Florida Guardian Ad Litem Program
The Voice for Florida's Abused & Neglected Children

Legal Briefs Newsletter

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First District Court of Appeal

Termination of Parental Rights – Clear and Convincing Evidence

M.E. v. Florida Dept. of Children and Families, 2009 WL 36556 (Fla. 1st DCA)

The mother appealed the trial court's order terminating her parental rights. She argued that the trial court failed to find the elements necessary for termination by clear and convincing evidence. The First District Court of Appeal agreed with the mother.

Clear and convincing evidence has been defined as "intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *C.M. v. Dep't of Children & Families, 953 So.2d 547, 550 (Fla. 1st DCA 2007)*.

The trial court terminated the mother's parental rights even though it found there were "… gaps in proof"; "obvious errors"; and the "only professional" who testified and a "certain vagueness even on subjects where [the professional] appeared to be reasonably accurate."

The First DCA reversed the trial court's order and remanded for further proceedings.

Read the Opinion

Second District Court of Appeal

Dependency of an Abused Child's Sibling

In re S.M., 997 So.2d 513 (Fla. 2d DCA 2008)

The mother appealed the trail court's dependency order of her three children. The trial court's dependency order was based upon evidence that the eldest of the three children, a young girl, was sexually abused by the mother's boyfriend. The mother had been informed of the abuse of her daughter, ordered to keep her boyfriend away from her children, and yet the mother continued to live with her boyfriend. The Second District Court of Appeal (Second DCA) affirmed the trial court's adjudication of the two oldest children but reversed the dependency adjudication as to the youngest child. The Second DCA held that there was clear and convincing evidence that the mother had not only abused and neglected one child by failing to protect her from continued contact with her boyfriend but had also abused the middle child.

The Second DCA held that "nexus" is not the only circumstance in which to find dependency of an abused child's sibling. "Without regard to the probability of future harm, there are times when a child's present knowledge of past or ongoing abuse to his or her sibling, coupled with the response of the parents to that knowledge, can result in present mental injury qualifying the child for protection under dependency." The middle child was a "direct witness to the fact that his mother was aware of the abuse but did nothing to protect [the daughter]… the middle child's "testimony at the adjudicatory

hearing was defensive and at times elusive. He appeared to blame [the daughter] for the break-up of the family and his placement into foster care. "[The middle child] has been taught, either directly or indirectly, to ostracize [the daughter] for coming forward and currently maintaining these allegations." The trial court based its adjudication of the middle child on "the trauma he exhibited when he testified today about the physical abuse and the fact that he has basically turned against his sister and that, in and of itself, does not provide for a healthy and safe environment for him, either. [The middle child] needs counseling ... so he will no longer bear the burden of having to choose sides in this family."

The Second DCA upheld the dependency adjudication as to the two oldest children but reversed as to the infant as the Department of Children and Family Services failed to present evidence that established that the infant half-sister was at risk of imminent abuse or neglect, nor to show that the abuse of the daughter in some way harmed this infant.

Read the Opinion

Abandonment – Termination of Parental Rights

In re Z.L., 2009 WL 277208 (Fla. 2d DCA 2009)

The father appealed the trial court's order terminating his parental rights. The father had never met the child and first heard of her when the Department of Children and Family Services (the department) contacted him while he was in prison in December 2007.

The Second District Court of Appeal (Second DCA) reversed the termination on two grounds. First, the trial court's order was "legally insufficient because it contains only a conclusory statement that termination of F.B.'s parental rights would be in the manifest best interests of the child. *See* S.P. v. State, Dep't of Children & Families, 751 So.2d 667 (Fla. 2d DCA 2000) (reversing when final judgment terminating parental rights failed to address statutory factors concerning manifest best interests of child); *see also* § 39.809(5), Fla. Stat. (2007)." Second, that there was insufficient evidence to prove that the father had abandoned the child. When the department contacted the father in 2007, he informed the department that he wanted custody of his child. The department failed to introduce evidence regarding when the father first learned of his child, what he had been doing in the intervening years, or whether he had been able to provide for the child.

