



Legal Briefs Newsletter

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Welcome to the December edition of the Statewide Guardian ad Litem Office Legal Briefs Newsletter. In addition to case summaries, this month we have the return of the popular Evidence Review section created by Program Attorney Lois Sears of the Sixth Circuit and an article explaining the burden of proof in involuntary commitment hearings by Charmaine I. Santiago of the Seventeenth Circuit.

Do not forget to visit the Statewide Guardian ad Litem website at www.gal.fl.gov where you will find more case summaries (organized by topic), archived newsletters and other valuable resources.

As always, please feel free to contribute articles, ideas for articles, editorial assistance or other suggestions to Liz Damski at Elizabeth.Damski@gal.fl.gov.

Least Restrictive Means

R.F. v. Department of Children & Families, 2004 WL 2922915 (Fla. 5th DCA)

R.F. appealed the trial court's termination of her parental rights on the grounds that the termination was not the least restrictive means available to protect her children from harm. R.F. based her argument on the willingness of her father and stepmother to care for her children. The trial court considered placement with the father and stepmother but held that there was not a "realistic likelihood of a successful placement of the children" and the best interest of the children required the court to proceed with a permanent placement. The Fifth District Court of Appeal upheld the lower courts termination of parental rights and found that substantial, competent evidence supported the trial court's finding that the termination of parental rights was the least restrictive means of protecting the children from harm.¹

In re: J.A., v. Department of Children and Family Services, 885 So.2d 960 (Fla. 2nd DCA 2004)

The issue on appeal was whether the trial court's order, terminating the mother's parental rights, in a situation where the children would remain in an indefinite state of dependency while their father worked toward reunification, was the least restrictive means to ensuring the children's safety. The Second District Court of Appeals held it was not.

The children were sheltered and adjudicated dependent when the mother was arrested and jailed for a drug offense in 2001. The children's father was already in jail on a drug charge. The mother failed to comply with her case plan while in jail. After release from jail, the mother left Florida for fear of deportation to Mexico. DCF filed a petition to terminate the mother and father's parental rights. The trial court ruled that the mother failed to complete her case plan (which the mother did not dispute) and abandoned the children. The trial court considered the mother's departure from Florida and the father's incarceration when determining the children's manifest best interest. Because of the father's possible deportation, the trial court delayed the TPR determination.

The Second DCA found that TPR was not least restrictive means of protecting the children from harm. The children were not awaiting adoption therefore, the only effect of the TPR

was to completely sever any rights the mother had to her children. There was no showing that supervised contact between the children and the mother would harm the children in any way. The Second DCA reversed the order terminating the mother's parental rights, and the case was remanded for further proceedings. ¶

Termination of Parental Rights

Indian Child Welfare Act (ICWA)

T.D. and D.D v. Department of Children & Families, 2004 WL 2996905 (Fla. 2nd DCA)

The mother appealed the termination of parental rights because the Indian Child Welfare Act (ICWA) was not applied to her case. The ICWA gives the child's Indian custodian or the child's Indian tribe the right to intervene at any time in a state court TPR proceeding concerning the Indian child. Pursuant to § 1911(b), this right is exercised through a petition by either the child's parent, Indian custodian, or tribe to transfer the proceedings to the jurisdiction of the appropriate tribe; such transfer may be declined by the tribal court. The Second District Court of Appeal upheld the TPR stating that the record contained no evidence that an application for transfer was made and there was no evidence of the child's Indian ancestry. In addition, the Second DCA stated there must be early investigation and determination of whether American Indian children are involved in child custody or TPR proceedings. The court suggests that the Department, at the initiation of the proceedings, or the trial court when it is first involved, inquire of the parents or relatives to determine the applicability of the ICWA. ¶

See the National Indian Welfare Association website at www.nicwa.org for more information regarding American Indian child welfare and works on behalf of Indian children and families. ¶

Effect of Children's Opposition to Termination of Parental Rights

M.J. and K.J. v. Department of Children & Families, 2004 WL 2952831 (Fla. 4th DCA)

Even though the trial court found by clear and convincing evidence that the children were at extreme risk because of father's sexual deviancy (egregious conduct) and mother's failure to protect children from the father, the trial court denied termination of parental rights because some of the children opposed terminating mother's parental rights. The Fourth District Court of Appeal reversed the trial court's holding. The Fourth DCA held that the fact the some of the children opposed the termination of parental rights did not amount to competent, substantial evidence in support of the trial court's decision to deny termination. The trial court can consider on remand whether parental contact with the children pending adoption is in their best interest. ¶

Prospective Abuse

J.F. v. Department of Children & Families, 2004 WL 3000848 (Fla. 4th DCA)

In this case, the Fourth District Court of Appeal withdraws its previous opinion upon mandate of the Florida Supreme Court, addressing *Florida Department of Children & Families v. F.L.*, 880 So.2d 602 (Fla. 2004). See the [October Legal Briefs Newsletter](#) for summary.

The trial court granted the TPR petition citing that the mother had failed to take responsibility for her stepchild's death (mother was convicted of manslaughter and child abuse for the killing of her stepchild); egregious conduct upon child or child's siblings; participated in long-term therapy but still had anger management problems; and failed to substantially complete the case plan.

The Fourth DCA reversed the TPR on appeal. The court held that the mother had

substantially complied with her case plan, and any missed therapy was a result of inadequate referrals, counseling programs closing down and the limitation of the mother's felony conviction. In addition, the Fourth DCA held DCF's contention that the mother's failure to take responsibility for her stepchild's death was the "nexus that proves that she is a danger to any child in her care" was insufficient to support a finding that the mother posed a substantial risk of harm to her current children or that the TPR is the least restrictive means of protecting the current children from harm.

