Legal Briefs Newsletter

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

Temporary Cash Assistance Benefits

DCFS approved placement

Manuel v. Department of Children and Family Services, 880 So.2d (Fla. 2nd DCA 2004)

Dorothy Manual appealed Department of Children and Family Services' (DCFS) determination that she was ineligible to receive temporary cash assistance benefits for her stepsister's three children that DCFS placed in her care.

DCFS based the ineligibility determination on DCFS's interpretive manual that sets forth what degree of blood relationship is required for family members who are living together to be eligible for cash assistance. The children did not meet DCFS's blood relationship requirements and therefore were not entitled to cash benefits. The hearing officer agreed with DCFS and held that the children were ineligible for cash assistance benefits.

Ms. Manual appealed and argued that the placement was an approved non-relative placement. The Second District Court of Appeal (Second DCA) held that the plain language of § 414.095(2)(a) "deems the children eligible for cash benefits … if she or he resides with a custodial parent or parents or other relative caretaker within the specified degree of blood relationship *or* if she or he resides is a setting approved by the department." *Id.* at 716. The "or" in the statute mandates that both scenarios can provide eligibility. The Second DCA reversed and remanded with instructions that the children be awarded benefits.

Dependency

Abandonment

S.H. v. Department of Children and Families, 880 So.2d 1279 (Fla. 4th DCA 2004)

S.H., an undocumented alien, lived with his uncle in Florida. S.H.'s uncle filed a verified dependency petition alleging the parents had abandoned S.H. § 39.01(14). S.H. acknowledged he was seeking dependency for no reason other than to change his immigration status and that there was no need for the services of the Department of Children and Families (DCF). The trial court denied the uncle's petition and S.H. appealed.

The Fourth District Court of Appeal (Fourth DCA) held that the uncle's petition established only that the parents sent the child to live with the uncle and that fact alone did not constitute abandonment. There was no proof that the uncle, who qualified as a caregiver under §39.01(10), had abandoned S.H. The Fourth DCA held that the trial court was

correct in not finding S.H. dependent.

A.M.T. v. State of Florida, 883 So.2d 302 (Fla. 1st DCA 2004)

The Department of Children and Families (DCF) filed a dependency petition when the father took a trip out of the country and left his three children under the supervision of his 16-year-old stepson. The judge, sua sponte, with no notice to the father, no sworn testimony and without inquiring into the allegations in the petition, sheltered the children and allowed only supervised visitation between the father and the children. At a subsequent adjudicatory hearing, the trial court found the children to be dependent.

The First District Court of Appeal (First DCA) held that § 39.401(1) and § 39.402(1) require that, before a child can be sheltered, the court must receive sworn testimony to establish probable cause to support the child has been, or is in imminent danger of being abused, abandoned, or neglected. Because the trial court never took sworn testimony or inquired as to the allegations in the dependency petition, it was error to shelter the children. The order sheltering the children was reversed.

The First DCA further held there was no evidence presented that the father had failed to support or communicate with his children while he was out of the country so as to constitute abandonment, nor was there evidence the father had deprived the children of food, clothing, shelter or medical treatment so as to constitute neglect. The First DCA held the trial court did not apply the appropriate two-pronged test to determine whether the children had been harmed under §39.01(30)(a). The first prong required that the trial court find that the children were left without adult supervision or other appropriate supervision considering the children's ages or mental conditions. If the first prong is satisfied, the trial court must then find that the inappropriate supervision caused or is likely to cause the children's health to be significantly impaired. There was no competent, substantial evidence to support a finding that the father abused, abandoned or neglected his children. The adjudication of dependency was reversed and the case was remanded.

Termination of Parental Rights

Abandonment: Termination as to one parent

In re: E.D., 884 So.2d 291 (Fla. 4th DCA 2004)

The Department of Children and Families (DCF) filed a termination petition alleging abandonment and that the continuation of a relationship with the parents threatened the health of the children irrespective of the provision of services. The father voluntarily surrendered his parental rights to three of the children, but denied paternity of E.D. The parental rights of E.D.'s father were never terminated. The trial court terminated the mother's parental rights to all of the children. The mother appealed the terminations.

The Second District Court of Appeal (Second DCA) held that because the paternal rights of E.D.'s father were never terminated, the action to terminate the mother's rights proceeded as an action to sever the parental rights of one parent without severing the rights of the other. Section 39.811(6) lists the only circumstances in which terminating on parents parental rights can be done. Neither the termination petition nor the evidence produced at trial alleged any of the circumstances described in §39.811(6). The Second DCA reversed the termination as to E.D.

