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

LEGAL BRIEFS NEWSLETTER

GuardianadLitem.org

October ~ November 2007

The Statewide Guardian ad Litem Program has added new resources our website at www.GuardianadLitem.org.

The newest addition to the Florida Guardian ad Litem website is the Dependency Practice Manual. The Practice Manual covers 22 topic areas important for anyone involved in Florida's dependency system. Experts from across the state contributed their considerable expertise in subject areas such as Independent Living, Education, Master Trusts, Evidence and Appellate Procedure. Each chapter has checklists, charts and other practice aids to help navigate the subject matter. We give our sincere "thank-you" to all who contributed.

Termination of Parental Rights

A.B. v. Department of Children and Families, 2007 WL 3166948 (Fla. 1st DCA)

The mother appealed the trial court's termination of her parental rights. The First District Court of Appeal (First DCA) held that there was not competent substantial evidence to support termination of parental rights based on abandonment. § 39.806(1)(b), Fla. Stat. (2006). However, the First DCA upheld the trial court's termination of her parental rights under §§ 39.806(1)(c) and (1)(e).

Read the Opinion

Filing Termination of Parental Rights Petition

S.D. v. Department of Children and Families, 2007 WL 3170468 (Fla. 4th DCA)

The parent appealed the trial court's termination of parental rights order based on the failure of the Department of Children and Families to file a termination petition. The Fourth District Court of Appeal agreed with the parent and held that because there was no petition filed, the court's jurisdiction was not properly invoked. § 39.802(1), Fla. Stat. (2007); Fla. R. Juv. Pro. 8.500(a)(1).

Read the Opinion

Prospective Abuse

T.M. v. Department of Children and Families, 2007 WL 4126910 (Fla. 4th DCA)

The mother appealed the trial court's order terminating her parental rights. The grounds for the termination were based on prospective abuse.

The Fourth District Court of Appeal (Fourth DCA) held that in:

> "prospective abuse cases, Department of Children & Families must prove a connection between past acts of abuse and the prospect that it will occur again; the issue in these cases is whether future behavior adversely affecting the child can be clearly and certainly predicted." *Padgett v. Dep't of Health & Rehabilitative Servs.,* 577 So.2d 565, 571 (Fla.1991). In prospective abuse cases DCF must prove a connection between past acts of abuse and the prospect that it will occur again. *See D.H. v. Department of Children & Families,* 769 So.2d 424 (Fla. 4th DCA 2000). The issue in these cases is whether future behavior adversely affecting the child can be "clearly and certainly predicted." *L.B. v.*

Department of Children & Families, 835 So.2d 1189, 1195 (Fla. 1st DCA 2002). Stated another way, the issue is whether it is *likely* to happen or *expected. In re J.L.,* 824 So.2d 1023, 1025 (Fla. 2d DCA 2002)."

The Fourth DCA upheld the trial court's termination order citing "[t]he history of violence in the relationship, the [mother] lying about the relationship being finished, and the failure of the mother to protect the child from the father."

Read the Opinion

Continuing Risk of Harm to the Child Irrespective of the Provision of Services

A.W. v. Department of Children and Families, 2007 WL 4105543 (Fla. 1st DCA)

The mother appealed both the trial court's order terminating her parental rights and the trial court's order denying her post-termination visitation. The Department of Children and Families (the department) based the termination petition on the mother's failure to complete her case plan, and the continuing risk of harm to the child irrespective of the provision of services provided to the mother. §§ 39.806(1)(b), (c), or (e), Fla. Stat. (2006).

The First District Court of Appeal (First DCA) upheld the trial court's termination of the mother's parental rights.

> "Evidence supported finding that further services for mother would not remedy her inadequate parenting skills and the other deficient circumstances that threatened child's health, safety, and well-being, in support of termination of parental rights; mother was in the borderline range for intellectual functioning, she was unable to implement the tasks that she learned during counseling and training, psychologist stated that mother was unable to provide good insight into the ordinary problems confronting a parent with a young child, that child was at risk in mother's home due to her anger management issues, and that mother might never be able to learn what she needed to now to parent child effectively."

The First DCA also affirmed the trial court's order for no post-termination visitation. The trial court must make the decision based on best interests of the child. There was expert testimony that recommended only limited written communication post-termination which supported the trial court's order. § 39. 811(7)(b), Fla. Stat. (2006).

