Legal Briefs Newsletter

February – March 2006

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Termination of Parental Rights

Review of the record

R.W. v. Department of Children and Families, 2006 WL 847110 (Fla. 5th DCA)

The Fifth District Court of Appeal held that "given the child's multiple serious medical conditions, and the mother's repeated incapacity to provide the necessary care required by her child, together with the mother's demonstrated inability to complete the agreed upon case plans and to care adequately for the child, the termination of parental rights was clearly necessary to safeguard the health and safety of the child."

Reasonable Efforts / Incarceration

V.M. v. Department of Children and Families, 2006 WL 708609 (Fla. 4th DCA)

The trial court terminated the father's rights to his child. The father appealed the termination.

The child was never found dependent but was placed with a non-relative guardian. Later, the Department of Children and Families (the department) filed a petition for Termination of Parental Rights/Permanent Commitment. The department alleged that: (1) termination was appropriate for the Father under § 39.806(1)(d), Florida Statutes, because of his incarceration for a substantial portion of the child's life; (2) termination was appropriate for both parents under § 39.806(1)(c) because they "engaged in conduct toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services"; and (3) termination was appropriate for the mother under § 39.806(1)(e) for the failure to comply with her case plan.

The Fourth District Court of Appeal (Fourth DCA) reversed the termination. The Fourth DCA held that the department had not made reasonable efforts to rehabilitate the father. The department has the burden of establishing a ground for termination and a continuing substantial risk of harm to the current child. C.B. v. Department of Children and Families, 874 So.2d 1246, 1253 (Fla. 4th DCA 2004)(quoting F.L. v. Department of Children and Families, 849 So.2d 1114, 1122 (Fla. 4th DCA 2003).

The department never prepared a formal case plan, and had no direct contact with the father while he was incarcerated. When the father was released (before he was re-incarcerated) he successfully completed the task under the voluntary case plan, he met with the caseworker, and after permission was granted, met with the child regularly. The department should have made a good faith effort to rehabilitate or reunify the father with his child as part of its required reasonable efforts. *See* C.B., 874 So.2d at 1252-53.

The Fourth DCA further states that "parental rights should not be terminated merely

because of the father's criminal history and incarceration history, without more." *See* § 39.806(1)(d), Fla. Stat.; D.S. v. Department of Children and Families, 842 So.2d 1071 (Fla. 4th DCA 2003).

The Fourth DCA reversed the order terminating the father's parental rights.

Substantial compliance, abandonment

M.E. v. Florida Department of Children and Families, 919 So.2d 637 (Fla. 3d DCA 2006)

The mother appeals the termination of her parental rights. The grounds for the Department of Children and Families' (the department) petition to terminate parental rights were: (1) irrespective of services, the parent's continuing involvement with the child threatens the child's safety, well-being, and health, §39.806(1)(c), Florida Statutes (2004); (2) failure to substantially comply with the case plan, § 39.806(1)(e), Florida Statutes (2004); and (3) abandonment. § 39.806(1)(b) Florida Statutes (2004).

The Third District Court of Appeal (Third DCA) reversed the order terminating the mother's parental rights. The Third DCA held that the department failed to provide clear and convincing evidence that irrespective of services, the mother's continued involvement with the child threatens the child's safety, well-being, and health. Therapeutic visitations and individual therapy received by mother were terminated due to budget cuts – not the mother's actions. The department failed to refer mother to another provider for therapy, which resulted in the mother not receiving individual therapy for seven months preceding the TPR hearing. The Third DCA held that the record did not indicate that provision of further services would be futile.

The Third DCA also held that the trial court erred in terminating the mother's parental rights based on her failure to comply with her case plan. "The failure to comply with a case plan may not be used as a ground for termination of parental rights if the failure is due to the parent's lack of financial resources or the failure of the department to make reasonable efforts to reunify the parent and child." K.J. v. Dep't of Children & Family Servs., 906 So.2d 1183 (Fla. 4th DCA 2005); see T.M. v. Dep't of Children & Families, 905 So.2d 993, 997 (Fla. 4th DCA 2005)." The mother completed her parenting classes. The mother's failure to complete the therapeutic visits and individual counseling was partially attributable to the department.

Finally, the Third DCA held that the trial court erred in terminating the mother's rights based on abandonment. The mother made more than a marginal effort to communicate with her child. The mother failed to provide child support but that alone does not warrant a finding of abandonment as the mother lacked the ability to provide child support.

The Third DCA reversed the TPR order and remanded for further proceedings.

Least Restrictive Means

M.S. v. Department of Children and Families, 920 So.2d 847 (Fla. 4th DCA 2006)

The mother appeals the termination of her parental rights. The Department of Children and Families (the department) filed the termination of parental rights asserting that the mother had mental health issues, lived a nomadic lifestyle, and refused services. The department relied on a prior termination to prove the mother refused to avail herself of services.

In order to prevail in termination proceedings, the department must prove "by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child ... [and] establish in each case that termination of those rights is the least restrictive means of protecting the child from serious harm." Padgett v. Dep't of Health & Rehabilitative Servs., 577 So.2d 565, 571 (Fla.1991). This evidentiary burden remains in place even where there has been a prior termination of parental rights to a sibling. Fla. Dep't of Children & Families v. F.L., 880 So.2d 602 (Fla.2004)."

