GAL
Guardian ad Litem
A POWERFUL VOICE FOR FLORIDA'S CHILDREN
FLORIDA GUARDIAN AD LITEM PROGRAM

LEGAL BRIEFS NEWSLETTER

GuardianadLitem.org

January 2012

"Guardian ad Litem volunteers are a special group because they are committed to the relentless advocacy for the well-being and best interest of the children they serve. I am thankful for each of the nearly 8,000 Florida GALs currently making a difference in the lives of children every day, and I welcome the new guardians being sworn in today."

~Governor Rick Scott
January 18, 2012 swearing in ceremony of new GAL volunteers

First District Court of Appeal

Compact on the Placement of Children (ICPC)

M.A.C. v. Florida Dept. of Children and Families, 73 So.3d 327 (Fla. 1st DCA 2011)

The mother appealed the trial court's order terminating supervision, adjudicating the child dependent and placing the child with her father who lives out of state. The child was on an "extended visit" with her father in another state. The child's permanent residence was with the mother. The mother argued that the trial court did not comply with the terms of the Interstate Compact on the Placement of Children (ICPC) when the trial court placed the child with the father out of state.

The First District Court of Appeal (First DCA) agreed with the mother holding "[a]ccording to the ICPC, of which Florida is a signatory, before a Florida court may place a child involved in dependency proceedings in a foreign state, certain requirements must be met. These requirements include the receiving state's concurrence to that placement and, because it is otherwise required by Florida law before changing placement, a statutorily-compliant home study. See §§ 409.401 and 39.521(3)(b), Fla. Stat. (2011) There is no record evidence that either of these requirements was met as of the date of the hearing at issue and the court's order."

The First DCA went on to state that although the ICPC requirements were not fulfilled, their opinion should not be read to require the child be moved back to Florida while the ICPC requirements and evidentiary hearings are pending.

Read the Opinion

Second District Court of Appeal

The Trial Court Must Consider Factors in § 39.621(10)

In re G.M., 73 So.3d 320 (Fla. 2d DCA 2011)

The mother appealed the trial court's order denying her motion for reunification and that terminated protective supervision with her child in the custody of his non-offending father. Both the mother and father's case plan goal was reunification and the trial court had found the mother and father (who lived in another state) were in substantial compliance of their case plans. The child lived with the father since 2009. The Department of Children and Family Services filed a "motion for termination of supervision on June 14, 2011, arguing that the longevity and stability of the child's placement with the Father no longer warranted protective supervision." The mother filed a motion for reunification which was denied. The trial court's order had the word "denied" handwritten on it.

The Second District Court of Appeal (Second DCA) reversed the trial court's order. The Second DCA held the trial court failed to consider the factors in Section 39.621(10), Florida Statutes (2010) which states:

> The court shall base its decision concerning any motion by a parent for reunification or increased contact with a child on the effect of the decision on the safety, well-being, and physical and emotional health of the child. *Factors that must be considered and addressed in the findings of fact of the order on the motion must include:*
>
> > (a) The compliance or noncompliance of the parent with the case plan;
> >
> > (b) The circumstances which caused the child's dependency and whether those circumstances have been resolved;
> >
> > (c) The stability and longevity of the child's placement;
> >
> > (d) The preferences of the child, if the child is of sufficient age and understanding to express a preference;
> >
> > (e) The recommendation of the current custodian; and
> >
> > (f) The recommendation of the guardian ad litem, if one has been appointed.

Florida statute also requires that when a court considers whether a child should be reunited with a parent, it "shall determine whether 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 by the return of the child to the home." § 39.522(2) Fla. Stat. (2010). The trial court's order denying the mother's motion failed to consider any of the factors required by statute. The trial court also failed to consider all of the factors required in its order granting the department's motion.

The Second DCA reversed the trial court's orders.

Read the Opinion

Case Plan Compliance, Abandonment & Incarceration

In re G.M., Jr., 71 So.3d 924 (Fla. 2d DCA 2011)

The father appealed the trial court's order terminating his parental rights based on his failure to complete his case plan tasks and abandonment. The father argued he was unable to comply with his case plan because the Department of Children and Family Services (department) failed to make reasonable efforts to reunify the father with his child. The father was incarcerated and during that time seven case managers assigned to his case did not send him a copy of his case plan or discuss it with him. He never signed a case plan. The department failed to respond to written requests for

help from the father. The father even sought "transfer to another facility in order to participate in a parenting class and other programs." The Second District Court of Appeal (Second DCA) cited another case stating, "[w]here a court is terminating parental rights based on a parent's failure to comply with a case plan or a performance agreement, it is axiomatic that the parent must have the substantial ability to comply with the plan or agreement." Hutson v. State, 687 So.2d 924, 925 (Fla. 2d DCA 1997).

