FLORIDA GUARDIAN AD LITEM PROGRAM

The Voice for Florida's Abused & Neglected Children

GuardianadLitem.org

LEGAL BRIEFS NEWSLETTER

January 2011

On behalf of Florida's most vulnerable children, I'm honored to have been appointed Executive Director of the Florida Statewide Guardian ad Litem Program. My experience in the law and in various systems of government, along with my passion for community service, has led me to this position, which I accept whole-heartedly.

I clearly remember the first two children I represented as a volunteer Guardian ad Litem, Gerald and Candice, back in 1986. They needed a voice - someone to speak for them in court. It was an awesome responsibility and challenge. But, my gifts of time and energy led to one of the most rewarding experiences I could have as an advocate and as a human being.

I see great challenges ahead: the huge number of Florida's children who deserve a voice in court, budget shortfalls, and tremendous pressures to perform well under very stressful times in our economy. But, when I step back from the dizzying numbers on paper, and the daily business of running an organization, I see the faces of Florida's abused and neglected children who are served by the volunteers of the Guardian ad Litem Program help every day. I also see the GAL volunteers and professionals across the state, whose dedication results in an awe-inspiring impact on the lives of our state's children. I am in awe of the resiliency of the children who, with the right combination of care and services, can enjoy a safe and positive future.

I am looking forward to all that we can accomplish together!

Alan Abramowitz
Executive Director
Florida Guardian ad Litem Program

First District Court of Appeal

Case Plan Compliance – Clear Expectations

S.K. v. Florida Dept. of Children and Families, 2010 WL 5175123 (Fla. 1st DCA)

The mother appealed the trial court's order placing her two children in permanent guardianship and terminating supervision by the Department of Children and Families (the department). § 39.6221, Fla. Stat. (2010). The mother argues the record does not contain competent, substantial evidence to support the trial court's order of permanent guardianship and the trial court failed to make case-specific findings explaining why reunification was not possible. § 39.6221(2)(a).

The trial court based its permanency order on mother's failure to maintain consistent visitation. However, the First District Court of Appeal (First DCA) held that because the case plan did not give concrete visitation expectations, the trial court could not say that the mother did not visit consistently. One of the children was placed 400 miles away from the mother, while the other was only 3 miles. The case plan only stated that the visitation should be scheduled around the mother and grandmother's schedule. Secondly, the trial court determined that "[t]he lack of visitation and interaction with the children ... renders it difficult to assess whether the safety of the children could be ensured if returned to the care and custody of the parents."

The First DCA held this position does not qualify as a basis for placing the children in permanent guardianships as the trial court's order must be supported by competent, substantial evidence.

The First DCA reversed and remanded the case.

Read the Opinion

Second District Court of Appeal

Case Plan Task – No New Law Violation

In re C.N., 2011 WL 116872 (Fla. 2d DCA)

The father appealed the trial court's order terminating his parental rights (TPR) based on the material breach of his case plan. §39.806(1)(e)(2), Fla. Stat. (2008). One of the case plan tasks was to "commit no further law violations and to avoid further involvement in crimes of violence." After the case plan was approved, the father was sentenced to four years in prison. The Department of Children and Family Services (the department) filed a TPR petition alleging "that the Father's new crimes and resulting imprisonment constituted a material breach of his case plan, making it unlikely that he will be able to substantially comply with his case plan within the one-year period mandated by the Florida Legislature." The trial court found "that grounds existed for termination of the Father's parental rights based on noncompliance with his case plan tasks."

The Second District Court of Appeal (Second DCA) reversed the trial court's TPR order. The Second DCA held that the inclusion of a no new law violation task is not a permissible case plan task. The inclusion of such a task "threatens to turn the dependency process into a form of criminal probation. Turning the dependency process into a form of criminal probation is not in keeping with either the letter or the spirit of chapter 39. A parent's criminal history and incarceration history is irrelevant to the decision to terminate parental rights, except as specifically provided in the statute." The father committed the crime within the first three months of his case plan. During those three months he had made progress in his case plan tasks. The father was not able to complete his case plan tasks as a result of his incarceration in a facility where the required services were unavailable, not from the incarceration itself.

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

Read the Opinion

Murder of a Child – Services, Nexus

In re E.R., 2010 WL 5094227 (Fla. 2d DCA)

The Department of Children and Family Services (the department), the attorney ad litem appointed for the children, and the guardian ad litem appealed the trial court's order denying the department's petition to terminate the parental rights (TPR) of the mother and father.

