Legal Briefs Newsletter

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Termination of Parental Rights

Father was a party to the case even though he was not named in the dependency petition under Florida Rule of Juvenile Procedure 8.210(a).

C.L.R. v. Department of Children and Families, 2005 WL 3000612 (Fla. 5th DCA)

The Department of Children and Families (the Department) filed a dependency petition with respect to both parents. Counsel was appointed to represent the father, but father's counsel withdrew and no other counsel was appointed.

The mother consented to the dependency, but the father denied the allegations in the petition. The Department orally dismissed the petition against the father. Eventually the children were reunified with the mother under the Department's supervision.

The father objected based on: (1) the failure to appoint counsel to represent him; (2) the refusal to allow him to take part in the dependency action; (3) the return of the children to an abusive environment: (4) the issuance of orders regarding the children and himself without notice of the proceedings; (5) the Department's failure to file a motion to disqualify the trial court on the basis of unspecified "prejudice"; and (6) the failure to provide legal counsel to the parties eldest child, who was living out of the home. The trial court denied father's request for a hearing.

The Fifth District Court of Appeal (Fifth DCA) held that it was error for the trial court to reject the father's objection to his exclusion from the proceedings. The Fifth DCA held that the father was a party to the case even though he was not named in the dependency petition under Florida Rule of Juvenile Procedure 8.210(a). The term "party" includes the petitioner, the child, the parent(s) of the child, the department, and the guardian ad litem or the representative of the guardian ad litem program.

As a party, the father was entitled to notice of all proceedings and should have been served with all pleadings, orders, and papers, regardless of whether he was "named" as a defendant in the dependency proceedings. B.C. v. Department of Children and Families, 864 So.2d 486 (Fla. 5th DCA 2004). *See* Fla. R. Juv. P. 8.225(c).

The Fifth DCA also held that even though the father was a party to the dependency petition, he was not entitled to appointed counsel pursuant to § 39.013(1), Florida Statutes (2004). The statutory right "if a right exists" "appears to refer to those parents who are respondents -- parents against whom allegations of the acts or omissions giving rise to the need for dependency are made."

The Department contended that the father's motion was untimely and/or moot because the dependency proceedings were no longer pending. The Fifth DCA rejected the mootness argument because the father had the right to notice in advance of the proceedings and there was no evidence that he was provided with notice. Additionally, the children were still under the Department's supervision.

Findings of fact inconsistent with conclusions of law

In re M.R. 910 So.2d 355 (Fla. 2d DCA 2005)

The Department of Children and Family Services (the Department) appealed a final order denying the Department's petition for termination of the parental rights. The Department petitioned the trial court to terminate parental rights (TPR) pursuant to § 39.806(1)(e), Florida Statutes (2004). The case manager testified that the mother had not complied with the case plan, was financially unstable, lacked consistent contact with the Department, and had poor parenting skills. However, the trial court denied the TPR petition. The trial court included its findings of fact (non-compliance, etc.) but the findings of fact were inconsistent with the trial court's conclusions of law. Thus, the Second District Court of Appeal (Second DCA) was unable to review the issues on appeal.

The Second DCA vacated the order and remanded for the entry of a new order.

Findings of fact and conclusions of law are essential

Department of Children and Families v. J.H. 907 So.2d 1275 (Fla. 5th DCA 2005)

Department of Children and Families (the Department) filed a termination of parental rights (TPR) petition. The trial court denied the petition, and ordered that children be returned to the parents' custody in another state.

The Department argued that the return of the children to another state was in violation of the Interstate Compact on the Placement of Children, which requires the receiving state's approval of the placement. No approval was provided in this case. Second, the Department argued that the order lacked findings of facts and conclusions of law. Further, the dispositional provisions of the order appear internally inconsistent. *See* § 39.811(1), Fla. Stat. (2004).Finally, the transcript was not accurate and the tape of the adjudicatory hearing was unintelligible and useless for preparation of a transcript.