The trial court also found the father had abandoned the child because he failed to support and communicate with the child. "Section 39.806(1)(e)(1) provides that a parent's failure to complete a case plan within nine months after an adjudication of the child as dependent is evidence of abandonment, abuse, or neglect." The Second DCA held that the termination of parental rights based on abandonment was improper where the father established a communication link with the child. "Incarceration . . . does not constitute abandonment as a matter of law. Rather, it is a factor for consideration. T.H. v. Dep't of Children & Family Servs., 979 So.2d 1075, 1080 (Fla. 2d DCA 2008). "[T]he parent's efforts, or lack thereof, to assume parental duties while incarcerated must be considered in light of the limited opportunities to assume those duties while in prison." Id. at 1080 (citing Wirsing v. Dep't of Health & Rehabilitative Servs., 498 So.2d 946, 948 (Fla.1986))."

The Second DCA reversed and remanded the case.

Read the Opinion

Third District Court of Appeal

Failure to Protect Children and TPR

A.H. v. Department of Children & Families, 2011 WL 6783631 (Fla. 3d DCA)

The mother appealed the trial court's order terminating her parental rights which was based on § 39.806(1)(c) or 39.806(1)(f), Florida Statutes (2010) – "continued interaction with the [mother] threatens the life, safety, or health of the child[ren], and ... that this threat cannot be remedied by the provision of services." The basis of the allegations against the mother was failure to protect her children from their mentally ill and abusive father. The Department of Children & Families never accused her of abusing her children or not providing for their care.

The Third District Court of Appeal (Third DCA) held that there was no clear and convincing evidence supporting the trial court's order. In fact, the Third DCA held the mother had done everything she could to protect her children. Her "efforts included calling the police or making a report at the station when the father violated the restraining order she had secured against him, leaving with the children to go to another location or a friend's house when the father showed up unwanted at her home, and making plans to relocate with the children to a gated apartment complex and even out of the country to her native Jamaica."

In addition, the father was no longer a threat as he was incarcerated and facing deportation to Jamaica. "[T]his evidence is insufficient to establish that continued interaction with the mother threatens the children's life, safety, or health; indeed, the possibility of interaction with the *father*—the basis of the lower court's ruling—has been alleviated"

The Third DCA reversed and remanded.

Read the Opinion

Best Interest Standard Versus Endangerment

S.V.-R. v. Department of Children and Family Services, 2011 WL 5375047 (Fla. 3d DCA)

The mother appealed the trial court's order denying her motion for reunification with her child following her substantial compliance with the tasks in her case plan. She also appealed "orders approving a general magistrate's report finding that custody of [child] should remain with her father (with visitation by her mother)." After the child was adjudicated dependent, the trial court placed the child with the non-offending father. The case plan goal was reunification with a concurrent plan of remaining with her father. Even after the mother's substantial compliance with the case plan, the trial court placed the child with the father using a "best interest" standard.

The Third District Court of Appeal (Third DCA) held "the general magistrate's charge . . . was not to select the "better" permanency option. Instead, having determined that the mother substantially complied with her case plan, the general magistrate was obligated to allow reunification with the mother unless that would "endanger" [the child] as described in § 39.522(2)." Further, the Third DCA held "the "best interests" and "endangerment" standards are markedly different. The latter standard applies to a reunification or permanency hearing in which reunification is the primary goal and, as here, the offending parent has substantially complied with her or his case plan."

In a footnote the Third DCA stated "[b]y separate order, the younger half-sibling. . . was reunified with the [mother]. Any finding of endangerment of [child] in the same home would seem to be inconsistent with the reunification of the younger child with the appellant."

The Third DCA reversed and remanded the case.

Read the Opinion

Fourth District Court of Appeal

UCCJEA – Emergency Jurisdiction; Convenient Forum

K.I. v. Department of Children and Families, 70 So.3d 749 (Fla. 4th DCA 2011)

The mother appealed the trial court's denial of her emergency motion to reopen her child's dependency case in order to have her child returned to Florida from Virginia and placed in her custody. The trial court held that it was in the child's best interest for Virginia to have jurisdiction over the case.

After an adjudication of dependency, the child was placed with her father in Pennsylvania who later moved to Virginia. The mother was granted visitation. The Florida trial court retained jurisdiction. After ten years, the father was arrested for child abuse in Virginia and mother filed an emergency motion to reopen the child's case in Florida and have her returned to the mother's custody. The trial court denied the mother's motion holding Virginia should have jurisdiction over the case.

