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Guardian ad Litem

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FLORIDA GUARDIAN AD LITEM  
PROGRAM

# LEGAL BRIEFS NEWSLETTER

GuardianadLitem.org

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## A Note from Alan Abramowitz, Executive Director, Florida Guardian ad Litem Program



In an effort to create a more useful and accessible website for use by the Florida Guardian ad Litem program and other child welfare professionals, the Program has partnered with Florida State University. To better understand the needs of our website users, we are asking that you take a short on-line survey. It will take you only about 20 minutes, and will give us information we need to make the website a "go-to" resource for child welfare professionals.

You can take the online survey at

<https://www.surveymonkey.com/s/GAL> or e-mail Florida State

University researchers Dr. Lorri Mon, Dr. Chris Hinnant and doctoral student Ji Sue Lee at [lmon@fsu.edu](mailto:lmon@fsu.edu) or call 850-980-0662 to schedule an interview or focus group session.

I appreciate your input and time.

Alan Abramowitz  
Executive Director  
Florida Guardian ad Litem Program

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## First District Court of Appeal

### *Termination of Parental Rights – Failure to Appear*

C.L. v. Florida Dept. of Children and Families, 2011 WL 3341490 (Fla. 1st DCA)

The father appealed the trial court's order terminating his parental rights which was based on his failure to appear at the hearing. The father had previously informed the court that he was working in Louisiana and could not afford to travel back to Florida to attend the hearing. He requested a short delay. However, the trial court terminated his parental rights as he did not show up for the hearing. The First District Court of Appeal held that the trial court erred "in holding the final hearing on termination of parental rights at a time when the appellant could not be present." See In re H.S., 995 So.2d 516, 516 (Fla. 2d DCA 2008) (deeming financial hardship of a parent a circumstance beyond the parent's control); In re A.N.D., 883 So.2d 910, 914 (Fla. 2d DCA 2004) (explaining that courts should avoid terminating a parent's rights if the parent is making a reasonable effort to be present at the hearing but is prevented by circumstances beyond his or her control).



## Read the Opinion

### *Termination of Parental Rights – Failure to Substantially Comply*

**K.G. v. Florida Dept. of Children and Families, 2011 WL 3055413 (Fla. 1st DCA)**

The mother appealed the trial court's order terminating her parental rights. The termination was based upon the mother's failure to substantially comply with her case plan. Section 39.806(1)(e) states "...failure of the parent or parents to substantially comply with the case plan for a period of 9 months...constitutes evidence of continuing abuse, neglect, or abandonment..."

The mother had been offered five different reunification plans over a two-year period. A witness "testified that [the mother] failed to complete the assigned psychotherapy sessions, medication management program and the dyadic therapy; they testified that [the mother] also failed to complete her substance abuse therapy because she stopped attending the counseling sessions and refused to follow a court order that directed her to go into an inpatient substance abuse program. Although [the mother] attended the parenting classes, her score on a post-services test led the case manager to conclude that reunification was not a safe option for the child."

The First District Court of Appeal affirmed the trial court's order, holding that the mother failed to "substantially comply with the case plans and made little effort to remedy the harmful behavior and circumstances that initially brought her child into foster care."



## Read the Opinion

### *Right to Counsel – Due Process Rights*

**A.G. v. Florida Dept. of Children and Families, 2011 WL 3055418 (Fla. 1st DCA)**

The father filed a petition for writ of certiorari after the trial court entered a shelter order. In his petition for writ of certiorari, the father argued that his due process rights were violated as he was not advised of his right to counsel, and was not asked if he wished to waive his right to counsel. After the trial court placed the child with maternal grandmother and granted the father supervised visitation, the trial court appointed counsel to represent him in future proceedings.

"To obtain certiorari jurisdiction over a non-final, non-appealable order, such as the shelter order in the instant case, a petitioner must demonstrate that the order: (1) caused harm so irreparable that it cannot be remedied on appeal following final judgment; and (2) departed from the essential requirements of the law."

The First District Court of Appeal (First DCA) held that the denial fulfilled both requirements. Any future proceedings in the dependency case would be based on a denial of the father's due process rights. And second, Florida statutes require that the parent have representation unless they waive representation. Fla. Stat. §§ 39.013(1), 39.013(9)(a), 39.402(8)(c)(2) and Fla. R. Juv. P. 8.305(b)(6)(A).

The First DCA held that "...because the trial court violated this right, we extend a writ of certiorari to quash the shelter order and remand the matter for further proceedings on whether the child should be detained."



## Read the Opinion

### *Designation of “Sexual Predator” Must be Made by a Criminal Court During Sentencing*

A.H. v. Department of Children and Families, 63 So.3d 874 (Fla. 1st DCA 2011)

The father appealed the trial court’s order terminating his parental rights. His child was living with her maternal grandmother and mother when the mother passed away and the Department of Children and Families (the department) got involved.