Read the Opinion

Incarceration/Abandonment

T.S. v. Department of Children and Families, 2007 WL 4105565 (Fla. 1st DCA)

The father appealed the trial court's order terminating his parental rights (TPR). The TPR petition cited the father's abandonment of the child during the father's incarceration. The trial court found that the father, while being able, made no provision to pay child support, failed to maintain contact with his child, and failed to send a card or gift for the child's birthday.

The First District Court of Appeal (First DCA) reversed the trial court's TPR. The father's incarceration can only be a factor in determining abandonment – not the basis. It is also improper to terminate parental rights "if a parent is unable to financially provide for the child or assume parental obligations due to incarceration. *See In re T.B.,* 819 So.2d at 272; *C.B. v. Dep't of Children & Families,* 874 So.2d 1246 (Fla. 4th DCA 2004)." The father was incarcerated for 8 months, the child was 8-15 months old and the father did not have "the ability to either support his child or meaningfully contact his child during the eight months he was in jail."

The First DCA reversed the trial court's TPR order.

Read the Opinion

Dependency

Expert Witness Qualifications

J.V. v. Department of Children and Family Services, 2007 WL 2935498 (Fla. 3d DCA)

The mother appealed the trial court's order adjudicating her child dependent based upon allegations of domestic violence between the mother and father. A pediatrician testified as an expert witness that the parent's infant suffered from a fractured femur. The mother contends that because the pediatrician was not a radiologist his reading of the child's x-rays and CT scan was inadmissible. Additionally, she argues, the pediatrician should not have been permitted to rely upon medical records authored by the radiologists.

The Third District Court of Appeal (Third DCA) disagreed with the mother and held, "[a] physician is not incompetent to testify as an expert merely because he is not a specialist in the particular field of which he speaks." *Hawkins v. Schofman,* 204 So.2d 336, 336 n. 1 (Fla. 3d DCA 1967) (quoting *Wong Ho v. Dulles,* 261 F.2d 456, 460 (9th Cir.1958)). The Florida Supreme Court has held the trial court has discretion to determine the sufficiency of a witness' qualifications to permit the witness to testify as an expert witness. The trial court's decision whether or not to accept the witness as an expert will not be reversed unless there is a clear showing of error.

The Third DCA affirmed the trial court's dependency adjudication as the record clearly indicated that the child "suffered a fracture to his left femur. This injury was as a result of a traumatic event. The child's parents . . . failed to offer any evidence of a traumatic event, and were the child's only caretakers."

Read the Opinion

Psychological Evaluation

D.C. v. Department of Children and Families, 2007 WL 3087464 (Fla. 4th DCA)

The mother appealed the trial court's dependency adjudication and order requiring her to submit to a psychological evaluation. The Fourth District Court of Appeal upheld the trial court's dependency order but reversed the order requiring her to submit to a psychological evaluation because the order failed to specify the "time, place, manner, conditions, and scope of examination" as required by Florida Rule of Juvenile Procedure 8.250(b).

Read the Opinion

Domestic Violence

C.J. v. Department of Children & Families, 2007 WL 4126864 (Fla. 4th DCA)

The father appealed the trial court's dependency adjudication of his child. The child was adjudicated dependent based on the history of the father's domestic violence against the mother. § 39.01(14),(30) and (43), Fla. Stat. (2006). The father contends that the "record does not show that [the child] saw or was aware of the violence in the home and therefore cannot be adjudicated dependent."

The Fourth District Court of Appeal (Fourth DCA) held that the "trial court was not required to determine whether child saw or was aware of violence against mother by father as such finding was not required in deciding whether child was neglected." §39.01(43) Fla. Stat. (2006). However, the Fourth DCA also held that the child must be present for domestic violence to constitute abuse. § 39.01(2), Fla. Stat. (defines abuse); § 39.01(31)(i), Fla. Stat. (defines harm); *D.H. v. Department of Children and Families,* 769 So.2d 424, 427 (Fla. 4th DCA 2000).

The trial court made a "blanket ruling" admitting hearsay under the assumption that hearsay "is permitted in dependency matters." However the Fourth DCA disagreed. An "[a]djudicatory hearing shall be conducted by the judge ... applying the rules of evidence in use in civil cases." §

39.507(1)(b), Fla. Stat.(2006); *See also In the Interest of S.J.T.,* 475 So.2d 951, 953 (Fla. 1st DCA 1985).

The Fourth DCA reversed and remanded the case and held the "trial court erred in admitting, and relying upon, inadmissible hearsay testimony at the adjudicatory hearing."