The Fourth District Court of Appeal (Fourth DCA) based its opinion on "the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), sections 61.501–.542, Florida Statutes (2010). The UCCJEA was enacted in part to "[a]void jurisdictional competition and conflict with courts of other states in matters of child custody...." § 61.502(1), Fla. Stat. (2010). The court that has initial child custody jurisdiction to decide child placement under the UCCJEA is "the home state of the child on the date of the commencement of the proceeding." § 61.514(1)(a), Fla. Stat. (2010). However, the court of another state may exercise temporary jurisdiction in an emergency situation to protect a child even though the court with initial custody jurisdiction has exclusive, continuing jurisdiction. Steckler v. Steckler, 921 So.2d 740, 743 (Fla. 5th DCA 2006). Both Florida and Virginia have adopted versions of the UCCJEA and both versions include a temporary emergency jurisdiction provision. See § 61.517, Fla. Stat. (2010); Va.Code Ann. § 20–146.15 (2010)."

The mother had three arguments: (1) only proper forum for proceedings regarding the modification of the child's placement is Florida, where jurisdiction was expressly

retained; (2) the trial court improperly transferred jurisdiction to Virginia on the grounds that Virginia was the more convenient forum; (3) the trial court erred by denying her the opportunity to be heard in the Virginia proceedings regarding the modification of the Florida placement order of the child.

The Fourth DCA held that Virginia was a proper forum because Virginia trial court was authorized to exercise emergency jurisdiction under Virginia's temporary emergency jurisdiction provision. "Virginia's emergency provision provides in pertinent part: A court of this Commonwealth has temporary emergency jurisdiction if the child is present in this Commonwealth and ... if it is necessary in an emergency to protect the child because the child ... is subjected to mistreatment or abuse.... "

The Fourth DCA also held Virginia was the most convenient forum as the child had lived there for 10 years, the aunt who was willing to care for the child lived there, the most recent abuse occurred there and Virginia had issued a preliminary protective order.

Finally, the Fourth DCA agreed with the mother holding that she was required to have been given notice of the hearing. "Where a court's decision on whether to allow a sister state to exercise jurisdiction is 'based, in whole or in part, upon conversations the judge has with the judge of a sister state, then the court **must** allow the parties to be *754 present during the conversation and set forth specific findings regarding the basis for concluding that jurisdiction in a sister state is appropriate.' " Poliandro v. Springer, 899 So.2d 441, 444 (Fla. 4th DCA 2005) (quoting McDaniel v. Burton, 748 So.2d 1072, 1076 (Fla. 4th DCA 1999) (emphasis in original)); see also § 61.511(2), Fla. Stat. (2010) ("The court shall allow the parties to participate in the communication. If the parties elect to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.")."

Affirmed in part; reversed in part and remanded.

Read the Opinion

Abandonment

L.W. v. Department of Children and Families, 71 So.3d 221 (Fla. 4th DCA 2011)

The mother appealed the trial court's order terminating her parental rights based on abandonment of her child. In 2005, the father was made the primary residential parent of the child. In that time the mother "never paid any support and failed to provide clothing, housing, and medical treatment over the next five years. The mother never wrote to the daughter, and last visited with the child nearly four years before the petition was filed. At that visit, the mother engaged in sexual activity with her boyfriend in the presence of the child. The mother testified that after trying to re-establish contact without success, she "let it lie." She admitted that she did not have the financial ability to support the child."

The Fourth District Court of Appeal (Fourth DCA) held the "trial court's findings of fact are supported by competent, substantial evidence. The mother had no contact with the child for nearly four years. She has never supported the child since the child was placed with her father. The stipulated length of time without contact, in combination with the evidence, establishes abandonment."

The Fourth DCA affirmed the trial court's order terminating parental rights.

Read the Opinion

Master Trust

Department of Children and Families v. B.R., 68 So.3d 372 (Fla. 4th DCA 2011)

The Department of Children and Families (the department) appealed the trial court's order requiring the department to pay a $500.00 administrative fee for transferring Master Trust funds to a fund established through the Center for Special Needs Trust Administration. The department could no longer administer the Master Trust as the child was 18 years old and had aged out of foster care.

The Fourth District Court of Appeal agreed with the department and required the administration fee to come out of the trust. The fee expense "to set up the special needs trust to be an appropriate expenditure for the use of funds from the child's Master Trust because it was "intended to benefit, and [did] benefit [the child]." R.I. v. Department of Children and Families, 47 So.3d 357 (Fla. 4th DCA 2010).