The Fifth District Court of Appeal (Fifth DCA) held that for there to be meaningful appellate review of a trial court's determination not to terminate parental rights, findings of fact and conclusions of law are essential. Department of Children and Family Services v. A.D., 904 So.2d 480 (Fla. 1st DCA 2005); Department of Children and Family Services v. M.J., 889 So.2d 986 (Fla. 4th DCA 2004).

The Fifth DCA held that "given all the circumstances present, including the lack of findings, the lack of an adequate record, the obvious error in failing to comply with the Interstate Compact and the passage of time, we conclude that the order must be quashed and another adjudicatory hearing should be conducted with proper findings made."

Dependency

No willful parental abuse, neglect, or impairment of the children's health

A.G. v. Department of Children and Family Services, 2005 WL 2993839 (Fla. 3d DCA).

The parent inadvertently drove the child into an area where the child believed the person who molested her lived. The incident evoked upsetting memories. A therapist testified that the child's counseling program had suffered a setback.

The Third District Court of Appeal held that it was error to find child dependent as to father where there was absence of evidence of willful parental abuse or neglect or impairment of the child's health.

Dependency adjudication deficient for failure to include findings of fact

Department of Children and Families v. P.C, 2005 WL 2838231 (Fla.1st DCA)

Even when a parent consents to dependency, the rule provides that the court must make written "findings of fact specifying the act or acts causing dependency, by whom committed, and facts on which the findings are based." The First District Court of Appeal found that dependency adjudication was deficient for failure to include findings of fact required by rule even when the parent consented to dependency.

Appellate Procedure

Failure to timely file

Department of Children and Families v. McShea, 2005 WL 2806315 (Fla. 5th DCA)

The trial court ordered the Department of Children and Families (the Department) to pay the child's maternal grandmother relative caregiver funds retroactive to when the child was placed with the grandmother. The Department appealed the order.

Three months later the trial court conducted a hearing on the Department's pending motion for rehearing. The Department argued that the order awarding the grandmother relative caregiver funds was improper because the court could not order "the executive branch to issue funds" without violating the separation of powers doctrine. The trial court rejected the argument, but after the court was advised that the mother had not moved out of the grandmother's house. The trial court stated that the relative caregiver funds had to be paid only as of the date the mother moved out the grandmother's house. The Department filed a notice of appeal within 30 days of the order.

The Fifth District Court of Appeal (Fifth DCA) dismissed the Department's appeal for lack of jurisdiction because the Department failed to timely file its notice of appeal. The notice of appeal was not held within 30 days of the original order to pay the relative caregiver funds. Further, the Fifth DCA held that the Department's motion for rehearing did not toll time for filing the notice of appeal.

(Torpy, J., dissenting). The notice of appeal was timely filed as the first order for relative caregiver funds was materially changed during the hearing for the Department's Motion for Rehearing. The trial court materially changed the order when the court changed the retroactive relative caregiver funds from the date the child was placed with the grandmother to the date that the mother moved out of grandmother's house. Therefore, the date at issue should be the date the order was materially changed. St. Moritz Hotel v. Daughtry, 249 So.2d 27, 28 (Fla.1971).

Immigration, Dependency, & Abandonment

Orphaned alien child living in the state without any legal custodian or caregiver legally responsible for his welfare was dependent. § 39.01(14)(e).

F.L.M. v. Department of Children and Families, State of Fla., 2005 WL 2861560 (Fla. 4th DCA)

The trial court denied the dependency petition for an orphaned alien juvenile that had no caregiver legally responsible for his welfare in the United States. The Fourth District Court of Appeal (Fourth DCA) held that the child was dependent.

The orphaned alien juvenile sought to be declared dependent so he would be able to apply to the U.S. Attorney General for a residency work permit. The child sought dependency in order to seek legal residency in the U.S. under the federal special immigrant juvenile visa program. During the hearing, the Department of Children and Families (the Department) responded to the court that the child fit within the meaning of abandoned. The judge ordered counsel to submit the dependency order, but later would not sign it.