The sibling of the two children subject to the TPR petition died as a result of shaken baby syndrome at the hands of the father. The mother "knew the father committed acts of abuse which led to [the sibling's] death and she [chose] to remain silent to protect herself and the father from criminal charges." The children at issue were removed from the parent's home and sheltered based on the death of the sibling as well as the parents' drug use, lack of financial stability, and lack of adequate housing.

The trial court denied the department's TPR petition, holding that the department failed to prove the TPR grounds by clear and convincing evidence; that the department was required to provide services until termination was granted but that, in this case, no services had been provided; "the trial court held that the mother's invocation of her Fifth Amendment right did not provide a basis for termination and that DCF failed to prove (1) that her continuing involvement threatened the life or well-being of the children, (2) that she engaged in egregious conduct, or (3) that she was involved in the murder of another child." The trial court found that the father had engaged in egregious conduct and had committed murder but that the department "failed to prove that the father's continuing involvement threatened the life or well-being of [the children]."

The Second District Court of Appeal (Second DCA)held that the trial court erred in failing to find that termination was the least restrictive means of protecting the children and in failing to conduct a manifest best interests analysis. The Second DCA held there is no requirement that it then prove a nexus between that child's murder and a threat of prospective harm to the murdered child's siblings. § 39.806(1)(h). They certified the question:

WHERE THE STATE PROVES BY CLEAR AND CONVINCING EVIDENCE THAT A PARENT

HAS COMMITTED ANY OF THE ACTS SET FORTH IN SECTION 39.806(1)(H), FLORIDA STATUTES (2008), MUST THE STATE ALSO PROVE THAT THE PARENT POSES A SUBSTANTIAL RISK OF SIGNIFICANT HARM TO THE OTHER CHILDREN WHO ARE THE SUBJECT OF A PETITION FOR TERMINATION OF PARENTAL RIGHTS?

The Second DCA held that even if nexus between the abuse of the sibling and the prospective abuse of other children was required to terminate father's parental rights, the department proved that the children were at substantial risk of significant harm from father. The trial court determined that father committed egregious abuse of the sibling which led to the child's death, that there was a high likelihood of recidivism, that father lacked self-control, and that he had admitted drug use and a serious criminal history.

The Second DCA held that the trial court erred in holding that the department must provide services to the parents. The Second DCA stated "we likewise hold that in such cases, [the department] is not required to prove that services would be futile in regard to the other children. Although §39.802(5) and §39.806(3) provide that in expedited termination cases, [the department] "may ... file ... a case plan having a goal of termination of parental rights to allow continuation of services until the termination is granted or until further orders of the court are issued," there is no statutory mandate that [the department] do so where it has proven grounds for termination pursuant to §39.806(1)(h). The futility of offering services to the parent who has already murdered one child is obvious to this court." This was supported as well by the father's diagnosis of a mental disorder, his drug use, his incarceration at the time of trial and his refusal to cooperate during his psychological evaluation.

As to the mother the Second DCA held that she engaged in egregious conduct sufficient to support termination of her parental rights as to her two children. Even though the mother did not witness the abuse, she was present in the house and knew what was occurring, but chose to conceal her knowledge of the incident and to continue her relationship with the father. The mother stated that she had no problem leaving her children with the father. "Perhaps the biggest factor suggesting that provision of services would be futile is the fact that the mother continued her relationship with the father."

Because the trial court must make manifest best interest finding during the TPR trial, the Second DCA remanded the case on the issue of manifest best interest.

Read the Opinion

Case Plan Compliance - Incarceration

In re R.S., 2010 WL 5113555 (Fla. 2d DCA)

The father appealed the trial court's order placing his son in a permanent guardianship and terminating the supervision of the Department of Children and Family Services (the department). The trial court held that the father was "not able to work on his case plan tasks due to being incarcerated."

The trial court found that the father was noncompliant with his case plan and could not provide stable housing or finances. The Second District Court of Appeal (Second DCA) held that the father's "failure to comply with his case plan and provide stable housing or finances, was due to his incarceration during the pendency of this case. Moreover, a parent's noncompliance with a case plan is not a statutory ground for placing a child in a permanent guardianship, although it is a factor that may be relevant to the trial court's inquiry regarding the parent's fitness to care for the child and whether reunification is possible."

The Second DCA agreed with the father's argument that the trial court's written order failed "to comply with §39.6221(2)(a), Fla. Stat. (2009), which requires the court to "[l]ist the circumstances or reasons why the child's parents are not fit to care for the child and why reunification is not possible by referring to specific findings of fact made in its order adjudicating the child dependent or by making separate findings of fact."

The Second DCA reversed the trial court's order.