After the child stated that the father had sexual abused her, the department filed a termination of parental rights petition. The trial court found that the father was a “sexual predator within the meaning and intent of section 39.806(1)(d)(2), Florida Statutes, based on [the father’s] abuse of the child and his Oregon sex-related crime convictions. Pursuant to § 39.806(1)(d) 2, terminating parental rights is authorized when “the parent of a child is incarcerated in a state or federal correctional institution” and “[t]he incarcerated parent has been determined by the court to be ... a sexual predator as defined in s. 775.21.”

The First District Court of Appeal (First DCA) disagreed with the trial court and held that the designation of sexual predator must be made by a criminal court during sentencing. No Oregon court had designated the father as a sexual predator and the trial court lacked the authority to make such a designation.

However, the First DCA upheld the termination of parental rights on other grounds.



## Read the Opinion

### *General Magistrate Cannot Conduct Adjudicatory Hearing*

A.T.N. v. Florida Dept. of Children and Family Services, 2011 WL 1879196 (Fla. 1st DCA)

The mother appealed an order that adopted a general magistrate's recommended order in adjudicating her child dependent. The mother and the Florida Department of Children and Family Services (the department) entered into an agreement (Stipulation of Treatment) stating that if the mother was not in substantial compliance with her case plan in 6 months, then “upon motion and hearing and the Court finding by a preponderance of the evidence that a material violation of the Stipulation has occurred, and without further evidence of the state of dependency, the parent hereby agrees that [the child] shall be adjudicated dependent.”

The department filed the motion with the magistrate arguing that the mother was unlikely to be able to finish the treatment plan by the deadline. Over the mother’s objections the magistrate found the child dependent and the trial court judge adopted the recommendation adjudicating the child dependent.

The First District Court of Appeal (First DCA) held that the general magistrate cannot conduct an adjudicatory hearing under §39.507, Fla. Stat. (2010). “Florida Rule of Juvenile Procedure 8.257(h) prohibits a general magistrate from presiding over an adjudicatory hearing under § 39.507: “Notwithstanding the provisions of this rule, a general magistrate shall not preside over a shelter hearing under § 39.402, Florida Statutes, an adjudicatory hearing under § 39.507, Florida Statutes, or an adjudicatory

hearing under § 39.809, Florida Statutes.”

The First DCA also reversed the order because the department did not present evidence that the child was dependent, nor did the department present any evidence that the mother did not comply with the stipulation.



### Read the Opinion

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## Second District Court of Appeal

### *Permanent Guardianship – Clearly Defined Visitation*

In re J.L.R., Jr., 2011 WL 2732671 (Fla. 2d DCA)

The mother appealed an order placing her two children in permanent guardianship with maternal grandmother. The trial court’s order (over the mother’s objection) left the visitation schedule to the discretion of the parties. Section 39.6221(2)(c), Florida Statutes (2010), requires the circuit court’s written order to “[s]pecify the frequency and nature of visitation or contact between the child and his or her parents.” This plain language mandates that the court establish a specific visitation schedule rather than leaving visitation to the discretion of either of the parties.”

The Second District Court of Appeal reversed the order “to the extent that it leaves the nature and frequency of any visitation between [the mother] and the children to the maternal grandmother’s unfettered discretion and remand for the trial court to delineate [mother’s] visitation rights with her children in accordance with §39.6221(2)(c).”



### Read the Opinion

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## Third District Court of Appeal

### *Termination of Parental Rights*

C.G. v. Department of Children and Families, 2011 WL 3250545 (Fla. 3d DCA)

The mother appealed the trial court’s order terminating her parental rights. At the termination trial the trial court took judicial notice of the prior dependency orders in the mother’s case. The mother contends that the Department of Children and Families “was required to re-prove its dependency case by a higher standard of review, i.e., clear and convincing, during the termination proceeding. The court said it would take notice of the adjudication of dependency record, but that it would not consider the dependency orders proven by “clear and convincing evidence.” Rather, the court noticed the orders based upon the weight by which they were entered in the dependency proceedings. The court agreed, on the other hand, that the findings upon which any termination was to be based must be by clear and convincing evidence.”

Third District Court of Appeal concluded “...that the trial court’s finding that clear and convincing evidence supported the termination of parental rights was based, in part, on competent and substantial evidence contained in the underlying dependency records. The state additionally demonstrated, by clear and convincing testimonial evidence, that [the mother] failed to substantially comply with the case plans and made little effort to remedy the harmful behavior and circumstances that initially brought her child into foster care.”

