other party's rights to challenge DCF's decision that compelling reasons exist not to file TPR are clarified. Additionally, material breach of a case plan as a ground for TPR is explained in § 39.806.

Amendments to § 39.810 provide the availability of a nonadoptive 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 TPR. If a child has been in a stable or preadoptive placement for 6 months, the availability of a different placement, including a placement with a relative, may not be considered as a ground to deny TPR.

[HB 7173/SB 1798](#) creates an Office of Child Abuse Prevention in Chapter 39 to establish a comprehensive statewide approach for the prevention of child abuse, abandonment and neglect. The bill also includes numerous amendments impacting older children in dependency proceedings, some of which are:

Creation of § 743.045 authorizing removal of the disability of nonage for purposes of executing contracts for residential leases and revision of § 39.701 to require entry of such an order at the judicial review that takes place 90 days after the child's 17th birthday.

Eligibility for Independent Living Transition services is expanded to include children placed with a court-approved nonrelative or guardian after reaching 16 and who spent at least 6 months in foster care.

New requirements are included in Chapter 409 for DCF to fully explain any document, report, form or other record presented to the child prior to the child's signature.

The Road to Independence Scholarship is renamed the "Road to Independence Program" to eliminate confusion about whether the money constitutes a taxable scholarship. Eligibility is expanded to include children who are "currently in licensed foster care or subsidized independent living . . . adopted from foster care after reaching 16 years of age, or after spending at least 6 months in the custody of the department after reaching 6 months of age, . . . placed in a guardianship by the court." New language authorizes payment of awards under the RTI Program by direct deposit, unless the recipient makes a different request.

Amendments provide that children eligible for transitional support services or aftercare services who wish to continue to reside with the licensed foster family or group care provider with whom they were placed at their 18th birthday, may continue to reside there or may reside with another such provider arranged by DCF.

Section 409.903 is amended to expand Medicaid coverage to include children formerly in foster care until their 20th birthdays.

[SB 114/HB 175, the "Robert J. Koch Drug Court Intervention Act"](#) incorporates principles of treatment-based drug courts into dependency proceedings.

Goals are established for substance abuse services in dependency court. Intent language is added to encourage use of the drug court program model in § 397.334 to assess and address substance abuse issues.

Section 39.407(16) is created to provide that after a shelter or dependency petition is filed the court can order a person with custody or a person requesting custody of a child to submit to a substance abuse assessment or evaluation.

Sections 39.507 and 39.521 are amended to provide that after adjudication of dependency, withholding of adjudication, or disposition, the court can order a person with custody or a person requesting custody of a child to submit to a substance abuse assessment or evaluation. The court can require the person to participate in treatment, including a treatment-based drug court. The court will oversee the person's progress and compliance and may impose appropriate sanctions for non-compliance. Orders under these subsections may be made only upon good cause shown.

[HB 1503/SB 2012](#) provides technical changes necessary due to the creation of the Agency for Persons with Disabilities (APD), but also includes provisions clarifying a dependency court's jurisdiction with regard to services provided by APD. Specifically, § 39.407(5) is amended to provide "nothing in this section confers jurisdiction on the court with regard to determining eligibility or ordering services under Chapter 393. The bill also gives priority status to dependent children on APD's waiting list.

[HB 5011/SB 1694](#) allows for the transfer of the current community based care lead agency

If you would like to make suggestions for our newsletter,

contribute an article, or have an idea for an article, please contact Liz Damski at

Elizabeth.damski@gal.fl.gov

oversight responsibilities of the Department of Children and Family Services to independent entities. The bill provides funding for the program through a grant that enhances funding flexibility in Broward, Dade and Monroe Counties. The pilot program expands the responsibilities and services provided by these lead agencies during the three-year pilot.

These bills can be accessed at www.leg.state.fl.us. The Governor must approve all bills before becoming law. ☞

Please visit the Statewide Guardian ad Litem Website at
www.guardianadlitem.org