Read the Opinion

Appeal - Irreparable Harm

In re D.R.C., 2010 WL 4628562 (Fla. 2d DCA)

The Department of Children and Family Services (the department) seeks a writ of certiorari directed to the nonfinal, nonappealable order entered by the trial court that vacated the Mother's consent to the dependency of her children and scheduled a hearing on the Department's dependency petition.

The mother consented to the dependency of her children but two days later appeared in court with new counsel, motioning to withdraw her consent. The trial court granted this motion based on counsel's unchallenged representations and scheduled an adjudicatory hearing on the department's dependency petition. The department filed a petition for writ of certiorari contending that the 'trial court departed from the essential requirements of the law in setting aside the Mother's consent because the Mother had not established any legal ground for withdrawing her consent."

The Second District Court of Appeal dismissed the department's petition, holding that the department failed to show that the resulting harm is irreparable and cannot be remedied on appeal following final judgment. "The party seeking review must demonstrate that the trial court departed from the essential requirements of law and that the resulting harm is irreparable and cannot be remedied on appeal following final judgment." *Dep't of Children & Families v. L.D., 840 So.2d 432, 435 (Fla. 5th DCA 2003)* This standard of review applies to petitions for certiorari filed in dependency and termination proceedings, just as it does in other civil actions. See, e.g., *L.D., 840 So.2d at 435; State, Dep't of Children & Family Servs. v. L.G., 801 So.2d 1047, 1050 (Fla. 1st DCA 2001); S.H. v. Dep't of Children & Families, 769 So.2d 452, 452 (Fla. 5th DCA 2000)*. Under this standard, relief by means of certiorari is not available when there is no irreparable harm or when the petitioner has another remedy. See *Dep't of Children & Families v. Clem, 903 So.2d 1011, 1014 (Fla. 5th DCA 2005); L.D., 840 So.2d at 435; S.H., 769 So.2d at 452.*

Because the Department did not establish that this order results in irreparable harm, the Second District Court of Appeal dismissed the petition.

Read the Opinion

Third District Court of Appeal

Two Parents Brought Before the Court at Different Times

C.R. v. Department of Children and Family Services, 2010 WL 4226711 (Fla. 3d DCA)

The mother appealed the trial court's orders that vacated an Order of Dependency Withholding Adjudication, and two disposition orders. At the time the trial court entered the dependency order (based on the mother's consent), the father had not been located. The trial court found that the child had no legal father. Later, the trial court held a disposition hearing and entered an Order of Disposition, Acceptance of Case Plan, and Notice of Hearing. Later, after the father acknowledged paternity, the trial court vacated the order in which it withheld adjudication and found the child dependent.

The mother argued that the trial court erred when it vacated the Order of Dependency Withholding Adjudication and the Order of Disposition. "She argues that both orders were final, and as such can only be modified by a motion for rehearing, a motion for relief from judgment or order, or by appeal or original proceeding."

The Third District Court of Appeal (Third DCA) agreed with the mother. No party filed a motion for rehearing. § 39.507, Fla. Stat. (2010). Section 39.507(7)(a) provides that while a court maintains jurisdiction over a dependency case, "only one order adjudicating each child in the case dependent shall be entered. This order establishes the legal status of the child for purposes of proceedings under this chapter and may be based on the conduct of one parent, both parents, or a legal custodian". This becomes problematic when two parents are brought before the court at different times.

The Third DCA held that § 39.507(7)(b) provides a remedy to the situation created in this case. "Section 39.507(7)(b) states that a court must conduct a subsequent evidentiary hearing to determine whether each of the parents abused or neglected the child. However, "[i]f the evidentiary hearing is conducted subsequent to the adjudication of the child, the court shall supplement the adjudicatory order, disposition order, and the case plan, as necessary." Thus, the trial court should have allowed the Withhold of Adjudication Order to stand and then held a subsequent evidentiary hearing to determine the father's status. Section 39.507(7)(b) allows a supplementary decision to be entered, which in this case could have addressed the father's status

and have found the child dependent as to the father."

The Third DCA reversed the trial court's decision to vacate the dependency order because that order was final in nature and one from which the parties did not appeal below.

Read the Opinion

Domestic violence - Dependency

C.R. v. Department of Children and Families,45 So.3d 988 (Fla. 3d DCA 2010)

The father appealed the trial court's dependency adjudication of his child which was based on past domestic violence between the mother and father in the presence of the child. The mother pleaded to the adjudication.

The father admits to the domestic violence between the father and mother in front of the child. However the father contends that he is no longer a risk to the child as the father and mother were enjoined by the court to have no further contact and the mother and father are separated and no longer living together.

