Legal Briefs Newsletter

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Termination of Parental Rights

Single Parent Termination

A.G. v. Department of Children and Family Services, 2006 WL 197310 (Fla. 2d DCA)

This case was dismissed because the court found that the issues brought by A.G. were moot. However, the Second District Court of Appeal, in a footnote, provided the following:

"The failure to address whether one of the circumstances in § 39.811(6), Florida Statutes exists has been the sole basis for reversal in several termination cases and would have been in this case had the prospective fathers' rights not been terminated. We emphasize to trial courts, and to all parties participating in termination proceedings, the importance of heeding this statutory provision in cases where only one parent's rights are terminated. Even in cases in which the rights of both parents are terminated, trial courts may find it appropriate to address whether any of these circumstances are present as a precaution against the possibility that one parent's termination is reversed on appeal. See, e.g., J.T. v. Dep't of Children & Family Servs. (In re L.C.), 908 So.2d 568 (Fla. 2d DCA 2005); N.M. v. Dep't of Children & Family Servs. (In re V.M.), 893 So.2d 595 (Fla. 2d DCA 2005)."

The trial court must assess the grounds for TPR, manifest best interests, and least restrictive means

In re A.L.R., 2006 WL 119431 (Fla. 2d DCA)

The father appealed a termination of parental rights (TPR) to A.L.R. The mother, in a divorce settlement agreed that the father, who was convicted in military court of sexually abusing his stepdaughters, could have supervised visitation with his daughter. The mother filed a TPR petition against the father. The trial court terminated father's parental rights. Father appealed.

The Second District Court of Appeal (Second DCA) held that the mother was permitted to file a petition to terminate parental rights under § 39.802(1), Florida Statutes (2002), which permits the filing of such a petition by "any other person who has knowledge of the facts alleged or is informed of them and believes they are true." The Second DCA held the following:

The trial court could not terminate father's rights based on length of his incarceration because the trial court did not assess whether father's remaining five to six years of incarceration represented a substantial portion of the ten years remaining before his daughter reached age of majority. § 39.806(1)(d)(1), Florida Statutes (2002).

The trial court could not terminate father's rights due to egregious conduct; even though father's sexual abuse of stepdaughters was egregious conduct, and there was evidence

that the abuse had an effect on daughter such that a continued relationship with father might pose a risk of significant harm, trial court did not assess these factors in deciding to terminate father's parental rights. § 39.806(1)(f), Florida Statutes (2002).

The trial court's failure to address whether termination was in daughter's manifest best interests required reversal; trial court discussed daughter's best interests but did not refer to statute containing the manifest best interests standard or discuss the factors listed in statute, and trial court did not address at all whether termination was the least restrictive means of protecting daughter.

Finally, the Second DCA held that the trial court failed to assess whether factors permitting termination of only one parent's rights were satisfied. § 39.811(6), Florida Statutes (2002).

The Second DCA reversed the judgment terminating the father's parental rights and remanded to the trial court to conduct further proceedings.

Nexus between drug use and child's safety

W.N. v. Department of Children & Family Services, 2006 WL 119822 (Fla. 3d DCA)

Father contends that the order terminating his parental rights should be reversed because there was no evidence of harm to the child, no finding of substantial noncompliance under the twelve-month rule, and because the least restrictive means test was not satisfied. The Third District Court of Appeal (Third DCA) upheld the trial court's ruling that the father's drug use threatened the life and safety of the minor child. A parent's drug use alone is not enough to establish that the child's life or safety is threatened. There must be a nexus between the illegal drug use and child's safety. The Third DCA held that there was substantial competent evidence to support the trial court's finding of a nexus between the father's drug use and the child's safety, including: repeatedly testing positive for cocaine, living with the child's mother whose parental rights had already been terminated, failing to pay child support, and failing to visit his child.

The Third DCA also held that the father failed to substantially comply with his case plan. The evidence established that measures short of termination will not permit the parent-child bond to be safely re-established. The Third DCA affirmed the termination of parental rights.

Reversal of Termination of Parental Rights

In re J.B., 2005 WL 3334379 (Fla. 2d DCA)

Department of Children and Family Services (the Department) sought termination of father's parental rights (TPR) to his child, who had been adjudicated dependent. The trial court terminated father's parental rights. Father appealed.