Read the Opinion

Fifth District Court of Appeal

Case Plans – No New Law Violations

S.S. v. Department of Children and Families, 2011 WL 6101945 (Fla. 5th DCA)

The mother appealed the trial court's order terminating her parental rights to her children – three oldest children and one child born after the dependency proceedings began. One of the arguments made by the mother was that the Department of Children and Families (department) could not include the phrase "no new law violations" in her case plan. She argued that the "no new law violations" was not a proper basis for terminating her parental rights. She cited the "Second District's opinion in, In the Interest of C.N., 51 So.3d 1224 (Fla. 2d DCA 2011). That case held that [the department] may not include a requirement of no new law violations as a case plan task, and that violation of this requirement, standing alone, is not a proper basis to terminate parental rights."

The Fifth District Court of Appeal (Fifth DCA) agreed that the "no new law violation" requirement could not stand alone as a proper basis to terminate the mother's parental rights but held that the department could include a "no new law violation" if "it is related to correcting a parent's behavior or to acts resulting in risk to the child." §§ 39.6011, 39.6012, and Fla. Stat. (2011).

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

Read the Opinion

Prescription Drug Use - TPR

T.K. v. Department of Children and Families, 67 So.3d 1197 (Fla. 5th DCA 2011)

The mother appealed the trial court's order terminating her parental rights. The mother argued that drug tests showing her use of prescription drugs, prescribed to her, cannot support the conclusion that she failed to substantially comply with her case plan. The Fifth District Court of Appeal (Fifth DCA) disagreed affirming the trial court's termination.

The mother in this case had been found on many occasions with large numbers of prescription medications and unfilled prescriptions from various doctors for drugs such as alprazolam, methadone, oxycodone, and hydrocodone. "The mother presented no evidence of a legitimate medical basis for her use of the medications, and this addiction led to numerous arrests."

The Fifth DCA held "that except for the completion of the parenting class requirement, the mother has not substantially complied with the case plan. She has paid no monies for the support of her child, has not visited with her child, and has not substantially completed substance abuse treatment. The same drug abuse issues that resulted in

the earlier termination of parental rights to [the child's] sibling continue to plague the mother, putting [the child] at risk"

Affirmed.

Read the Opinion

Default Judgment

R.A. v. Department of Children and Families, 2011 WL 6258832 (Fla. 5th DCA 2011)

The father appealed the trial court's order terminating his parental rights to his five children. He argues the trial court erred in finding the grounds of consent (based on his failure to appear) and abandonment.

The father appeared by phone at the advisory hearing where he entered a denial to the termination petition. At the adjudicatory hearing, the father appeared by phone; however, the court continued the hearing and scheduled a second advisory (not adjudicatory) hearing. The trial court found that he did not receive proper notice to the second advisory hearing so they scheduled a third. Father did not appear at the third advisory hearing and the trial court entered a default judgment against him. Following the adjudicatory hearing where they considered manifest best interest only, the court entered an order terminating the father's parental rights on the grounds of his failure to appear (consent-by-default) and abandonment.

The Fifth District Court of Appeal (Fifth DCA) agreed with the father who argued that the trial court cannot have more than one advisory hearing, and then default him for not appearing at the third advisory hearing. "Florida's TPR statutory and rule scheme contemplates only one advisory hearing." Further the Fifth DCA states "only one advisory hearing is necessary because the "purpose of an advisory hearing is to advise the parents of their right to counsel, appoint counsel if necessary, determine whether the parents will consent to the termination, appoint a guardian ad litem for the children, and set a date for the adjudicatory hearing." In re E.L., 732 So.2d 37, 39 (Fla. 2d DCA 1999). See § 39.808(2), Fla. Stat.; Fla. R. Juv. P. 8.510(a)(2)."

Reversed and Remanded.

Read the Opinion

Stated Findings of Fact Inadequate

H.B. v. Department of Children and Families, 73 So.3d 309 (Fla. 5th DCA 2011)

The mother appealed the trial court's order adjudicating her four children dependent. The mother argues the trial court failed to set "forth factual findings supporting a determination of dependency. She also contends that the evidence presented at the adjudicatory hearing was legally insufficient to sustain the trial court's determination of dependency." The Fifth District Court of Appeal agreed holding that the statement under the Findings of Fact in the trial court's order: "The factual basis for the adjudication of dependency is as follows: as outlined on the petition for dependency and incorporated herein as if stated" were legally inadequate. §39.507(6), Fla. Stat. (2010).

Read the Opinion

comments or suggestions - elizabeth.damski@gal.fl.gov