The Third District Court of Appeal (Third DCA) agreed with the father and reversed the dependency adjudication. The Third DCA held that "the risk of harm associated with the domestic violence between the parents is no longer present. Moreover, there was no evidence of any other reason why placing the child with her natural father would endanger the child."

The Third DCA reversed the trial court's dependency adjudication

Read the Opinion

Fourth District Court of Appeal

Payment of Fees for Establishment of Special Needs Pooled Trust

R.I. v. Department of Children and Families, 47 So.3d 357 (Fla. 4th DCA 2010)

R.I. appealed the trial court's "Order Denying Motion to Order Department of Children and Families to Pay Fees Associated with the Administration of the Trust." R.I. is a developmentally delayed 18 year old who is under the extended jurisdiction of the court until his 19th birthday. R.I. received SSI and RTI funds into his master trust account that has been administered by the Department of Children and Families (the department). In order to preserve his funds, R.I. wanted to establish a special needs trust. He requested that the court order the department to establish a trust on his behalf, separate from the master trust, and that the department serve as trustee. "The primary purpose of the special needs pooled trust is to ensure that [R.I.] can conserve some level of personal assets while continuing to be eligible for SSI benefits. [R.I.] may also deposit his Road to Independence stipend into this trust." The special needs pooled trust ensures that assets contained in the trust are exempt from being counted towards the [$2,000] SSI resource cap.

R.I. argues that the department should pay the $500.00 fee to establish the special needs trust because, when the department is required to "establish" a trust pursuant to subsection (c) of the statute, it must pay any fees associated with the establishment of the trust. § 402.17(7)(c). The trial court disagreed with R.I.

The Fourth District Court of Appeal (Fourth DCA) upheld the trial court's order. The department's obligations in administering a child's master trust account are detailed in section 402.17. The statute states that the department "shall act to protect both the short-term and long-term interests of the clients for whose benefit it is holding such money...." The Fourth DCA held that is what the department did in using funds from R.I.'s master trust to pay for establishment of the special needs trust as it would benefit R.I. because it "allows him to conserve his assets and ensure continued eligibility for public assistance, making the $500 administrative fee to join the special needs pooled trust an appropriate expenditure." The Fourth DCA upheld the trial court's order.

Read the Opinion

Provision of Services Futile

A.B.E. v. Department of Children and Families, 47 So.3d 347 (Fla. 4th DCA 2010)

The mother and father appealed the trial court's order terminating their parental rights. The mother argues that the Department of Children and Families (the department) failed to prove any ground for termination of parental rights (TPR) and failed to establish that the provision of additional services to her would be futile.

The child was sheltered at birth when the child and the mother tested positive for cocaine. After almost three years, the child was reunited with the mother, however the child was taken back into the department's custody when the mother was criminally charged with child abuse. The mother was placed on probation and given a no contact order with her child. The mother never inquired as to the child's welfare nor did she ask about tasks she needed to complete in order to be reunited with her child. The in-home parenting consultant testified that she would not give the mother a certificate of completion of the parenting class because she failed to comprehend parenting.

The father was incarcerated but asked that the child be placed with his nieces. The trial court found that both nieces were an unacceptable placement.

The trial court found that the parents had "engaged in conduct towards the child that demonstrated that continuing involvement of the mother and father would threaten the child's safety irrespective of the provision of services, that they failed to substantially comply with their case plan and that they had abandoned the child." The mother argued that she was not provided adequate services, the department could not prove that she did not substantially comply with her case plan, that the department failed to prove abandonment when the court prevented all contact between her and the child as result of her conviction of child abuse.

The Fourth District Court of Appeal (Fourth DCA) upheld the trial court's termination of the parent's parental rights. The Fourth DCA held that the provision of services would be futile as the case manager testified that she was of the option that "no services can correct the mother's behavior" and that the trial court was in the best position to determine the issue. Secondly, the Fourth DCA held that the mother did not substantially comply with her case plan (failure to substantially comply constitutes evidence of continuing abuse). § 39.806(1)(e), Fla. Stat. (2010). The mother had failed to complete in-home parenting after reunification and during that time the instructor observed that the mother did not understand parenting. Further, less than three months after the first reunification, the mother abused the child "thus showing that she had not successfully and substantially completed her tasks." The Fourth DCA also affirmed the trial court's finding of abandonment as the mother had mot inquired into the welfare of her child after the second removal.

The father argued that the TPR was not the least restrictive means of protecting the child where the father's relatives were available to care for the child. The Fourth DCA held that the mere fact that a relative is available for placement does not mean that [the department] cannot prove that termination is the least restrictive means of protecting the child. In this case the relative placements were unacceptable placements.

