Legal Briefs Newsletter

August/September 2005

Volume 2, Number 7

Welcome to the one-year anniversary of the Legal Briefs Newsletter! We hope that you have found our newsletter informative and helpful in your involvement in Florida's child welfare system.

Case Plans

Substantial Compliance

Substantial compliance: "the circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child's parent." §. 39.01(68), Fla. Stat.

D.B. v. Department of Children and Families, 2005 WL 2138815 (Fla. 4th DCA)

The parents appealed the termination of their parental rights. The Fourth District Court of Appeal (Fourth DCA) upheld the trial court's findings (supported by clear and convincing evidence), which held that the children would be subject to ongoing neglect and abuse if returned to parents, and termination of parental rights was in the children's manifest best interests.

The Fourth DCA adopted the trial court's order that stated the parents failed to substantially comply with their case plans. The parents' failure to comply with the case plan was evidenced by: mother's failure to submit to drug screens and testing positive for cocaine and other drugs on past screens; parents' refusal to attend long-term residential treatment after both were discharged from outpatient treatment; mother's failure to maintain stable housing; father's probation violation for child neglect, and incarceration.

The Fourth DCA held that termination of the parents' parental rights was in the children's manifest best interests and was evidenced by the parents' refusal to comply with their case plans, lack of capacity to care for children, the therapeutic needs of one of their children which could be met by freeing child for adoption, the amount of time separated from parents, and sporadic visitation by parents. Additionally, the children formed a significant relationship with their current caretakers who wished to adopt them.

Court can only consider tasks in the case plan when determining substantial compliance

H.G. v. Department of Children & Families, 2005 WL 2292144 (Fla. 4th DCA 2005)

The Fourth District Court of Appeal (Fourth DCA) reversed the trial court's final order denying mother's reunification with son based on her failure to substantially comply with her case plan.

The case plan's tasks were structured to address the mother's inability to provide a safe and nurturing home. The mother attended parenting and anger management classes, and attended individual counseling in accordance with the case plan. The case plan was not amended – even though the trial court had ordered family counseling sessions to include both parents. The trial court judge also stated that he would consider the mother's failure

to pay child support when issuing his ruling regarding reunification.

The trial court adopted the Department of Children and Families' (the Department) proposed case plan that changed the goal from reunification with the mother to "maintaining the relationship with the father." The mother appealed.

The law requires that the court return children to their parent if the parent has substantially complied with the case plan and the child will not be endangered. Even though the mother did not participate in counseling with both parents, the Fourth DCA held that the mother did substantially comply with the case plan. The Fourth DCA held that it was improper to consider mother's failure to attend the family counseling sessions including both parents and failure to pay child support when determining whether the mother had substantially complied with the case plan. Consideration of these tasks was improper because the mother's case plan was never amended to include family counseling with both parents and child support payment.

The Fourth DCA reversed the trial court's denial of reunification and reversed the case plan goal change. The Fourth DCA remanded the case with instructions to reunify the child with the mother under protective supervision of the Department unless the court finds reunification would be detrimental to the child. *See* Fla. R. Juv. P. 8.415(f)(2).

Substantial Compliance and Reunification

S.P. v. Department of Children and Families, 904 So.2d 615 (Fla. 4th DCA 2005)

Mother moved for reunification with her child, and Department of Children and Families (the Department) moved to terminate protective supervision and permanently place the child with the paternal grandmother. The trial court denied reunification with the mother and granted termination of protective supervision. Mother appealed the trial court's holding.

The Fourth District Court of Appeal (Fourth DCA) held that evidence was insufficient to establish that living with mother would be unsafe for child and reversed the trial court's holding with directions.

At one permanency hearing, the general master found that the mother had not substantially complied with her case plan but had "completed all of her tasks." The mother eventually filed a motion for reunification in which she stated that she had completed all of her tasks. The trial court denied the motion.

The court must return a child to the custody of the parents if the court determines that the parent has substantially complied with the case plan unless reunification would be detrimental to the child. *See* § 39.701(8)(b), Fla. Stat. (2002). The Fourth DCA held that the mother had substantially complied with the case plan as she had completed her tasks and further found that there was no evidence that placing the child with the mother would be detrimental to the child. The only statement regarding the mother's ability was that returning the child to the mother might be "overwhelming."

The Fourth DCA reversed the trial court's holding and remanded for the trial court to make findings to support the conclusion that the mother cannot provide a safe environment for the child.

Single-Parent Termination of Parental Rights

In re L.C., 908 So.2d 568 (Fla. 2d DCA 2005)

The trial court terminated parental rights (TPR) as to mother's five children. The children have four fathers. The trial court terminated two of the fathers' parental rights to three of the children. The Second District Court of Appeal (Second DCA) affirmed the mother's and father's TPR as to one child. However, the Second DCA reversed the termination of mother's rights to the remaining four children. As a result, the Second DCA held that the fathers' terminations must be dealt with as single-parent terminations.