Finally, the Fourth DCA rejected DCF's argument that no nexus between the acts described in § 39.806(1)(h) – which allows TPR when parent or parents have committed murder or voluntary manslaughter of another child... -- and the potential for future abuse need be shown. The court applied the rationale of *Florida Department of Children & Families v. F.L.*, 880 So.2d 602 (Fla. 2004) and held "that in order for a termination of parental rights to be based solely on the single act of committing manslaughter or a felon assault against another child, the state must also prove that, based on the totality of the circumstances surrounding the petition, the parent currently poses a substantial risk of significant harm to the current child or children and that the termination of parental rights is the least restrictive means of protecting the current child or children from harm." The guidelines discussed in *F.L.* are as follows: if the parent's conduct was egregious as to another child, the amount of time that has passed between the first involuntary termination of parental rights and the current case, and any change of circumstances (however, a parent is not required to show evidence of changed circumstances to avoid a TPR. *Id.* at 610)

DCF failed to prove manifest best interests of the children would be served by termination mother's parental rights. The case was remanded for continuation of the children's dependency status. ¶

Involuntary Commitment: Burden of Proof

Charmaine I. Santiago, Esq.

Program Attorneys representing guardians ad litem in proceedings for the involuntary commitment of a dependent child pursuant to § 39.407(5), Fla. Stat. (2004) must be aware that the "clear and convincing" evidence burden of proof governs such proceedings, even though the statute and Fla. R. Juv. P. 8.350 are silent as to the burden of proof.

The Florida Supreme Court addressed a similar issue in *In re Beverly*, 342 So.2d 481 (Fla. 1977), a case challenging an early version of The Baker Act, which was silent as to the burden of proof required to involuntarily hospitalize mentally ill patients. The Court declared that the clear and convincing standard is the appropriate standard for civil commitment proceedings.

The United States Supreme Court, in *Addington v. Texas*, 441 U.S. 418 (1979), also held that due process requires the clear and convincing burden of proof, as civil commitment proceedings involve issues of significant liberty interests: "Having concluded that the preponderance standard falls short of meeting the demands of due process, and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state." *Id.* at 431.

Most recently, the Second District Court of Appeal held, in *In re J.W.*, 29 Fla. L. Weekly D2764b (Fla. 2nd DCA 2004), that the trial court did not err in requiring the Department of Children and Families (DCF) to establish by clear and convincing evidence that the involuntary placement of J.W. into a residential treatment facility is appropriate. Although the Second District Court of Appeal in *J.W.* reached the same conclusion as *In re Beverly* and *Addington*, neither case was cited in its opinion, a fact that underscores the importance of providing the court with controlling authority.

Program Attorneys must be cognizant of the correct burden of proof and be prepared to produce sufficient evidence when the child's best interests require commitment. On the other hand, if DCF pursues a commitment that the guardian ad litem believes to be contrary to the child's best interest, Program Attorneys must be prepared to show how

DCF has failed to satisfy the more stringent clear and convincing standard. 🏠

Evidence Review: Verification of Photographs

Lois Sears, Esq.

Florida Evidence Code § 90.901 Requirement of authentication or identification; § 90.951 Definitions; § 90.952 Requirement of originals; § 90.953 Admissibility of duplicate

Hypothetical

The Guardian ad Litem is a witness during a termination of parental rights trial. The Guardian ad Litem had been present at the family home on a day the children were removed from the family home due to deplorable conditions and physical abuse. The Guardian ad Litem was on the scene at the time the children were removed and took a Polaroid snapshot of the condition of the home and the children.

Procedure for Verification of Photographs

The proponent must show:

1. The witness is familiar with the object(s) depicted in the photograph
2. The witness has a basis for that familiarity
3. The witness recognizes the object(s) depicted in the photograph as that with which he or she is familiar;
4. The photograph is a fair depiction of the object(s) at the relevant time;
5. The photograph is an original (or negative or any print therefrom)

Sample Predicate Questions

1. State your name, etc.
2. Have you been to this family's home? How many times?
3. Are you familiar with the family's home as it looked on (date)?
4. Show photograph to opposing counsel
5. Your Honor, I request permission to approach the Witness
6. Let the record reflect, I am showing what has been previously marked as Exhibit #__, to the Witness
7. Witness, do you recognize that photograph?
8. How do you recognize that photograph?
9. What scene does the photograph give of the family's home?
10. What scene does the photograph give of the children?
11. Does GAL Exhibit # __ fairly and accurately portray the scene at the family home?
12. How accurately does the photograph show the condition of the home/children on the (date)?

No further questions your honor. Let the record reflect that I am retrieving the exhibit from the witness and handing it to counsel for inspection and possible objection. I would offer Exhibit #__ into evidence as Guardian ad Litem Exhibit #__ 🏠

Websites Resources


National Indian Child Welfare Association: www.nicwa.org

The National Indian Child Welfare Association (NICWA) is the most comprehensive source of information on American Indian child welfare and works on behalf of Indian children and families. NICWA provides public policy, research, and advocacy; information and training on Indian child welfare; and community development services to a broad national audience including tribal governments and programs, state child welfare agencies, and other organizations, agencies, and professionals interested in the field of Indian child welfare.


Quoted from website 

Best Interests: The E-mail Magazine for Children's Advocates:

<http://www.childadvocacy.com>

This newsletter offers news and resources for professionals and volunteers who advocate for the best interests of abused and neglected children. 

National Association of Counsel for Children: <http://www.naccchildlaw.org>

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association. The NACC is dedicated to providing high quality legal representation for children. Our mission is to improve the lives of children and families through legal advocacy. The NACC provides training and technical assistance to attorneys and other professionals, serves as a public information and professional referral center, and engages in public policy and legislative advocacy. 

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