The Second DCA reversed the trial court's termination of parental rights. The trial court remanded the case stating that the "department may indeed be able to establish abandonment with clear and convincing evidence that [the father] knew of his child, was able to support her or at least to communicate with her and assume some parental duties, and yet made only marginal efforts to do so. *See* *In re R.V.F.,* 437 So.2d 713 (Fla. 2d DCA 1983) (concluding that father abandoned child when he did not contact child or Department for more than seventeen months and provided no support although he had the financial ability to do so)."

The Second DCA reversed the termination.

Read the Opinion

Third District Court of Appeal

Visitation after Termination of Supervision

F.E. v. Department of Children and Families, 2009 WL 80429 (Fla. 3d DCA)

The mother sought review of the trial court's order terminating the Department of Children and Families (the department) supervision of her daughter and allowing the mother no visitation with her daughter. The Third District Court of Appeal (Third DCA) upheld the trial court's order which was based on "extensive expert and lay testimony

that, because of severe physical abuse, the child was in fear of the mother and would suffer serious mental distress from any personal contact with her." However, the Third DCA struck the part of the trial court's order which allowed for visitation with the child in the future "at the discretion of the custodial father." The mother "retains the unqualified ability to seek a modification or elimination of any restrictions under § 39.621(9), Fla. Stat. (2008)."

Read the Opinion

Fourth District Court of Appeal

Termination of Parental Rights – Manifest Best Interest Hearing

R.E. v. Department of Children and Families,996 So.2d 929 (Fla. 4th DCA 2008)

The father appealed the trial court's order terminating his parental rights. The termination order had been entered as a default judgment after the parents had failed to appear at the advisory hearing. Ultimately, the Fourth District Court of Appeal (Fourth DCA) relinquished jurisdiction to the trial court in order to conduct a new manifest best interest hearing as there was a transcription problem during the original manifest best interest hearing. After this new manifest best interest hearing, the trial court again entered its termination order. The father argued that the new judge could not hold the manifest best interest hearing without also rehearing the termination proceedings.

The Fourth DCA disagreed. The termination of parental rights process is a two-step process: "(1) the trial court must find by clear and convincing evidence that one of the statutory grounds for termination has been established, and (2) the trial court must consider the manifest best interests of the child. *J.J. v. Dep't of Children & Families,* 886 So.2d 1046, 1048 (Fla. 4th DCA 2004). Typically a successor judge cannot enter a judgment based on evidence he or she did not hear, *see Beattie v. Beattie,* 536 So.2d 1078 (Fla. 4th DCA 1988)." But in this case there was no evidence introduced as the termination was based on default for failure to appear. § 39.801(3)(d), Fla. Stat.; Fla. R. Juv. P. 8.525(d).

The Fourth DCA affirmed the trial courts termination of parental rights.

Read the Opinion

Fifth District Court of Appeal

Putative Father Registry

J.H. v. K.D.M., 2009 WL 275173 (Fla. 5th DCA)

The putative father appeals an order terminating his parental rights and granting adoption to the child's maternal grandparents. The putative father properly registered with the Putative Father Registry pursuant to § 63.054, Fla. Stat. (2004) but failed to update his registration when he later changed residences. "Section 63.054, Florida Statutes, establishes the Florida Putative Father Registry … which requires an unmarried biological father to timely file a claim of paternity with the Registry in order to preserve the right to notice and consent to an adoption. *See also Heart of Adoptions, Inc. v. J.A.,* 963 So.2d 189, 196 (Fla.2007)."

The trial court found that because he failed to update his registration he could not claim lack of notice as a defense. The Fifth District Court of Appeal (Fifth DCA) disagreed. Although § 63.054(6) requires that the putative father notify and update the Office of Vital Statistics of any change of address" and that the failure "to report any such change is at the registrant's own risk and shall not serve as a valid defense based upon lack of notice," the trial court did not take into account the exception in § 63.054(6) which states

"*unless the person petitioning for termination of parental rights or adoption has actual or constructive notice of the registrant's address and whereabouts from another source*." In this case, the trial court had evidence that the mother and maternal grandparents had actual or constructive knowledge regarding the putative father's residence.

The Fifth DCA vacated the final judgment granting the adoption and terminating the parental rights and remanded for further proceedings.