Jurisdiction. The Fourth DCA concluded that the trial judge thought he lacked jurisdiction to sign the order, without the Attorney General's consent, that he had earlier directed counsel to submit declaring the child dependent. The Fourth DCA held that the trial court erred. The federal statute affording children special immigration status precludes the state court from declaring an alien juvenile dependent only if the Attorney General has *actual* or *constructive* custody of the child. The Attorney General did not have custody of the child in this case. Therefore, the trial court had jurisdiction to declare the child dependent.

The Department waived alleged procedural defects. The Department argued to the Fourth DCA that the several legal deficiencies stood in the way of reversal. The Fourth DCA held that the Department waived all the alleged procedural defects by failing to assert them at

trial.

Dependency. The Fourth DCA held that the child fit within the meaning of dependent under § 39.01(14)(e), Fla. Stat. (2005) as the child was a minor child in Florida without parents or legal guardian. However, the Fourth DCA stated the child was not abandoned, as asserted during the hearing by the Department. The statute defines abandoned as the failure, while being able, to provide a minor child with support, guidance, and supervision. The parents in this case were deceased – unable to provide for their child.

Motivation for declaration of dependency irrelevant. The Fourth DCA disagreed with the Department's argument that the child's motivation in being declared dependent was not proper use of Florida's laws and resources. The Fourth DCA held that if the child qualifies for a declaration of dependency under the Florida statutes, the child's motivation is irrelevant.

The Fourth DCA declared the child dependent and provided that the Department's responsibility over him terminated when he attained the age of 18.

Adoption of Proposed Order

In re T.D., 2005 WL 2218026 (Fla. 2d DCA)

The trial court terminated parental rights (TPR) to the parties' daughter. The parents argue that the termination warrants reversal because the trial judge adopted the Department of Children and Family Services' (the Department) proposed judgment. The Second District Court of Appeal (Second DCA) held that it was not reversible error to adopt the Department's order. The Second DCA based its decision on Perlow v. Berg-Perlow, 876 So.2d 383 (Fla. 2004) and related cases. The Supreme Court in the Berg-Perlow case stated that in marital proceedings: (1) the trial judge may ask both parties or one party to submit a proposed final judgment; (2) if proposed final judgments are filed, each party should be given an opportunity to review the other party's proposed final judgment and make objections; (3) if only one party submits a proposed final judgment, there must be an opportunity for review and objections by the opposing party; and (4) prior to requesting proposed final judgments, the trial judge should, when possible, indicate on the record the court's findings of fact and conclusions of law.

The Second DCA held that, in this case, the judge followed the dictates of Berg-Perlow. The trial judge's failure in the TPR action to state his findings of fact and conclusions of law on record before he agreed to the parties' request to submit proposed orders did not warrant reversal of the termination of parental rights. However, the Second DCA encouraged other circuits to state the findings of fact and conclusions of law before requesting proposed orders.

Further, the judge gave all parties sufficient time after trial to prepare and submit judgments. The judge waited seven days after receiving parties' proposals to announce his ruling, thereby giving parents ample time to object to the Department's proposed order. The judge had sufficient time to study orders and determine whether one accurately set out his own view of evidence and legal conclusions to be drawn from the evidence. The Second DCA held that the parents failed to demonstrate the circumstances surrounding the entry of the judgment created an appearance that the judge did not exercise his independent judgment. The Second DCA affirmed the trial court's holding.

Federal Case

Younger Abstention Doctrine

31 Foster Children v. Bush, 329 F. 3d 1255 (11th Cir. 2003)

A group of thirty-one foster children (plaintiffs) brought suit against the Governor of Florida, the Secretary of the Florida Department of Children and Families (DCF) and the administrators of fourteen of DCF's districts (defendants). The plaintiffs alleged widespread deficiencies in the foster care system in violation of the United States Constitution and federal statutory law. The plaintiffs moved for certification of a statewide

class and sought declaratory and injunctive relief from the federal court. The federal district court dismissed all of the plaintiffs' claims on the proceedings and only eleven of the plaintiffs who remained in the custody of DCF appealed.