The Second District Court of Appeal (Second DCA) reversed the TPR holding that the statutory grounds for the termination were not supported by clear and convincing evidence. The Second DCA held the following:

The Department failed to provide clear and convincing evidence that the father had abandoned child. Incarceration alone is insufficient to TPR on the grounds of abandonment. The father actively sought custody of his son before his incarceration, demonstrated an interest in his son, and was near the end of his incarceration.

The Department failed to carry its burden to show that father had engaged in conduct toward child that threatened child's well-being. The father had discontinued substance abuse, had ceased criminal activity to support a drug habit, was taking self-improvement courses in prison, and his most recent criminal activity was throwing a rock through a former employer's window in frustration. The Second DCA held that it was error to terminate under § 39.806(1)(c) "when improvement was demonstrated and further improvement was possible." *K.S. v. Department of Children and Family Services*, 898 So. 2d 220 (Fla. 1st DCA 2004). Further, there was no evidence that the father's incarceration would adversely impact the child.

The Department failed to prove by clear and convincing evidence that father's parental rights should be terminated based on statute providing for termination when child has been adjudicated dependent, case plan has been filed with court, and child continues to be abused, neglected, or abandoned. To terminate parental rights under § 39.8061(e), "the trial court must find that any provision of services provided would be futile or that the child would be threatened with harm despite any services provided to the parent." *R.W.W. v. Department of Children and Families*, 788 So 2d 1020, 1023 (Fla. 2d DCA 2001). The father was unable to comply with the remainder of his case plan because of incarceration – this does not support termination. See *Hutson v. State*, 687 So.2d 924 (Fla. 2d DCA 1997).

Consent

Consent to dependency: Findings must be incorporated into the Order

D.M.U. v. Department of Children and Families, 2005 WL 3536096 (Fla.3d DCA)

The mother appealed the trial court's orders denying her motion to withdraw her consent to dependency of her child. The trial court found the child dependent after the mother consented to the adjudication of dependency. The trial court questioned the mother verifying that the mother understood (1) the allegations contained in the petition, (2) the ramifications of consent to the dependency, and (3) the right to trial and appeal. The mother later filed a motion to set aside her consent alleging that good cause existed for withdrawal based on duress and lack of understanding the legal ramifications. (*See* Fla. R. Juv. P. 8.325(c)).

The Third District Court of Appeal (Third DCA) found that the mother's contention that her consent was uninformed was without merit as the trial court accepted her consent only after asking whether she understood the ramifications. However, the Third DCA did agree with the mother's contention that the trial court's failure to insert specific written findings into its adjudication order violates Florida Rule of Juvenile Procedure 8.325(c). The rule requires that the court incorporate its findings into a written order. The Third DCA held that the adjudication order must be vacated and remanded so the court can enter an order, which contains written findings as to the voluntary and knowing nature of mother's consent. Further, the Third DCA held that the trial court was presented with competent substantial evidence to sustain its findings but did not sufficiently incorporate the findings in the adjudication order.

Consent, Mediation – Notice and Opportunity to be Heard

Department of Children and Families v. L.R., 914 So.2d 1055 (Fla. 1st DCA 2005)

The First District Court of Appeal held that, "notwithstanding that she (mother) had signed a written consent to the petition for dependency, the child's mother was entitled to notice and an opportunity to be heard with regard to all proceedings regarding the dependency of her child. *J.H. v. Department of Children & Families*, 890 So.2d 476 (Fla. 5th DCA 2004); *C.L.R. v. Department of Children & Families*, 913 So.2d 764 (Fla. 5th DCA 2004). This includes entitlement to notice and opportunity to attend the mediation conference involving the father of the child."

Case Plans

Case Plans – Case Plan must be Amended

H.G. v. Department of Children and Families, 916 So.2d 1006 (Fla. 4th DCA2006)

The court placed the child with the father at shelter. The case plan addressed the mother's inability to provide a safe and nurturing home. The case plan required the mother to attend parenting classes, complete anger management, family counseling with the child, and participate in individual counseling. At a later hearing, the trial court ordered both parents to attend family counseling sessions, but did not amend the case plan. At a later permanency review hearing the trial court found that the mother completed parenting

classes, an anger management program, and individual counseling. The trial court also stated that "child support is part of the case plan" and the mother's refusal to pay the support would be considered.

The Department of Children and Families (the Department) filed a motion to terminate protective supervision, alleging that permanency had been reached with the father. The mother filed a motion for reunification the following day.

When a case plan goal is reunification, the law requires that the child be returned to his parent if the court is satisfied that the parent "has substantially complied with the terms of the case plan to the extent that the safety, well-being, and physical, mental, and emotional health of the child is not endangered buy the return of the child to the home." § 39.522(2), Florida Statutes.