The Second DCA held that the trial court properly terminated mother's parental rights as one of the children who had suffered at least two instances of severe abuse and who

Section 39.811(6) permits single-parent termination under the following circumstances:
(a) If the child has only one surviving parent;
(b) If the identity of a prospective parent has been established as unknown after sworn testimony;
(c) If the parent whose rights are being terminated became a parent through a single-parent adoption;
(d) If the protection of the child demands termination of the rights of a single parent; or
(e) If the parent whose rights are being terminated meets any of the criteria specified in ss. 39.806(1)(d) and (f)-(i).

required extraordinary care because of his medical condition. The mother had opportunity and capability to prevent the abuse and knowingly failed to prevent the egregious conduct that threatened the life, safety, or physical, mental, or emotional health of child or child's sibling. In addition, the mother failed to obtain adequate medical care for her child, which was egregious abuse that endangered life of child. One father's parental rights to one child were properly terminated based on egregious abandonment. The father had virtually no contact with special-needs child over extended periods.

The Department failed to present clear and convincing evidence that mother posed substantial risk of significant future harm to other four children, as would justify termination of mother's parental rights to remaining children.

Because of the reversal of the mother's parental rights, termination of the fathers' parental right must be justified as single-parent terminations. The Department failed to present clear and convincing evidence that first father egregiously abandoned his other child, as would justify termination of father's parental rights. The record did not support termination of either fathers' parental rights as single-parent terminations under statutory section listing circumstances under which parental rights of one parent could be terminated without severing rights of the other parent. The only ground for termination cited by trial court, which would have permitted single-parent termination, was section of statute listing incarceration as ground for termination of parental rights, which had separately been rejected on appeal.

Non-Offending Parent

Regardless of offending parent's substantial compliance with their case plan, the trial court is not required to return the child to the offending parent when a non-offending parent placement is available

R.W. v. Department of Children and Families, 909 So.2d 402 (Fla. 1st DCA 2005)

The mother appealed the trial court's order changing her case plan goal from reunification to permanent custody with the father -- a non-offending parent. The mother argued that, because the trial court found she substantially complied with her case plan and the case plan goal throughout the proceedings was reunification, the court must return the child to her. § 39.701(9)(b), Fla. Stat. (2004).

The First District Court of Appeal (First DCA) held that the father was a non-offending parent and as such, the court was required to place the child with the non-offending parent if certain conditions are met, including that the placement is in the child's best interests. See § 39.521(3)(b), Fla. Stat.

The First DCA further held that even though substantial compliance with the case plan is required before a child can be reunited with an offending parent; the trial court is not required to return the child to the offending parent when a non-offending parent placement is available. It is within the court's discretion to give permanent custody to the non-offending parent. The First DCA affirmed the trial court's order.

Anders Procedure

Applicable to appeals of orders placing a child in residential treatment

L.M. v. Department of Children and Families, 2005 WL 2043497 (Fla. 5th DCA)

In this appeal of a dependency order that placed a child into residential treatment, the child's counsel moved to withdraw, certifying that, after a conscientious review of the record, he determined in good faith that there are no meritorious grounds on which to base an appeal.

The Fifth District Court of Appeal (Fifth DCA) considered whether the procedures

applicable to criminal cases, as set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), are applicable to appeals of orders placing a child in residential treatment.

The Fifth DCA held that "given the curtailment of the fundamental right of liberty which occurs when a child is placed into residential treatment, the fundamental policies and interests served by the *Anders* procedure (the appointed attorney files a brief to support the claim of absence of arguable issues for appeal), are also present in appeals taken from orders placing a child into residential treatment." The Fifth DCA Court deferred ruling on counsel's motion to withdraw and directed counsel to file *Anders* brief.

Adoption

Private adoption agency right to intervene in dependency proceedings

In re S.N.W., 2005 WL 2467056 (Fla. 2d DCA)

The mother, without the knowledge of the Department of Children and Families (the Department) or counsel, contacted a private adoption agency (Adoption Miracles), selected prospective adoptive parents for her child, and executed consent to her child's adoption. Prior to the adjudicatory hearing in the dependency proceeding, Adoption Miracles filed a motion to terminate parental rights in the East Division of the 13th Judicial Circuit – a division handling general civil, probate, and family law cases.

The mother decided that she no longer wanted to consent to the adoption and stated that the consent was obtained by fraud or duress and without an attorney present.

The trial court denied the Adoption Miracles motion to intervene and set aside the birth mother's consent to the adoption. The trial court intended to proceed with the dependency, and the Department intended to offer the mother a case plan.

The Second District Court of Appeal (Second DCA) held that the trial court was required to permit the agency to intervene in dependency proceedings, and the trial court erred in denying agency's request to intervene in dependency proceeding once the agency filed mother's consent to adoption.

The Second DCA further held that dependency court has authority to address validity of mother's consent to adoption. Further, the Second DCA held that a proceeding must be held to provide an appropriate evidentiary basis to establish whether the mother's consent was obtained by fraud or duress. Notice must be provided to the private adoption agency.

After holding the consent and intervention by Adoption Miracles was valid, the Second DCA held that proceedings in adoption case are secondary to dependency proceedings. The dependency court must determine that prospective adoptive parents are properly qualified to adopt child and that the adoption is in best interests of child.