One of the holdings of the case dealt with the *Younger* abstention doctrine. The Eleventh Circuit also held the district court was correct in dismissing the plaintiffs' claims under the *Younger* abstention doctrine. The plaintiffs were seeking relief that would interfere with the ongoing state dependency proceedings by placing decisions that were in the hands of state courts under the direction of the federal district court. An essential part of court's inquiry when deciding whether there is ongoing state proceedings is whether the state proceeding in question is one with which a federal lawsuit will interfere; if there is no interference, then abstention is not required

On motion for *Younger* abstention, plaintiffs have burden of establishing that state proceedings do not provide an adequate remedy for their federal claims. Minimal respect for state processes precludes any presumption that state courts will not safeguard federal constitutional rights. Federal court should assume that state procedures would afford an adequate remedy, in the absence of any unambiguous authority to contrary. The Eleventh Circuit added that a Florida state court could remedy the harms that a child in DCF's custody might suffer. Portions of the court's order were vacated, portions were affirmed, and the case was remanded.

Evidence Review: Statement of the Child Victim

Hearsay Exception; Statement of the Child Victim Section 90.803(23)

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. The necessary reliability of the statement is lacking because the jury cannot observe the demeanor of the witness when the statement was originally made, and there was no opportunity for cross-examination at that time. Thus, if the statement is hearsay, it is generally inadmissible. However, the Florida Evidence Code provides 28 specific exceptions to the hearsay rule – one of them being the Statement of the Child Victim.

Child hearsay comes in

If it is reliable and trustworthy + child testifies (subject to cross-examination)
or
If it is reliable and trustworthy + child does not testify + there is other corroborating evidence

Requirements §90.803(23), Fla. Stat. (2004)

- *Out-of-Court Statement*: a statement made without benefit of cross-examination
- *By a child victim* with a physical, mental, emotional, or developmental age of 11 or less
- *Describing an act* of child abuse, neglect, or sexual abuse,
- *Performed in the presence* of, with, on, or by declarant child.
    - The exception does not apply to statements of children who are witnesses and not victims. State v. Dupree, 656 So.2d 430 (Fla.1995).

Court must conduct a hearing and make all of the following findings:
That the statement concerns an act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of child;

AND

- That the statement does not indicate a lack of trustworthiness;

AND

- That the time, content, and circumstances of the statement provide sufficient safeguards of reliability.
- Court may consider any of the following to make a determination that the *time*, *content,* and *circumstances* of the statement are reliable:
    - Statutory
        - The mental and physical age and maturity of the child;
        - The nature and duration of the abuse or offense;
        - The relationship of the child to the offender;
        - The reliability of the assertion;
        - The reliability of the child victim; and
        - Any other factor deemed appropriate.
    - Case Law
        - The statement was spontaneous and was made in response to questions from adults; the mental competence of the child; the possibility of improper influence; State v. Townsend, 635 So.2d 949(Fla. 1994).
        - Child-like description of the act; Perez v. State, 536 So.2d 206, 211(Fla.1988).
        - The ability of the child to distinguish reality from fantasy; whether the statements were vague and partially contradictory; State v. Romanez, 543 So.2d 323 (Fla. 3d DCA 1989).
        - Time of incident relative to time of statement; Jaggers v. State, 536 So.2d 321(Fla. 2nd DCA 1988).
        - Clarity, detail; experience of the interviewers; non-leading questions. M.H. v. Department of Health and Rehabilitative Services, 703 So.2d 1195 (Fla. 1st DCA 1997).

AND

The child either:

- Testifies

OR

- Is unavailable as a witness; however there must be other corroborative evidence of the abuse or offense.
    - To find that the child witness is unavailable, the court must make a finding that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm OR make findings pursuant to §90.804(1) (hearsay exceptions; declarant unavailable).

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