The Fourth District Court of Appeal (Fourth DCA) held that because the case plan was never amended to include family therapy, the mother's failure to attend those sessions could not be considered when determining whether she substantially complied with the case plan. The Fourth DCA held that the mother substantially complied with her case plan. The Fourth DCA also held that because the record contained no evidence showing that the case plan was amended to require the mother to provide the support, her failure to pay could not be considered when the trial court ruled on reunification. The Fourth DCA remanded to the lower court with instructions to return the child to the mother unless reunification would endanger the child's safety, well-being, and physical, mental, and emotional health or otherwise would not be in the child's best interest.

Assistance of Counsel

Chapter 63

G.C. v. W.J., 2005 WL 3555723 (Fla. 1st DCA)

G.C., an incarcerated, unmarried biological father, appealed the trial court's termination under Chapter 63, Florida Statutes (2003), of his parental rights. His appeal was based on the denial of assistance of counsel. The trial court denied G.C.'s requests for counsel concluding that Chapter 63 does not require the court to advise appellant of his right to counsel or appoint him counsel. The First District Court of Appeal (First DCA) held that even though Chapter 63 (unlike Chapter 39) does not expressly provide for appointed counsel, "such an entitlement is inherent where fundamental parental rights are subject to termination." The First DCA reversed and remanded the termination of parental rights and the final judgment of adoption.

Hearsay

Admission of hearsay testimony in a post-dispositional context

R.C. v. Department of Children and Families, 2005 WL 3330326 (Fla. 5th DCA)

Dependency proceedings were brought involving five minor children. After the adoption of a case plan for the parents, the trial court modified the case plan based on new evidence, provided by the Child Protection Team (CPT) investigator that father abused two or more of the female children. The CPT investigator interviewed the 19-year-old sibling of the five children, who said that she had been sexually abused by her father and that her two sisters told her they had also been sexually abused by the father and older brother. The Department of Children and Families (the Department) sought to suspend the father's visitation and add a psycho-sexual evaluation of the father to the case plan.

The trial refused to admit "double hearsay" but the trial court allowed the CPT investigator's testimony about what the 19 year-old said happened to her but not about what she said her siblings said to her (double hearsay). The Fifth District Court of Appeal (Fifth DCA) held that the statement did not qualify under the medical diagnosis exception to the hearsay rule. The Department argued that the hearsay was admissible under §

39.521, Florida Statutes, which includes the catch-all, "any other relevant and material evidence." However, § 39.601(9)(f) requires that a case plan can only be amended by the court "based on competent evidence demonstrating the need for the amendment." The Fifth DCA held that hearsay in this context is not competent. The witnesses in this case must testify.

Evidence Review[1]

Impeachment of a Witness: Florida Evidence Code § 90.608

Impeachment – Prior Inconsistent Statements

- Most common method of impeachment
- The argument is not that the prior statement is true and the testimony in court is false, but that because the witness had made two different statements concerning a material fact, the court should not place great weight on the in-court testimony
- Examples of types of statements Florida courts have admitted – witness's own tax returns, letters, sworn extrajudicial statements, depositions, signed medical records, testimony at a previous trial
- Must be statement of the witness testifying
- Not "nit-picking," must be a significant fact
- Inadmissible if probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury, or needless presentation of cumulative evidence § 90.403
- Did the witness make the prior statement – time, place, occasion, and person ?
- If written or oral reduced to writing, the court, upon motion of counsel, must order the statement be shown or contents disclosed to the witness

Impeachment – Proof of Bias or Interest § 90.608(1)(b)

- The underlying bias must be relevant
- The subject need not have been brought up on direct
- If witness admits facts giving rise to the bias or interest, counsel may not introduce extrinsic evidence to prove the bias or interest. If the witness does not admit, then he or she may be contradicted by introduction of other evidence showing bias or interest
- No foundation needs to be laid

Impeachment –Contradiction § 90.608(1)(e)

- During cross the examiner may point out the facts which are contrary to the witness's testimony on direct examination – the credibility of the witness's direct testimony will be in doubt.

Other grounds of impeachment include: Defects in Mental or Sensory Capacity §90.608(1)(d), Proof of Character using Reputation Testimony § 90.609, Conviction of Certain Crimes as Impeachment § 90.610. See Florida Evidence Code.

[1] Ehrhardt, Florida Evidence, § 608.4 - § 608.6 (2002 Edition)

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