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

LEGAL BRIEFS NEWSLETTER

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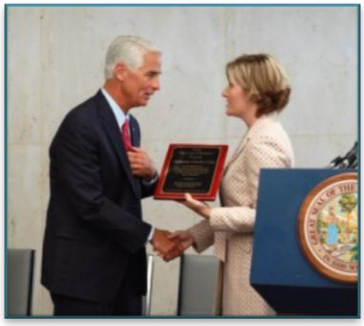

On March 25, 2009, volunteer guardians ad litem came from all over the state to meet with legislators and make Guardian ad Litem Day at the Capitol a tremendous success. The Florida Guardian ad Litem Foundation hosted the luncheon and Theresa Flury, Executive Director of the Florida Guardian ad Litem Program, presented Governor Charlie Christ with the Voice for Children Award. This award is presented annually to someone who has positively impacted the lives of abused and neglected children. Chief Justice Peggy Quince also spoke at the event about the needs of children in foster care and the importance of giving them a voice in court. Jeremy Chick spoke about his experiences as a child in Florida's dependency system. Mr. Chick thanked his Guardian ad Litem Volunteer and the Guardian ad Litem Program for their advocacy.

First District Court of Appeal

Dependency – Domestic Violence

C.W. v. Department of Children and Families, 2009 WL 762173 (Fla. 1st DCA)

The mother contested the trial court's dependency adjudication of her child. The Department of Children and Families (the department) based its dependency petition on a domestic violence incident that occurred between the parents while the father held the three month old child. § 39.01(31)(i), Fla. Stat. (2007).

The First District Court of Appeal (First DCA) reversed the trial court's order adjudicating the child dependent. The First DCA held that although domestic violence may constitute harm if it occurs in the presence of a child, the domestic violence must result in some physical or mental injury to the child. *See M.B. v. Dep't of Children & Family Servs.,* 937 So.2d 709 (Fla. 2d DCA 2006) In this case, there was no evidence that the infant "comprehended the incident, sustained any physical or mental injury, or was cognizant in any way of the parents' poor behavior toward one another."

The First DCA reversed the trial court's order.

Read the Opinion

Second District Court of Appeal

Due Process – Notice and Opportunity to be Heard

In re A.W.P., Jr., 2009 WL 724040 (Fla. 2d DCA)

The father appealed the trial court's Order Approving Educational Plans which prohibited

the father from having any visitation with his teenage son while his son attended a military academy in Indiana. The father argued that he was denied due process as he did not receive notice nor was he given an opportunity to be heard. The father was served the day before the trial court heard the motion. In addition, the father and the department agree that the trial court did not address the father's right to counsel as § 39.013(9)(a), Fla. Stat.(2008), requires.

Doughtery (the child's co-custodian who filed the Motion for Order Approving Educational Plans) argued that because the father had previously been limited to supervised visitation "by Hillsborough Kids, Inc. (HKI), and because HKI does not operate outside Hillsborough County, the order prohibiting any visitation in Indiana does not modify his rights." The Second District Court of Appeal (Second DCA) did not agree.

The Second DCA held that "the father was entitled to notice and an opportunity to be heard on Dougherty's motion that specifically requested "[t]hat the father be denied visitation with the child while the child resides at [the military academy], where the father is outside the supervision of this Court."

The Second DCA quashed the Order Approving Educational Plans, as the father was denied due process.

Read the Opinion

Substantial Compliance with Case Plan

In re G.C., 2009 WL 454580 (Fla. 2d DCA)

The parents appealed the trial court's order terminating their parental rights. The Department of Children and Family Services (the department) based the termination of parental rights on the parent's failure to substantially comply with their case plans under §§ 39.806(1)(c) and (e), Fla. Stat. (2007).

The trial court "ruled that termination was not appropriate under § 39.806(1)(c) because the department had not proven by clear and convincing evidence that the parents' continuing involvement in the children's lives posed a risk to the children despite the provision of services. In particular, the court noted that it could not determine whether any provision of services would be futile."

The trial court based the termination on §39.806(e), holding that the parents had failed to substantially comply with their case plans, as defined in § 39.01(71). The parents had not "ameliorated the problems which caused the case to be filed." The trial court stated that the "children were removed from the parents' care because the parents could not provide supervision and care since the Father lacked appropriate housing and the Mother had been arrested and evicted." However, even though the trial court found that there was stable housing and the parents could financially support the children, they found the parents were not in substantial compliance of their case plans because "(1) they had not eliminated household violence, (2) the Mother had not completed her mental health tasks, and (3) the Mother had not completed her anger management tasks."