The Fourth DCA upheld the trial court's termination of mother and father's parental rights.

Read the Opinion

Fifth District Court of Appeal

Maintain and Strengthen Not a Permanency Goal

A.L. v. Department of Children and Families, 2010 WL 5184730 (Fla. 5th DCA)

The mother appealed the trial court's order terminating supervision and placing the children in the custody of their non-offending father.

The children were placed with the father after the mother consented to the dependency of the children. The mother's permanency goal was reunification. At a later permanency hearing, the mother's goals were reunification as well as to "maintain and strengthen." At a subsequent status hearing the father requested that the court terminate supervision and jurisdiction. The mother argued that she should be given the full nine months to comply with her case plan. The trial court terminated jurisdiction and supervision of the children.

The mother argued "maintain and strengthen" is a "reunification" goal, and that she should have the full nine months to achieve reunification. She also argues that the case plan establishes a permanency goal of "maintain and strengthen," not one of the statutory options available in §39.621, Fla. Stat. (2010). "DCF counters that: (1) "maintain and strengthen" is equivalent to the

permanency goal recognized in §39.621(2)(d) of "permanent placement with the fit and willing relative"; (2) concurrent permanency goals may be pursued, here, either reunification as to the mother or maintain and strengthen as to the father; and (3) once one of these goals was reached, here, permanency with the father, DCF was under no obligation to continue with the other goal. DCF claims at that point, the trial court could terminate supervision in accordance with § 39.521(3)(d)."

The Fifth District Court of Appeal (Fifth DCA) held that the mother and the department were under different understandings of the case plan goal. The permanency goal must be clearly enunciated to those involved in the dependency action. The mother was progressing well in the five months since she had gotten her case plan. The Fifth DCA reversed the trial court's order terminating supervision holding "The procedure utilized in this case was confusing and counter to the mother's reasonable understanding of the case plan. The procedures utilized in a dependency action must comport with due process principles. See, e.g., *Dep't of Children & Family Servs. v. M.L., 984 So.2d 606 (Fla. 3d DCA 2008)*."

Read the Opinion

Dependency

L.T. v. Department of Children and Families, 2010 WL 4739523 (Fla. 5th DCA)

The uncle appealed the trial court's order making him the legal custodian his nephew but dismissing the uncle's dependency petition. The uncle argued that the child was dependent as both of his parents were deceased. The Fifth District Court of Appeal (Fifth DCA) agreed with the uncle. The child was seeking "a dependency adjudication so that he could petition for legal residency in the United States under the federal special immigrant juvenile visa program." The Fifth DCA found that "When a judge finds that a child is orphaned and has no legal custodian, the legal conclusion is that the child is dependent. Those facts are the ones proven at the hearing. The child had lost both his parents to death, and there had never been anyone appointed by a legal authority to be his custodian. His circumstances fit exactly within the statutory definitions." §39.01(14)(e), Fla. Stat. (2009).

The Department of Children and Families (the department) also argued that the uncle failed to failed to comply with notice and service of process requirements set forth in §§ 39.502 and 39.503. The Fifth DCA held that the department failed to raise the issue so they waived the ability to appeal.

The department argued that the dependency petition was moot because the child had reached the age of majority. The Fifth DCA relied on F.*L.M. v. Department of Children and Families, 912 So.2d 1264 (Fla. 4th DCA 2005)* and held that "because the denial of the declaration of dependency had the effect of continuing to deprive the child of a legal basis for regularizing the child's immigration status" the dependency petition was not moot. Because the trial court erred, as a matter of law, in dismissing the dependency petition, the Fifth DCA reversed.

Read the Opinion

Constructive Consent

B.D. v. Department of Children and Families, 46 So.3d 650 (Fla. 5th DCA 2010)

The Fifth District Court of Appeal (Fifth DCA) reversed the trial court's final judgment terminating parental rights, based on consent by default. The Fifth DCA held "[c]onstructive consent should be the disfavored result in a termination of parental rights proceeding. *A.H. v. Dep't of Children and Families, 22 So.3d 801 (Fla. 5th DCA 2009).* The trial court should have either granted a short continuance or permitted appellant to appear by telephone where the record reflects that appellant was making a reasonable effort to personally appear at the scheduled adjudicatory hearing. *D.M. v. Dep't of Children and Families, 921 So.2d 737 (Fla. 5th DCA 2006);* see also *B.H. v. Dep't of Children and Families, 882 So.2d 1099, 1100-01 (Fla. 4th DCA 2004)* ("Courts have made a distinction between parents who fail to appear at a hearing without a reasonable explanation versus those who have made some reasonable effort to be present.")"

Read the Opinion

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