The Second DCA held that the trial court's finding that the mother had abandoned her children was clearly erroneous. But termination was appropriate pursuant to §39.806(1)(c). The mother's breach of two case plans, her incarceration, mental illness and drug use demonstrated that her continuing involvement with the children would result in harm regardless of the provision of services. The Second DCA affirmed the termination of parental rights order as to the other children.

Prospective Abuse

C.B. v. Department of Children and Families, 879 So.2d 82 (Fla. 4th DCA 2004)

The Department of Children and Families (DCF) filed a petition to terminate the mother's parental rights to the newborn on an expedited basis. The trial court found, due to the likelihood of prospective abuse under §39.806(1)(f), that termination was in the child's best interest. The mother appealed.

The issue in cases in which termination of parental rights is sought based on prospective abuse is whether future behavior, which will adversely affect the child, can be clearly and certainly predicted and whether the behavior of the parents was beyond the parent's control, likely to continue and placed the child at risk. § 39.806(1)(f).

The Fourth District Court of Appeal (Fourth DCA) found that §39.806(1)(f) permits termination if the parent engaged in egregious conduct or had the opportunity to prevent and knowingly failed to prevent, egregious conduct that threatens the health and well-being of a child's sibling. In this case, the mother continued her relationship with the father despite the abuse perpetrated on the other children and a court order prohibiting contact. The Fourth DCA held that this evidence, along with evidence demonstrating termination was in the child's best interest and was the least restrictive means of protecting the child, justified the termination of the mother's parental rights. The order was affirmed.

Relative Placement

In re: W.D., 2005 WL 231781 (Fla. 2nd DCA)

The father appealed the termination of his parental rights. He argued there was no clear and convincing evidence presented at trial that showed a lack of suitable permanent custody arrangements with relatives of the child. Specifically the Department of Children and Families (DCF) failed to investigate the paternal grandmother as a placement.

An order terminating parental rights must be supported by clear and convincing evidence that termination is in the child's best interests. When determining the best interests of a child, the trial court must evaluate any suitable permanent custody arrangements with a relative of the child. § 39.810(1). The Second District Court of Appeal held that because DCF never evaluated the paternal grandmother's suitability as a placement, the trial court's determination that she was not a credible relative placement was not supported by clear and convincing evidence. The order of termination was reversed and the case was remanded back to the trial court.

Child witnessed or aware of domestic violence

In re: J.A.H. 876 So.2d 647 (Fla. 2nd DCA 2004)

Despite the mother's knowledge of the poor relationship between the grandfather (who lived with the family) and her son, the mother continued to leave the child unsupervised with the grandfather. The grandfather struck the son. The Department of Children and Families (DCF) removed both children in the home. The trial court adjudicated both children dependent. The mother appealed.

The Second District Court of Appeal (Second DCA) upheld the son's dependency adjudication. The Second DCA held that in accordance with § 39.01(30), harm to a child so as to justify a finding of abuse can include those situations where a person negligently fails to protect a child under her care from physical harm caused by the acts of another person. Through the omission of proper supervision when the incident occurred, the mother had negligently permitted the son to be abused by the grandfather.

Though the daughter had never directly been abused, the Second DCA held the child may still have been adjudicated dependent if DCF demonstrated a nexus between the son's abuse and the daughter's prospective abuse. A child also may be adjudicated dependent under § 39.01(30)(i) if there is evidence that the child witnesses or is aware of an incident of domestic violence that occurs between other family members. The Second DCA reversed the daughter's dependency adjudication as there was no evidence that the daughter witnessed or was cognizant of the son's abuse.

Default Judgment

E.S. v. Department of Children and Family Services, 878 So.2d 493 (Fla. 3rd DCA 2004)

The mother in this case, personally appeared at an advisory hearing on the Department of Children and Families' (DCF) petition to terminate her parental rights. Neither the mother, nor her attorney, was present at the final hearing. As a result, a default was entered and the mother's rights were terminated. The mother filed a motion to set aside the default and asserted she was unable to attend the hearing because of medical reasons. At the motion hearing, the mother's counsel requested the trial court take testimony from the mother regarding her medical condition. The trial court declined to take her testimony and denied the mother's motion to vacate the default judgment. The mother appealed the order terminating her parental rights.