Read the Opinion

Substantial Risk of Imminent Harm – Drug Use

J.O. v. Department of Children and Family Services, 2007 WL 3274708 (Fla. 3d DCA)

The father appealed the trial court's dependency order as to his two children. The dependency was based upon the father's drug use and his selling of drugs from his home which resulted in the children's physical and mental health being at substantial risk of imminent harm. § 39.01(14), Fla. Stat. (2007).
The Third District Court of Appeal (Third DCA) upheld the trial court's order quoting J.C. v. Florida Department of Children & Family Services, 937 So.2d 184 (Fla. 3d DCA 2006):

> "While there is no evidence that the children were present or even aware that their father was selling drugs from the structure within the curtilage and directly behind their home, and no evidence of violence, based upon the ages of the children (ten and a half, and seven years of age), the proximity of the drugs, the number of transactions, the fact that the transactions occurred throughout the day and evening, and the presence of an unsecured firearm within the home, we conclude that there was sufficient evidence to support the trial court's finding that the children's physical and mental health were at substantial risk of imminent harm."

Read the Opinion

Reopening of Dependency Proceedings

L.R. v. J.F., 960 So.2d 836 (Fla. 4th DCA 2007)

The mother requested that the trial court reopen the dependency proceedings that had resulted in the placement of the child with the father. The mother requested the trial court appoint an attorney to represent her. The mother also requested the child be heard by the court regarding her placement wishes. The trial court denied the mother's requests and the mother appealed.

First, the Fourth District Court of Appeal (Fourth DCA) held that the trial court had erred in not appointing counsel for the mother as the Fourth DCA held that the proceeding was still a dependency proceeding. The trial court had retained jurisdiction over the case even though the Department of Children and Families (the department) had terminated supervision, and no permanent placement was ever ordered. A parent has the right to counsel in dependency proceedings. § 39.013(1), Fla. Stat. (2006).

The Fourth DCA also agreed with the mother's contention that the trial court erred when it excluded the child from the hearing and did not hear her wishes regarding her placement. "Juvenile Procedure Rule 8.255 supports the mother's position. Subsection (b) of the rule makes clear that a child has a right to be present in juvenile matters "unless the court finds that the child's mental or physical condition or age is such that a court appearance is not in the best interest of the child." No such finding was made . . ."

The Fourth DCA held that the mother, in requesting the trial court speak with her daughter, was trying to call her as a witness. "Subsection (d)(1) of the rule states that a child "may be called to testify in open court by any party to the proceeding or the court, and may be examined or cross-examined." Fla. R. Juv. P. 8.255(d) (2006). It was error for the court to refuse to hear from the child.

The Fourth DCA reversed and remanded the case.

Read the Opinion

Evidentiary Hearing to Reopen Dependency Case – Sufficiency of Facts Alleged

J.M. v. Department of Children and Families, 2007 WL 3407778 (Fla. 5th DCA)

The trial court placed the mother's children in long-term relative care (upheld on appeal). The mother filed a motion to have the dependency proceeding reopened. The trial court denied her motion. The mother appealed the trial court's denial of her motion to reopen the dependency case.

The Fifth District Court of Appeal (Fifth DCA) upheld the trial court's denial of the mother's motion. The Fifth DCA explained that long-term relative care is considered a permanent placement § 39.621(d), Fla. Stat. (2007), and cannot be modified unless the "circumstances of the permanent placement are no longer in the child's best interest." § 39.621(9) Fla. Stat. (2007). There must be a hearing to determine whether or not to reopen the dependency case. "At the hearing the parent must demonstrate that the safety, well-being, and physical, mental and emotional health of the child are not endangered by the modification." In her motion the mother did not allege facts that if proven, would have supported an order of reunification. If she had, then the trial court would be required to hold an evidentiary hearing.

The Fifth DCA affirmed the trial court's decision.

Read the Opinion

Non-Offending Parent

Placement

E.B. v. Department of Children and Families, 2007 WL 4105523 (Fla. 1st DCA)

The father, a non-offending parent, appealed the trial court's order denying his motion to have his children placed with him. The father argued that the trial court erred in using the "best interest" standard to determine whether or not to modify the children's placement and there was not sufficient evidence to support the denial. The First District Court of Appeal (First DCA) agreed with the father.

A home study was completed and the home was found to be stable and secure. The father had no criminal history. The First DCA held that the trial court abused its discretion in denying the father's motion. "If a child is adjudicated dependent as to one parent, the non-offending parent should be given custody unless the trial court finds that parent to be unfit or that the child would be endangered if placed in his or her custody." See § 39.521(3)(b) Fla. Stat. (2006). The trial court erred in applying the best interest standard.