The Third DCA agreed with the trial court that the termination was the least restrictive means of protecting the child.



### Read the Opinion

#### *No dependency where drugs not dealt out of the home and firearm kept in locked room*

M.S. v. Department of Children and Families, 60 So.3d 573 (Fla. 3d DCA 2011)

The mother appealed the trial court's dependency adjudication which resulted after the father was arrested in a drug sting operation. The Department of Children and Families' (the department) petition was based on the father being arrested for selling drugs and because the father kept weapons in the bedroom. The Third District Court of Appeal (Third DCA) held that the evidence was insufficient to establish that child was dependent as to mother on the basis of neglect. The father did not deal drugs out of the home. The father's arrest resulted from a sting operation away from the home. Both the mother and father testified that the child was not allowed in the room with the weapons and the grandfather and mother testified that the weapons were behind a locked door. Additionally, the Third DCA held that "[the department] presented no evidence showing that [the child's] physical, mental or emotional health was significantly impaired or was at risk of such impairment."

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



### Read the Opinion

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#### Fourth District Court of Appeal *Substantial Compliance with Case Plan*

D.G. v. Department of Children and Families, 2011 WL 2462847 (Fla. 4th DCA)

The mother and father appealed the trial court's order terminating their parental rights. The termination was based on the parent's failure to substantially comply and material breach of their case plan. § 39.806(1), Fla. Stat.(2010). The mother was given case plan based upon "the mother's lack of parenting skills; the mother's lack of education; the mother's lack of employment; the mother's lack of housing; the mother's continued acceptance of domestic violence; and the mother's drug and alcohol use." In the span of three years from the date of the case plan, the mother had positive drug tests, she failed to obtain employment or stable housing, even though multiple years had passed since the case plan was originally implemented, and she continued to contact her abusive first husband for six months after the court ordered her to cease all contact with him.

The father was given a case plan that included obtain stable housing, employment, and to meet with his daughter in a consistent manner. In support of finding that the father did not substantially comply with his case plan the trial court found that the "father was not employed and lived in a house provided by child's maternal grandmother, and he failed to obtain a certificate of completion indicating that he had passed his high school equivalency exam because the certificate cost \$200, yet father and mother spent \$70 per week on cigarettes."

The Fourth District Court of Appeal upheld the trial court's order terminating both the mother's and father's parental rights.



## Read the Opinion

### *Termination of Parental Rights - Abandonment*

L.K. v. Department of Children and Families, 62 So.3d 1241 (Fla. 4th DCA 2011)

The mother appealed the trial court's order terminating her parental rights based on abandonment §39.01(1), Fla. Stat. (2010). The mother was given a family case plan and was only able to visit the child 2-3 times before she was incarcerated for narcotics. She then consented to the dependency. While in jail, the mother was unable to contact the Department of Children and Families (the department) as their phones could not receive collect calls. The mother kept abreast of the child's well-being through the grandfather. She sent letters, exchanged pictures through the grandfather and asked that the child visit her in jail – a request that was denied by the department. The mother participated in intensive rehabilitation and a work-release program.

The trial court terminated the mother's parental rights based on abandonment. The Fourth District court of Appeal (Fourth DCA) held that to terminate parental rights based on abandonment requires a two-prong test. "First, the parent must have been able to support the child and, second, the parent failed to establish a relationship with the child. See § 39.01(1), Fla. Stat. (2010)." The mother argued "the trial court erroneously excluded evidence of her compliance with her case plan and, instead, focused solely on her attempts to communicate with the child."

The Fourth DCA agreed with the mother holding "even though [the mother] was unable to make contact with [the child], [the mother] evinced intent to contact her child, have visits with her child, and receive information, photographs, and updates. Also, [the mother] possibly made efforts to substantially comply with her case plan and it was erroneous to penalize her and find that she abandoned her child without first allowing for presentation of any evidence which may show those efforts"

The Fourth DCA reversed and remanded the case.



## Read the Opinion

### *Termination of Parental Rights – Manifest Best Interest*

J.C. v. K.K., 2011 WL 2462854 (Fla. 4th DCA)

The Department of Children and Families (the department), the Guardian ad Litem program, and the child appealed the trial court order declining to terminate the father's parental rights. The trial court held that the grounds to terminate the father's rights existed but termination was not the least restrictive means necessary to protect the child from further harm.

The department originally filed a dependency petition at the child's birth when the mother tested positive for methadone. The child was later sheltered as a result of the mother's ongoing substance abuse and non-compliance with the department's services. The trial court found that the father and mother abandoned the child and the father failed to substantially complete his case plan within nine months. The trial court praised the father's actions after the case plan. The trial court made its manifest best interest finding but only as to the mother.

