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

LEGAL BRIEFS NEWSLETTER

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Time limitations – Continuances

"The Legislature finds that time is of the essence for establishing permanency for a child in the dependency system. Time limitations are a right of the child which may not be waived, extended, or continued at the request of any party except as provided in this section" § 39.0136(1), Fla. Stat. (2006).

R.S. v. Department of Children and Families, 2007 WL 1486114 (Fla. 4th DCA)

The trial court granted a continuance of father's termination of parental rights trial. On the day of trial, the father moved for a two- to four-week continuance. His attorney said that he simply needed more time for preparation as a result of witness names the father provided only that morning. The length of the continuance granted by the order amounted to 77 days.

The Fourth District Court of Appeal (Fourth DCA) held that the trial court's decision was contrary to § 39.0136, Fla. Stat. (2006). Section 39.0136(3) specifies that:

"… in order to expedite permanency for a child, the total time allowed for continuances or extensions of time may not exceed 60 days within any 12-month period for proceedings conducted under this chapter. A continuance or extension of time may be granted only for extraordinary circumstances in which it is necessary to preserve the constitutional rights of a party or if substantial evidence exists to demonstrate that without granting a continuance or extension of time the child's best interests will be harmed."

The Fourth DCA held that the father made no attempt to show that without a continuance the child's best interests would be harmed. The unavailability of evidence does not constitute "extraordinary circumstances" unless the party establishes that the evidence is material and the party has exercised due diligence to obtain the evidence. § 39.0136(2)(b)(1), Fla. Stat. (2006). An attorney needing more time for preparation was not an extraordinary circumstance. Finally, the total time granted by the order was more than the 60-day limit imposed by § 39.0136(3). The Fourth DCA directed the trial judge to begin trial "forthwith."

Non Offending Parent

Defective Procedure

K.E. v. Department of Children and Families, 2007 WL 1450735 (Fla. 5th DCA)

The mother appealed the trial court's order placing her daughter in the sole custody of the child's father, and terminating jurisdiction over the dependency case. The Fifth District Court of Appeal (Fifth DCA) reversed the trial court's order, holding that the procedure followed was defective.

The mother consented to the dependency petition. The mother's case plan goal was reunification. After the trial court found that the Department of Children and Families (the department) had failed to prove grounds for dependency as to the father, the trial court granted father temporary legal custody. Later, the trial court granted father's motion for sole custody terminated jurisdiction.

The mother appealed, contending it was error to terminate jurisdiction while she was in the process of complying with her case plan and the timeframe for compliance with the case plan. The Fifth DCA held that the proper procedure would have been to amend the case plan. The Fifth DCA has held in prior cases that "once reunification services are provided to the offending parent pursuant to a case plan, the trial court may not simply discard the case plan prior its expiration. *D.S. v. Dep't of Children & Families,* 900 So.2d 628, 631-32 (Fla. 5th DCA 2005) Also, an offending parent who has substantially complied with a case plan that has the goal of reunification is entitled to reunification with the dependent child, absent a determination that reunification would be detrimental to the child. *D.G. v. Dep't of Children & Families,* 903 So.2d 1042 (Fla. 5th DCA 2005); *R.H. v. Dep't of Children & Families,* 948 So.2d 898, 900 (Fla. 5th DCA 2007) See §§ 39.522(2) and 39.701(9)(b), Fla. Stat. (2006)."

If a party objects to a proposed amendment to the case plan, an evidentiary hearing must be held to determine whether the need for the amendment is established by the preponderance of evidence. *See* § 39.6013(1), Fla. Stat. (2006)

The Fifth DCA reversed the trial court's order.

Placement – ICPC

C.K. v. Department of Children and Families, 949 So.2d 336 (Fla. 4th DCA 2007)

The trial court found the child dependent as to the mother but not as to the father. The trial court found that the father was not a fit placement for the child as a result of prior domestic violence, his pattern of engaging in sexual relations with female minors, and his failure to adequately support his other children. The trial court ordered the father to complete various programs, and to comply with the Interstate Compact on the Placement of Children (ICPC).

The Fourth District Court of Appeal (Fourth DCA) held that and the Department of Children and Families (the department) conceded that there was not sufficient connection between the father's past issues and the child's safety. Although the court does have the authority to order a non-offending parent to participate in treatment and services, there was insufficient evidence to support these requirements as to this child. *See* § 39.521(1)(b), Fla. Stat.; *J.P. v. Dep't of Children & Families,* 855 So.2d 175 (Fla. 5th DCA 2003); *D.M. v. Dep't of Children & Families,* 807 So.2d 90 (Fla. 5th DCA 2002).