The Third District Court of Appeal (Third DCA) held that when the court has proceeded under section 39.801(3)(d), and parent seeks to vacate default, the court should apply a three-part test. The defaulting parent carries the burden of persuasion when applying the three-part test that requires the mother's due diligence, the demonstration of excusable neglect, and demonstration of the existence of a meritorious defense to the termination petition would apply in this case. *R.H. v. Department of Children and Family Services,* 860 So.2d 986, 988 (Fla. 3rd DCA 2003). The mother filed the motion to vacate one day after the termination judgment and nine days after the final hearing, therefore, she showed due diligence. The Third DCA held the mother should have been allowed the opportunity to testify regarding the existence of excusable neglect and a meritorious defense. The termination of parental rights order was reversed and remanded back to the trial court.

S.C. v. Department of Children and Families, 877 So.2d 831 (Fla. 4th DCA 2004)

The Department of Children and Families (DCF) filed a petition to terminate the mother's parental rights to her two children. When the mother informed DCF she would not be able to personally appear at the advisory hearing, DCF agreed she could appear by telephone. When the mother could not be reached by telephone on the day of the advisory hearing, the court declared a default as to the mother and terminated her parental rights. The mother filed a motion to set aside the default, but the trial court denied the motion after the mother gave conflicting statements as to why she did not answer the phone. The mother appealed.

The Fourth District Court of Appeal (Fourth DCA) reiterated that constructive consent in termination of parental rights cases should be disfavored and should not be used as a "gotcha" practice when a parent makes a reasonable effort to be present. *A.J. v. Department of Children and Families*, 845 So.2d 973 (Fla. 4th DCA 2003). However, in this case, the mother provided no reasonable excuse for her failure to appear by telephone. The Fourth DCA held that, despite the efforts of the trial court and DCF to accommodate the mother's inability to travel to Florida, the trial court reasonably concluded the mother failed to appear at, or participate in, the advisory hearing. The order terminating the mother's parental rights was affirmed.

Withdrawal from Mediated Plea Agreement

Voluntary & Understanding

In re: B.G., 884 So.2d 357 (Fla. 2nd DCA 2004)

The Department of Children and Families (DCF) filed a petition for dependency alleging the father had failed to protect his children from the physical and mental abuse of their stepmother. A stipulated agreement was entered into by the father and DCF. The father later notified DCF he wanted to withdraw from the agreement. DCF filed a motion to enforce the agreement. At a hearing, the trial court granted DCF's motion and, at a subsequent hearing, entered an order finding the children dependent and finding the father had voluntarily consented to the dependency. The father appealed.

The Second District Court of Appeal (Second DCA) held that father was entitled to

withdraw from a mediated plea agreement with DCF where the trial court never questioned father to determine whether the father's consent was made voluntarily and with a full understanding of the nature of the allegations against him and the consequences of his consent. Florida Rule of Juvenile Procedure 8.325(c). Because the trial court failed to follow the requirements of Rule 8.325(c), the order enforcing the agreement and the order adjudicating the children dependent was reversed and the case was remanded.

Adoption

Rule which provides that adoptive applicants do not have right to appeal DCF's decision on the selection of an adoptive home for particular child is invalid

State, Department of Children and Family Services v. I.B., 2005 WL 192365 (Fla. 1st DCA)

I.B. and D.B. filed an application to adopt a child who had been living with them for over a year. The Department of Children and Families (DCF) denied their application and instead approved the application of two of the child's biological relatives. At the time DCF denied their application to adopt the child, an internal DCF rule required that I.B. and D.B. be told of DCF's decision in writing and be advised of their right to a hearing. By the time I.B. and D.B. requested such a hearing, DCF had amended the internal rule to read that adoptive applicants did not have the right to appeal DCF's decision on the selection of an adoptive home. DCF relied on the amended rule to dismiss I.B. and D.B.'s hearing. I.B. and D.B. challenged the rule in an administrative court. The administrative law judge held that the amended rule was invalid exercise of delegated legislative authority. DCF appealed.

The First District Court of Appeal (First DCA) affirmed the administrative law judge's final order invalidating the rule. I.B. and D.B have the right to a hearing wherein they have an opportunity to change the agency's mind. The First DCA reasoned that the Administrative Procedure Act provides that an agency may only adopt rules that implement or interpret specific powers and duties granted by the enabling statute. There were no statutes, collectively or individually, that provided DCF with the necessary specific legislative authority required. The First DCA held that the Administrative Code Rule that prohibited an adoption applicant from appealing a DCFS decision on the selection of an adoptive home for a child was invalid and I.B. and D.B. were entitled to a hearing.