The First DCA reversed and remanded the case.

Read the Opinion

Placement

G.M. v. Department of Children and Families, 2007 WL 4208556 (Fla. 1st DCA)

The child was placed in long-term custody with the maternal grandparents. The father, a non-offending parent, appeals the trial court's order placing his child in long-term custody and terminating protective supervision services by the Department of Children and Families (the department). The First District Court of Appeal (First DCA) affirmed the trial court's order.

> "The court shall place the child with the non-offending parent upon completion of a home study, unless the court finds that such placement would endanger the safety, well-being, or

physical, mental, or emotional health of the child. § 39.521(3)(b), Fla. Stat.(2005). In this case the home study found a suitable environment however the court determined that placing the child with the father would endanger her safety, well-being, or physical mental or emotional health of the child. To overturn the trial court's finding the First DCA must find abuse of discretion (Discretion is abused only where the trial court acts in an "arbitrary, fanciful, or unreasonable" manner and no reasonable person would agree with its view. *See Canakaris v. Canakaris,* 382 So.2d 1197, 1203 (Fla.1980)."

The First DCA held that the trial court did not abuse its discretion –the father "knew he should attend family counseling to strengthen his ability to protect his daughter's well being and emotional health, yet he failed to do so."

The First DCA reversed and remanded the trial court's decision.

Read the Opinion

Termination of Protective Supervision

Permanent Guardianship

I.Z. v. Department of Children and Families, 2007 WL 3170460 (Fla. 4th DCA)

The mother appealed the trial court's order terminating the Department of Children and Families' (the department) protective supervision and placing the child in a permanent guardianship. The Fourth District Court of Appeal (Fourth DCA) held that the trial court met the statutory requirements for terminating protective supervision and for placing the child in a permanent guardianship. § 39.6221, Fla. Stat. (2007). To place a child in permanent guardianship, the court must find reunification or adoption is not in the best interest of the child, the child must have been in the placement for 6 months, the placement must be a safe and suitable home for the child, the guardian has made a commitment to the child until the age of majority, and agree to inform the court of any address change.

The Fourth DCA held there was competent substantial evidence that the mother had not substantially complied with the case plan and affirmed the trial court's decision.

Read the Opinion

Involuntary Commitment of Minors

Presence at the Hearing

L.T. v. Department of Children and Families, 2007 WL 3274834 (Fla. 4th DCA)

The child appealed a trial court's order involuntarily committing her to a residential treatment facility. The child contends that she was denied due process as she was not permitted to attend the hearing or participate in a meaningful way. The Fourth District Court of Appeal (Fourth DCA) affirmed the trial court's order. The Fourth DCA held that the trial court properly determined that the child's presence at the hearing was not in her best interests. Florida Rule of Juvenile Procedure requires that a child be present at a hearing on the placement of a child into a residential treatment center, "[t]he child shall be present at the hearing unless the court determines pursuant to subdivision (c) that a court appearance is not in the child's best interest." Fla. R. Juv. P. 8.350(a)(10). The child was a runner, and she was considered to be a danger to herself and others.

The Fourth DCA also held that the child was not denied due process as she was able to participate in the hearing via phone, and was represented by an attorney ad litem who was present at the hearing, and was able to speak privately with attorney.

Read the Opinion

Website Resources

The Florida State Courts Office of Court Improvement has many helpful resources including the 2007 Dependency Benchbook, and a variety of Domestic Violence resources. You can find their website at www.flcourts.org/gen_public/family/familycourts.shtml

The National Resource Center for Family-Centered Practice and Permanency Planning at the Hunter College School of Social Work has a newly created resource for Latino Child Welfare Issues. The information can be found at:
www.hunter.cuny.edu/socwork/nrcfcpp/info_services/latino-child-welfare.html

> The Center also includes **Quarterly Webcasts** - focusing on a wide range of family-centered practice and permanency planning related issues, these are broadcast live and then archived on this website. The webcasts can be found at:
> www.hunter.cuny.edu/socwork/nrcfcpp/webcasts/index.html

National Dissemination Center for Children with Disabilities provides information about disabilities in infants, toddlers, children, and youth, IDEA, which is the law authorizing special education, No Child Left Behind (as it relates to children with disabilities), and research-based information on effective educational practices. The center's website can be found at:
www.nichcy.org

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