The Fourth DCA affirmed the trial court's order for the father to comply with ICPC. The father erroneously argued that ICPC did not apply to him because ICPC applies only in foster care and adoption situations. ICPC applies where court is transferring custody of child to an out-of-state non custodial parent.

Dependency

Deprivation of Necessary Food and Medical Treatment - Harm

In re J.H., 2007 WL 1452172 (Fla. 2d DCA)

The trial court adjudicated the child dependent based upon the assertion that the parents neglected the child by depriving her of necessary food and medical treatment. The child was placed with the maternal grandmother. The parents appealed.

The Second District Court of Appeal (Second DCA) held that the evidence presented was insufficient to prove that the parents deprived the child of food and medical care. The expert's review of pediatrician's records and parent's testimony showed that the child received regular medical care. The Second DCA stated that other "decisions that have approved terminations of parental rights and dependencies on the basis of under nutrition, *M.J.S. v. State, Department of Children & Family Services (In re D.J.W.*), 764 So.2d 825 (Fla. 2d DCA 2000); *K.F.,* 916 So.2d at 950; and *Hardy v. Department of Health & Rehabilitative Services,* 568 So.2d 1314 (Fla. 5th DCA 1990), involved a quantum of evidence. The *Hardy* court explained that "[t]he only way to confirm a diagnosis of nonorganic failure to thrive is to place the child in a more nurturing environment and see if the child begins to grow. If so, the subsequent growth confirms the diagnosis." 568 So.2d at 1315. Thus, in *Hardy,* nonorganic failure to thrive was proved because the child lost weight while in his parents' care and then gained 1.5 pounds and grew two inches while in foster care. Here, in contrast, [the child] was actually gaining more weight in her parents' care than she did after she was sheltered."

The Second DCA reversed the dependency adjudication.

Corporal Punishment

T.P. v. Department of Children and Families, 2007 WL 1093590 (Fla. 5th DCA)

The mother appealed the trial court's dependency adjudication of her three children based on corporal punishment. The Fifth District Court of Appeal (Fifth DCA) affirmed the trial court's order.

The Fifth DCA held that the mother's pattern of using excessive force and inappropriate methods of punishment to discipline her children amounted to abuse. "The line of demarcation between reasonable and unreasonable corporal punishment, for purposes of determining abuse in dependency proceeding, is whether the parent caused harm to the child." § 39.01(2), Fla. Stat. (2006). The testimony showed a pattern of conduct reasonably characterized as being harmful, or likely to cause harm, to the children.

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

Appellate Procedure

Florida Rule of Appellate Procedure 9.2003(a)(3)

S.H. v. Department of Children and Family Services, 2007 WL 1158219 (Fla. 5th DCA)

Attorney filed a notice of appeal following a termination of parental rights proceeding. The trial court then granted counsel's motion to withdraw and appointed appellate counsel. The Guardian ad Litem filed motion to compel designation of transcript. The Fifth District Court of Appeal (Fifth DCA) held that attorney should not have been allowed to withdraw after filing notice of appeal until filing of directions with clerk and designation of record with court reporter.

Florida Rule of Appellate Procedure 9.2003(a)(3) requires "the attorney who files the notice of appeal to file any directions to the clerk and designations to the court reporter, within 10 days of the notice of appeal."

The Fifth DCA, adopting the Second DCA's opinion in *Interest of P.G., 944 So.2d 443 (Fla. 2d DCA 2006)*, states the following procedure for trial court and counsel:

- Upon appointing an attorney to represent a parent on appeal, in either a dependency or termination of parental rights case, the trial court should forward a copy of that order to the Fifth DCA.
- To ensure that the Fifth DCA is apprised of the withdrawal of counsel, trial counsel shall submit a copy of the order, along with the order appointing appellate counsel.
    - Absent receipt of these copies, the Fifth DCA will assume that the attorney who filed the notice of appeal remains attorney of record on appeal until appointed counsel files their notice of appearance.
- Appointed counsel on appeal should promptly file their notice of appearance in the Fifth DCA to demonstrate that they are aware of their appointment.

Termination of Parental Rights

Failure to State Statutory Ground TPR Petition – Violation of Due Process

L.A.G. v. Department of Children and Family Services, 2007 WL 1062435 (Fla. 3d DCA)

The trial court terminated the mother's parental rights (TPR) to her three oldest children and adjudicated her youngest child dependent. The mother appealed the trial court's order.