Amendments to the Florida Rules of Juvenile Procedure No. SC04-97 (Fla. Jan. 27, 2005)

The Florida Supreme Court amended the Rules of Juvenile Procedure. The following is a summary of some of the changes

Rule 8.165, Providing Counsel to Parties

Rule 8.165(a) requires a written waiver of counsel when a child is entering a plea or being tried for a delinquent act.

Rule 3.165(b)(3) requires that when a child is entering a plea or being tried for a delinquent act, a written waiver of counsel be submitted to the court in the presence of a parent, legal custodian, responsible adult relative, or attorney assigned by the court to assist the child

The Court declined to adopt the portion of rule 8.165(a) regarding consultation with an attorney prior to a waiver, but added that they were deferring the issue until after the legislative session.

Rule 8.257, General Magistrates

Rule 8.257 governs the use of general magistrates in juvenile dependency proceedings – appointment, consenting and objecting to appointment, general powers and duties, electronic reporting, content and service of magistrate's report, service of exceptions of magistrate's report and the provision of the record to the court for a hearing on exceptions.

Rule 8.400, Case Plans

Rule 8.400, new subdivisions (b)(2) and (b)(3), clarify the procedure for amending case plans. The amendment to rule 8.400 provides that any amendments must be based on competent evidence, and if any party objects to the amendment of a case plan, the court must conduct a hearing allowing each party to present evidence and information as permitted by rule 8.340(a).

Rule 8.410 clarifies what findings a court must make in approving a case plan with a goal of reunification.

Rule Amendments Necessary to Bring the Rules into Conformance with the Florida Stats.

Rule 8.240(d) creates a procedure for filing a motion for continuance, extension, or waiver of time in dependency and termination of parental rights proceedings. § 39.013 (10), Florida Statutes (2004).

Rule 8.415 (f)(6) removes a provision that allows commitment of a children to a licensed child-placing agency for adoption. § 39.812 (1), Florida Statutes (2004).

Rule 8.500(a)(2) removes "a licensed child-placing agency" from the list of who may file a petition to terminate parental rights. § 39.802 (1), Florida Statutes (2004).

Rule 8.505(a)(5) requires notice to grandparents of termination of parental rights pending adoption proceedings as provided by law. § 63.0425(1), Florida Statutes (2004)

Rule 8.510(a)(3) states that the court shall enter a consent to the termination of parental rights petition for the parent who failed to personally appear at the advisory hearing on the termination of parental rights petition. Rule 8.510 (a)(4) clarifies the procedure for entry of admission or consents to termination of parental rights. § 39.801 (3)(a) and (3)(d), Florida Statutes (2004).

Rule 8.515(a)(1)deletes the requirement to offer counsel if the parties have executed voluntary surrenders to terminate their parental rights. § 39.013 (9), Florida Statutes (2004).

Rule 8.535(c) adds that the petition for adoption must be filed in the court that entered the judgment terminating parental rights unless a motion for change of venue is granted. § 39.812 (5), Florida Statutes (2004).

Miscellaneous Rule Changes Re: Juvenile Dependency

Rule 8.245 (g)(2)(B) allows the clerk, court, or any attorney of record to issue subpoenas for taking depositions. Florida Rule of Juvenile Procedure 8.225(a)(2) and Florida Rule of Civil Procedure 1.410(a).

Rule 8.305(b)(9) requires that if a shelter hearing is conducted by a judge other than one assigned to hear dependency cases, a judge assigned to hear dependency cases must review the child's status within two working days.

Rule 8.305(c) clarifies what findings need to be made only in an order granting shelter care. § 39.402 (8)(h), Florida Statutes (2004).

Rule 8.315 states that a disposition hearing can only be conducted if an admission or

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consent is entered and *no denial is entered by any other parent or legal custodian.* The Court explains that if any parents or legal custodian denies the allegations of the dependency petition, it is a denial of due process to move to disposition without and adjudicatory hearing.

Rule 8.325 prohibits stipulations to the placement of a dependent child – not all stipulations.

For the full text of the Amendments to the Rules of Juvenile Procedure, please visit the News section of the Statewide Guardian ad Litem website at www.guardianadlitem.org.