Independent Living

Qualification

Department of Children and Family Services v. T.R., 906 So.2d 335 (Fla. 4th DCA 2005)

The trial court ordered the Department of Children and Family Services (the Department) to place the child, who was just shy of her eighteenth birthday, "in the Subsidized Independent Living Program & the Road to Independence Scholarship Program."

The Fourth District Court of Appeal reversed the trial court's holding and held that the child did not qualify for the programs because she had refused to be placed in a foster home and only children who have been in foster care qualify for placement in the programs. *See* §§ 409.1451(4)(c)2.a. and (5)(b) 2.a., Fla. Stat. Therefore, the trial court erred in ordering the Department to place the child in the programs.

At-Risk Placements and Adoption

Andrea R. Hack, Esq.
Permanency Project Director, Florida Statewide Guardian ad Litem Office

Delay can be a major hurdle in achieving timely permanency for children after parental rights are terminated (TPR). However, there are ways to ensure that the adoption process proceeds in a timely manner.

In Florida, a child cannot be placed in an "adoptive" or "pre-adoptive" home until legally free for adoption, or until the biological parents' rights are legally terminated. Until the child is in a pre-adoptive or adoptive home, the case is usually not handled by an adoptions caseworker, so work to complete the adoption is not typically done. However, Florida's Administrative Code provides an "at-risk" placement exception, allowing the case to be transferred or reclassified, and the caseworker to do virtually everything short of an adoption hearing to process and approve the home before the TPR takes place. Fla. Admin. Code R. 65C-16-009(5).

In order for a home to be classified as an at-risk placement, the prospective adoptive parents must clearly understand that the biological parents' rights have not been terminated, and there is no guarantee that the adoption will go through as anticipated. The potential adoptive parents must indicate in writing that they understand and accept the risks associated with the placement. The caseworker must also obtain the written approval of the District Family Safety Program Office (or the equivalent entity within a community-based care provider) for an at-risk placement.

The Administrative Code provides that at-risk placements should be used whenever it would be in the child's best interests. Examples provided in the Code include when the TPR is on appeal, or when a TPR has been filed because it is unlikely that the child can be returned to the biological parents within a reasonable period.

Employing the at-risk provision of the Administrative Code enables an active caseworker to work with motivated adoptive parents prior to TPR to complete most of the adoption paperwork, and promises to short-circuit delays and provide permanency in a more timely manner.

In addition to benefiting children, using the at-risk placement provision allows Florida to come into compliance with federal mandates. The federal Adoptions and Safe Families Act (ASFA) requires every state's social service agency to begin to "identify, recruit, process, and approve "adoptive placements concurrently with filing or joining a TPR petition." 42 U.S.C. § 675(5)(e). This provision of ASFA was developed specifically "to ensure that a child does not wait unnecessarily between the time a TPR is granted and the child's permanent placement in a home." 65 Fed. Reg. 4062 (Jan. 25, 2000). ASFA requires that the efforts by the Department to secure and approve adoptive placements be "child-specific," "as meaningful as possible," and involve "whatever steps are necessary." 42 U.S.C. § 671(a)(15)(C); 45 C.F.R. § 1356.21(d)(3); 45 C.F.R. § 1356.21(g)(5). At a minimum, adoption recruitment efforts must include placing the child on regional, state, and national adoption exchanges. 45 C.F.R. § 1356.21(g)(5).

The at-risk placement provision of Florida's Administrative Code is a useful tool that enables the GAL program, the courts, and the Department to work together to comply with federal law while better serving the needs of Florida's dependent children.

Websites Resources

Adoption and Safe Families Act of 1997 (ASFA):
http://www.acf.hhs.gov/programs/cb/laws/public_law/pl105_89.htm
This law (1) re-defines "reasonable efforts"; (2) imposes deadlines for filing termination of parental rights petitions; (3) requires notice and an opportunity to be heard to foster parents, pre-adoptive parents, and caretaker relatives at all review hearings; (4) requires case plans to address efforts to achieve permanence; and (5) limits time for federally

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

funded reunification services to 15 months from initial placement.

Summaries of State Legislation Enacted in Response to the Adoption and Safe Families Act Searchable Database
http://www.ncsl.org/statefed/cf/asfasearch.htm You can search Florida's (as well as other state's) response to ASFA by subject (Termination of Parental Rights, Permanency Hearings, Adoptions across State Lines, Assurances of Child Safety, Health Insurance for Special Needs Children, Notice Requirements, Effective Date, Criminal Record Check, Clarification of Reasonable Efforts.)

The ABA Center for Children and the Law: www.abanet.org The ABA has compiled a copy of the federal child welfare laws as amended by the Adoption and Safe Families Act.

National Council of Juvenile and Family Court Judges: **www.ncjfcj.org**
The NCJFCJ is dedicated to serving the nation's children and families by improving the courts with juvenile and family jurisdictions. Their mission is to better the justice system through education and applied research and improve the standards, practices and effectiveness of the juvenile court system.