The Third District Court of Appeal (Third DCA) held that because the termination order was based on a statutory ground not asserted in the Department of Children and Family Services' (the department) petition, the order violated the mother's due process rights. The mother had no notice of the statutory ground upon which the TPR was based. The department also asserted that the mother did not substantially comply with her case plan. The Third DCA held that the mother did substantially comply with her case plan, in that she completed in-patient drug treatment program consistently tested negative for drug use during residential program and following treatment, and the only evidence that mother deviated from case plan were two occasions when she had contact with father and paternal grandmother. Finally, the Third DCA held that the department had "lumped" the dependency petition in with the TPR and evidence was insufficient to support the dependency adjudication of her youngest child. The factual findings were "inadequate."

The Third DCA reversed the trial court's order.

Nexus Between the Conduct & Abuse; Futility of Providing Services; Possibility of Relative Placement

L.D. v. Department of Children and Family Services, 2007 WL 1062572 (Fla. 3d DCA)

The Department of Children and Family Services (the department) asserted in its termination of parental rights (TPR) petition that mother's continued involvement with the child threatened "the life, safety, well-being or physical, mental or emotional health of the child irrespective of the provision of services." The trial court terminated the mother's parental rights based on § 39.806(1)(c), Fla. Stat. (2006). The mother appealed the trial court's order.

The Third District Court of Appeal (Third DCA) held that there was insufficient evidence to terminate the mother's parental rights.

The Third DCA held that that there must be a nexus between the conduct and the abuse, neglect, or specific harm to the child. Even though the mother had a long history of alcohol addiction, for which she was receiving treatment, there was no evidence presented that she posed any risk of harm to the child. There was testimony that the mother had a strong and loving bond with the child.

The Third DCA held that that the trial court must find that any provision of services would

be futile or that child would be threatened with harm despite any services provided to parent. The mother in this case relapsed but then self-referred to a new treatment program. The department fashioned a per se rule that when a parent relapses, termination is proper. The Third DCA cited *R.F. v. Department of Children and Families,* 770 So.2d 1189, 1194 (Fla.2000), stating that the Supreme Court "strongly disapproved of per se rules in the parental rights context, instead favoring a flexible approach that analyzes the termination petition amongst the totality of the circumstances."

The Third DCA also held "because the possibility of a relative placement was disregarded without first conducting a home study, and no other relative was even contacted, the finding that termination of the mothers parental rights is the least restrictive means of protecting the child is not supported by competent, substantial evidence."

The Third DCA reversed the trial court's order terminating mother's parental rights.

Appeals

M.R. v. Department of Children and Families, 952 So.2d 1208 (Fla. 5th DCA 2007)

Father appealed the trial court's order terminating his parental rights. The Fifth District Court of Appeal held:

"A trial court's finding that termination is supported by clear and convincing evidence is given the benefit of the presumption of correctness, and should not be disturbed absent a showing of clear error or a lack of evidentiary support. *See D.P. v. Dep't of Children & Family Servs.,* 930 So.2d 798, 801 (Fla. 3d DCA 2006), *N.L. v. Dep't of Children & Family Servs.,* 843 So.2d 996, 999 (Fla. 1st DCA 2003)."

The Fifth District Court of Appeal affirmed the trial court's order terminating his parental rights.

Indian Child Welfare Act

25 U.S.C. § 1901, et seq.

Seminole Tribe of Florida v. Dept. of Children and Families, 2007 WL 1544114 (Fla. 4th DCA)

The Seminole Tribe of Florida (the tribe) appeals an order denying its motion to place a dependent child, pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq. (ICWA). The tribe argued that the trial court "disregards or misunderstands the mandates of the ICWA by failing to begin with a presumption in favor of the tribe's preference."

The trial court found, and the Fourth District Court of Appeal (Fourth DCA) affirmed that the Department of Children and Families (the department) and the Guardian ad Litem program had the burden of proving that good cause existed to deviate from the presumption, found in ICWA, in favor of the tribe's preference with regard to child's placement. The trial court found that tribe-recommended family could not meet child's unique medical needs and therefore there was good cause to deviate from the presumption favoring the tribes preferred placement and place child with the department's chosen placement.

The Fourth DCA affirmed the trial court's order, stating "we cannot conclude that the trial court abused its discretion when the order reflects an understanding of the statutory scheme and there is evidence, albeit conflicting, that there was good cause to deviate from ICWA."