The Second District Court of Appeal (Second DCA) reversed the trial court's order terminating parental rights. "Substantial compliance means that *the circumstances which caused the creation of the case plan* have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child's parent." § 39.01(71) (emphasis added); *E.R. v. Dep't of Children Family Servs.,* 937 So.2d 1196, 1198 (Fla. 3d DCA 2006)." The mother's case plan was created because of lack of housing and inadequate supervision, while the

father's case plan was based on lack of housing. The trial court "found that the parents had stable housing, the Mother was applying for disability benefits due to her asthma, and the Father worked regularly, earning between $2000 to $6000 monthly. The parents finished a parenting class and visited as often as possible with the children. Above all, there was no indication that domestic violence caused any harm to the children because the children were not present when the alleged incidents occurred. *See* § 39.01(31)(i)."

The Second DCA also could not affirm termination under § 39.806(1)(c) for two reasons. First, the department's only allegation of harm was that the dependency forced the children to live without them in foster care. Any harm to the children was as a result of the department's placement of the children into a particular foster home and cannot be the basis for termination under § 39.806(1)(c). Second, the department did not prove provision of services would be futile. For these reasons, the Second DCA upheld the trial court's decision not to terminate parental rights under § 39.806(1)(c).

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

Read the Opinion

Third District Court of Appeal

Termination of Parental Rights – Case Plan Compliance

K.G. v. Department of Children and Families, 2009 WL 763609 (Fla. 3d DCA)

The mother appealed the trial court's order terminating her parental rights. The Department of Children and Families based its termination petition on § 39.806(1)(e)1, Fla. Stat.(2007). The mother had been offered three case plans and had failed to comply with any of them leading "her children to languish in the system for more than two years."

The Third District Court of Appeal upheld the trial court's order terminating the mother's parental rights.

Read the Opinion

Fourth District Court of Appeal

Evidence – Business Records Exception; Telephonic Testimony

M.S. v. Department of Children and Families, 2009 WL 838285 (Fla. 4th DCA)

The father appealed the trial court's order adjudicating his daughter dependent. The father argued that the trial court erred in allowing Maryland (the state from which the family had recently moved) child welfare records to be admitted into evidence as business records. The father also argued that the trial court erred in allowing a Maryland caseworker to testify telephonically without consent of all the parties. The Fourth District Court of Appeal (Fourth DCA) agreed with the father and reversed the trial court's dependency adjudication.

For the business records exception to apply to the Maryland child welfare records, it must be shown that the record was:

1. made at or near the time of the event recorded;
2. by or from information transmitted by a person with knowledge;
3. kept in the course of a regularly conducted business activity; and
4. that it was the regular practice of that business to make such a record.

See Quinn v. State, 662 So.2d 947, 953 (Fla. 5th DCA 1995); § 90.803(6)(a), Fla. Stat. (2002).

The records in this case consisted mostly of inadmissible hearsay statements from unknown persons in Maryland. The court erred in admitting them as a business record.

The Fourth DCA also held that the trial court erred in allowing telephonic testimony over the objection of the father. Pursuant to Florida Rule of Judicial Administration 2.530(d)(1), "[a] county or circuit court judge may, *if all the parties consent*, allow testimony to be taken through communication equipment." The father did not consent to the telephonic testimony therefore it was inadmissible.

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

Read the Opinion

To learn more about evidentiary issues, be sure to review the Guardian ad Litem Program audio training entitled EVIDENCE ISSUES INVOLVING JUVENILES IN FLORIDA, Charles W. Ehrhardt, Ladd Professor of Evidence, Florida State University College of Law available on the Florida Guardian ad Litem Program website at GuardianadLitem.org.

Surrender and Consent to Termination of Parental Rights

T.G. v. Department of Children and Families, 2009 WL 690998 (Fla. 4th DCA)

The mother appealed the trial court's order denying her motion to withdraw her surrender and consent to the termination of her parental rights. She argues that her consent was the product of fraud and duress.

The mother executed a surrender and consent to the termination of her parental rights in open court. The trial court "engaged in a thorough colloquy with the mother. The mother confirmed that she understood that the surrender was permanent and that her parental rights to the child would be terminated forever. When asked if anyone promised her anything or threatened her to get her to surrender her rights, she responded, "No, I was willing." She believed that the surrender was in the child's best interests."

The Fourth District Court of Appeal (Fourth DCA) held that the consent was not made under duress. Duress is defined as a "condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do and act or make a contract not of his own volition. *Herald v. Hardin,* 95 Fla. 889, 116 So. 863, 864 (1928)." In order to prove duress "it must be shown (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side." *City of Miami v. Kory,* 394 So.2d 494 (Fla. 3d DCA 1981)."

The Fourth DCA held that the mother's responses to the court's questions and her unique inquiries to the court demonstrate the voluntariness of her consent and the absence of fraud and duress.

The Fourth DCA upheld the trial court's order.