"[T]he court determined that termination of the father's parental rights was not the least restrictive means to protect the child from harm. The court explained: "The father's

success in completing the case plan tasks and his persistence in establishing a relationship with his son demonstrate that reunification is a reasonable and less restrictive alternative to terminating his parental rights.” The court thus re-adjudicated the child dependent and ordered the Department to file a new case plan for reuniting the father with the child.”

The Fourth District Court of Appeal (Fourth DCA) held that the trial court did not comport to the manifest best interest statute where: there is not a suitable relative placement, the child has been in a stable or preadoptive placement for over six months, and the child was bonded to the foster family.

The Fourth DCA held “this case comes down to the missing analysis of what is in the child's manifest best interest—termination or reunification? We reverse and remand for further proceedings for the court to determine this issue.”



### Read the Opinion

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## Fifth District Court of Appeal *Substantial Compliance with Case Plan*

C.K. v. Department of Children and Families, 2011 WL 2937371 (Fla. 5th DCA)

The mother appeals the trial court's order terminating her parental rights. The Fifth District Court of Appeal (Fifth DCA) upheld the termination of the mother's rights citing the mother's lack of compliance with her case plan. Even eight months after expiration of mother's case plan, mother was not in substantial compliance with the case plan tasks addressing the issues that led to child's removal from her care, including substance abuse counseling, a parenting class, a bio-psychological assessment and necessary follow-up, stable income and housing, and a co-dependency program.



### Read the Opinion

## *Termination of Parental Rights - Abandonment*

R.L. v. Department of Children and Families, 63 So.3d 920 (Fla. 5th DCA 2011)

The mother of two of the children and the father of one child appealed the trial court's order terminating their parental rights. The Fifth District Court of Appeal (Fifth DCA) upheld the termination of the mother's rights but reversed as to the father's rights to one of the children.

To terminate parental rights, “the State must establish: (1) the existence of one of the statutory grounds set forth in Chapter 39; (2) that termination is in the best interest of the child; and (3) that termination is the least restrictive means of protecting the child from harm.”

The Department of Children and Families (the department) failed to show that the father abandoned the child where the father supported the child, clearly had positive parent-child bond, no case plan was ever offered. The Fifth DCA went on to say that the father's working overseas and his medical problems did not necessarily mean that the father abandoned the child. Further, the termination of parental rights was not the least restrictive means of protecting the child from harm where there was visitation and a parent-child bond.

The Fifth DCA upheld the trial court's order terminating the mother's parental rights but

reversed the order as to the father.



## Read the Opinion

### *Step-father has no right to inspect confidential records*

R.L.F. v. Department of Children and Families, 63 So.3d 902 (Fla. 5th DCA 2011)

The step-father filed a writ of mandamus seeking to compel the trial court to treat him as a party to the dependency proceeding and to allow him access to confidential Department of Children and Families (the department) records. The Fifth District Court of Appeal (Fifth DCA) found the step-father's request to be treated as a party to the case was moot because the trial court had already been treating him as a party in the dependency proceedings.

The Fifth DCA held that the step-father did not have a right to access confidential records as a step-parent is not named as a party entitled to review such documents. Section 39.0132(3) states "All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, subject to the provisions of s. 63.162, a **child and the parents of the child and their attorneys, guardian ad litem, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child....**" The statute goes on to name more individuals that qualify as a person that may review records – a step-father is not named.

The Fifth DCA found that the step-father did not "establish entitlement to receive mandamus relief" as he did not show that the trial court "has a clear legal duty to grant him access to the DCF's confidential records since he is not a party with statutory entitlement to receive such access."



## Read the Opinion

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### Website Resources

#### *Child Welfare Information Gateway - For Adopted People*

Being adopted has a lifelong impact for the adopted person. Adopted people often wonder where they come from and whom they look like. Adopted people may want to search for their biological families, or if adopted through intercountry adoption, may want to visit their country of birth and investigate their roots. Find resources in this section that may be helpful to people who joined their families through adoption.

[http://www.childwelfare.gov/adoption/adopt\\_people/](http://www.childwelfare.gov/adoption/adopt_people/)

#### *Welcome to the Adoption & Child Welfare LawSite*

The LawSite is a single online source of child welfare and adoption law information for adoptive and foster parents, biological parents, child and family lawyers, juvenile and family court judges, agency personnel and child advocates of all kinds. The LawSite provides statutes, regulations, key cases, and explanatory materials, and many other resources for child welfare and adoption information. Also included are plain English summaries of most of the legal source documents hosted on the site.

<http://www.adoptionchildwelfarelaw.org/>

comments or suggestions - [elizabeth.damski@gal.fl.gov](mailto:elizabeth.damski@gal.fl.gov)

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