Read the Opinion

Validity of Surrender

R.B. v. Department of Children and Families, 2008 WL 5422870 (Fla. 5th DCA)

The mother appealed the trial court's denial of her motion to set aside her surrender of parental rights to her two children. The mother argued that the surrenders had been coerced, were not properly acknowledged, and that her mental condition was not properly addressed. The Fifth District Court (Fifth DCA) disagreed with the mother and upheld the trial court's denial of mother's motion to set aside the surrenders.

The mother contends that the surrenders were not notarized as required by statute and therefore the surrenders were not valid. The Fifth DCA held that the mother's argument failed to take into account the rest of the statute which allows for the surrender document to be acknowledged by "other person authorized to take acknowledgements." The mother's surrenders were acknowledged by the general master - someone authorized to take the acknowledgement. *See Burns v. Burns,* 153 Fla. 73, 13 So.2d 599, 602 (1943).

Secondly, the mother contends that the surrenders were made under fraud or duress and she should be able to revoke the surrenders under § 39.806(1)(a)2 because a Department of Children and Families worker told her that she would spend 20 years in jail if she did not surrender the children. The Fifth DCA held that the mother did not provide any clear and convincing evidence that the statement was ever made to her – it was just speculation and conjecture on her part.

Finally, the Fifth DCA held that the trial court properly weighed the evidence regarding the mother's mental health issues and affirmed the trial court's denial of mother's motion.

Effective Assistance of Counsel – Termination of Parental Rights

A.G. v. Department of Children and Families, 2009 WL 211071 (Fla. 5th DCA)

The Fifth District Court of Appeal certified the following question for consideration by the Florida Supreme Court:

MAY A PARENT WHOSE PARENTAL RIGHTS HAVE BEEN TERMINATED CHALLENGE THE JUDGMENT OF TERMINATION BY PETITION FOR HABEAS CORPUS ON THE BASIS THAT THE PARENT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

Read the Opinion

Preserving the Record for Appeal

Wendie Cooper, Appellate Counsel Statewide Guardiand ad Litem Office

No one likes to be told by an appellate attorney that error needs to be conceded on appeal or that error was not preserved and no appeal can be taken. As a trial attorney, there are steps that can be taken to possibly prevent this from happening. To understand better, it is important to understand what an appellate court does. First, an

appellate court exists to correct errors in the trial court. To do this an error must be either preserved or amount to fundamental error. Second, the appellate court must defer to the trial court's findings of fact. The appellate court is not permitted to reweigh the evidence presented at trial and substitute its judgment for that of the trial court.

Burdens of Proof/Content of Record. For a dependency trial, the burden of proof is a preponderance of the evidence. In termination of parental rights trials, the burden is clear and convincing evidence. For each burden, there must be competent, substantial evidence in the record to support the trial court's findings. The appellate court cannot go outside of the record to review a case. In most situations, only the trial is transcribed, so if information is brought before the court at a different hearing, the appellate court may not be aware of it. Even if other hearings are transcribed, it may not be enough to save an appeal. The evidentiary standards are often relaxed at non-adjudicatory hearings. So, the unsworn statements of a case worker or volunteer concerning a parent at a judicial review are usually not sufficient to prove a ground for TPR at trial. You must prove all elements of your case *at trial* sufficient to meet the burden of proof, even if it takes longer or seems redundant.

Contemporaneous Objections. The second major mistake that results in problems at the appellate level is the failure to preserve an error. If an error is not preserved, an appellate court cannot review it unless it amounts to fundamental error. The reason for this is that a trial court must be given the opportunity to correct the error. This is called the contemporaneous objection rule. As a trial attorney, you must object to an error at the time it occurs. Not only must you object you must make your objection specific enough to alert the court as to why you are objecting – state the evidentiary ground for the objection. Finally, you must ensure that the court rules on the objection. Without a specific objection and a ruling, there is no preservation for purposes of appeal.

While most of this seems technical and can be hard to remember in the heat of a trial, it is important because reversal and remand or not being able to appeal an issue results in delay of permanency. When preparing for trial, evaluate the elements necessary to be proven in the case and review the evidence to be sure that competent, substantial evidence exists. Also, pay close attention at trial to be sure no critical errors are missed. These few simple steps will enhance your trial skills and will help move cases to quicker resolution for the children we represent.