Read the Opinion

Termination of Parental Rights - Consent, Failure to Appear

J.M. v. Department of Children and Families, 2009 WL 529558 (Fla. 4th DCA)

The mother appealed the trial court's termination of her parental rights arguing that the trial court erred in entering a consent to termination after she failed to appear at the initial hearing and that the Department of Children and Families (the department) failed to present clear and convincing evidence of the statutory grounds for termination, nor did it prove that termination was in the manifest best interests of the child.

"During the first two hearings, the court admonished the mother to appear at the next scheduled hearing date or suffer a consent to the petition. However, at the last hearing the court continued the adjudicatory hearing but failed to advise the mother that she must personally appear at the reset date." When the mother failed to appear, the trial court entered a consent to the petition. The mother participated fully in the following five hearing dates. The Fourth District Court of Appeal (Fourth DCA) concluded that because the trial court did not order the mother to personally appear for the date on which the adjudicatory hearing began, the trial court should not have entered a consent to the petition.

However, the Fourth DCA upheld the termination as the mother fully participated in the proceedings, her attorney cross-examined witnesses and called witnesses, and the trial court did not rely on the consent in reaching its termination determination.

Read the Opinion

Fifth District Court of Appeal

Second Dependency Adjudication; Case Plan

P.S. v. Department of Children and Families, 2009 WL 482280 (Fla. 5th DCA)

The father appealed the trial court's order adjudicating his two children dependent and the requirement that the father complete a case plan. The trial court entered its dependency order based on hazardous conditions and physical abuse of the children while residing with their mother and her husband. Approximately six months later the trial court entered a second dependency order based on the ground that the children were at risk of prospective neglect from their father.

The Fifth District Court of Appeal (Fifth DCA) held that it was improper for the trial court to enter a second dependency adjudication. § 39.507(7)(a), Fla. Stat. (2008). "As long as a court maintains jurisdiction over a dependency case, only one order adjudicating a child dependent is to be entered in that case." A second dependency adjudication is prohibited and the trial court must still hold an evidentiary hearing to determine if the father abused, abandoned, or neglected the children. §39.507(7)(b).

The Fifth DCA also held that the trial court could require the father to complete a case plan. Section 39.521(1)(b)(1) specifically provides that when a child is adjudicated dependent, the court has the power to require a parent (or legal custodian) to participate in treatment and services identified as necessary.

Termination of Parental Rights

J.Y. v. Department of Children and Families, 2009 WL 790138 (Fla. 5th DCA)

The mother appealed the trial court's order terminating her parental rights under §§ 39.806(1)(c) and (1)(e), Fla. Stat. (2007). In order to terminate parental rights under §39.806(1)(c), the trial court must find:

1. the child's life, safety, or health would be threatened by the continued

interaction with the parent, regardless of services;
2. irrespective of services, the trial court must find that there is no reasonable basis to believe the parent will improve; and
3. that termination of parental rights is the least restrictive means of protecting the child from serious harm.

The trial court found that even after four years of attempting reunification, the mother's domestic violence and mental health problems were not resolved. Additionally, six "mental health experts opined that [the mother's] stability and mental health would require extended and ongoing treatment for years, and that, even if resolved at some future date, her parenting skills would be inadequate to care for the child's extraordinary needs should the stable environment with her foster parents be severed."

The trial court also found that after four years the mother did complete some of her case plan requirements but failed to remedy the problems that caused her child to be sheltered.

The trial court then found that the termination of parental rights was in the manifest best interest of the children. § 39.810; *See Williams v. Dep't of Health & Rehabilitative Servs.,* 648 So.2d 841, 843 n. 2 (Fla. 5th DCA 1995) stating ""[I]t is far better for [this child] to be placed for adoption with a loving and stable family than it is to have [her] remain in foster care any longer awaiting the rehabilitation of [her] parents which will likely never occur."

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

Read the Opinion

Website Resources

ChildWelfare.gov. The 2009 National Child Abuse Prevention Month website provides resources and strategies on engaging communities and supporting families.

Worst to First. Worst To First is a statewide advocacy campaign to make children's issues the top priority for Florida's leaders.

National Child Welfare Resource Center on Legal and Judicial Issues. The Resource Center provides training, technical assistance and consultation to agencies and courts on all legal and judicial aspects of the child welfare system.

IDEA Parent Guide. This guide from the National Center for Learning Disabilities (NCLD) provides specific learning disability information, parent perspectives, terms, and practical materials such as Checklists, Sample Letters, Charts, and Questions to Ask.

The Legal Center for Foster Care and Education. The ABA Legal Center for Foster Care and Education is a go-to source for the latest information concerning foster care and education. On the site there are checklists, fact sheets about critical issues related to the education of children in out-of-home car (a new one each month), materials about special education decision making, and an informative ListServ.