The department did not provide a case plan to the mother in this case. The department relied on the prior termination to serve as evidence of the mother's refusal of services. In fact, the prior termination showed that the mother was in full compliance with her case plan and that the department had recommended full reunification pending the assessment of the man with whom she resided. Nowhere does the order reflect refusal of services. The man the mother lived with refused assessment and the mother moved to Virginia without the case being closed. The prior termination was based on instability and inability to meet the child's material needs – not mental health issues or refusal of services.

There is no evidence that the mother was ever referred for mental health services in this case. There is no evidence on the record that she actually is mentally ill. No records were provided.

The Fourth DCA reversed the termination of mother's parental rights, as there was an inadequate record to conclude that termination is the least restrictive means of protecting the child, where mother had substantially complied with a past case plan, had no case plan, and no "specifics" were presented regarding the effect of termination on the child.

Consent by Default

Fact dependent

D.M. v. Department of Children and Families,921 So.2d 737 (Fla. 5th DCA 2006)

The mother appeals the trial court's order that she consented to termination of parental rights by default because she failed to appear at the adjudicatory hearing. The trial court had permitted the mother to appear by telephone at an evidentiary hearing on her motion requesting authorization to testify telephonically for the adjudication hearing. The trial court denied the mother's motion, and the adjudicatory hearing immediately followed. The trial court held that the absence of the mother led to a consent by default and terminated her parental rights.

The Fifth District Court of Appeal (Fifth DCA) held that the mother should have been permitted to appear telephonically. The entry of the default consent was an abuse of discretion. The determination of whether to allow a parent to appear telephonically at a termination hearing is "fact-dependent." In this case, the mother was ill, had letters from her doctor, had previously traveled to Florida and depleted her financial resources.

The Fifth DCA reversed and remanded the case.

Reasonable efforts to be present

In re T.B., 920 So.2d 170 (Fla. 2d DCA 2006)

The father appeals the trial court's final judgment terminating his parental rights to his son. He argues that the trial court erred in denying his request for a continuance and in determining that his failure to appear at the adjudicatory hearing constituted his consent to the termination of his parental rights.

The Second District Court of Appeal (Second DCA) held that the consent order was an abuse of discretion and they reversed the judgment terminating the father's parental rights. The Second DCA based its decision on "all of the circumstances," but looked to the fact that the father was making "reasonable efforts to be present on the dates that the termination hearing had been scheduled" and he was not neglecting the proceedings.

Adoption –Consent

Irrevocable and binding

C.G. v. Guardian ad Litem Program, 920 So.2d 854 (Fla. 4th DCA 2006)

In the course of a dependency proceeding, the mother executed surrender and consent to adoption for a child under six months to a licensed attorney – an adoption entity. The adoptive parents decided they did not want to take custody of the child. As a result, the

adoption entity decided not to go on with the adoption. The mother claims that her consent is invalid because she is entitled to choose the placement of her child, and because the original placement did not occur. The trial court held that the mother's consent to adoption was valid and binding. The mother appealed.

The Fourth District Court of Appeal (Fourth DCA) held that the mother's consent was irrevocable absent a showing of fraud or duress. Once the adoption entity accepts a surrender and consent, it does not have the right to reject the surrender. The written surrender and consent in this case was not conditional upon the adoption entity discontinuing if the prospective adoptive parents declined to go forward. It was an unconditional surrender to the adoption entity. The Fourth DCA held that the irregularity in the proceedings (the initial refusal of the adoption entity to pursue the placement of the child) does not result in revocation of consent. *See* J.S. v. S.A., 912 So.2d 650, 658-59; § 63.2325, Florida Statutes.

The Fourth DCA affirmed the trial court's holding stating the consent and surrender was valid and the mother had no standing to contest the matter because she validly and irrevocably consented to the surrender and adoption.

Sunshine Law: Permanency Staffing Meeting

Overall scheme of Chapter 39 and Legislative Intent

J.I. v. Department of Children and Families, 2006 WL 544475 (Fla. 4th DCA)

The father appealed the termination of his parental rights claiming that the Department of Children and Families' permanency staffing meeting on his case was subject to the Sunshine Law. The father argues that the department violated the statute when the public, father, and the father's attorney were not notified of the meeting.

The Fourth District Court of Appeal (Fourth DCA) held that Sunshine Law does not apply to permanency staffing meetings conducted by the department to determine whether to file a petition to terminate parental rights. The Fourth DCA held that when the "entire statutory scheme is viewed as a whole; the essence of these statues is to mandate confidentiality in the TPR under chapter 39. The unambiguous legislative intent is for all information involving the child to be confidential."

Supervised Visitation

B.H. v. Department of Children and Families, 2006 WL 733941 (Fla. 5th DCA)

The father appeals the trial court's denial of the father's motion for supervised visitation with his dependent children.

The Fifth District Court of Appeal (Fifth DCA) were "hard pressed to imagine" how supervised visitation could be harmful to the children. The trial judge made no findings that supervised visitation would be harmful.

The Fifth DCA remanded with directions that the trial court allow reasonable supervised visitation "under such conditions as may be necessary to protect the welfare of the child."

Party v. Participant

Award of attorneys fees

Department of Children and Families v. H.G., 2006 WL 663890 (Fla. 5th DCA)

The Department of Children and Families (the department) filed a shelter petition to take custody of a child. The aunt and uncle (the child's legal custodians) filed a motion to dismiss and award attorneys fees in favor of the aunt and uncle.

The Fifth District Court of Appeal held that because the aunt and uncle were not parties, but merely participants to the proceedings under § 39.01(50), Florida Statutes (2002), an

award of attorneys fees under § 57.105 was error. Further, the Fifth DCA held that as non-parties, the aunt and uncle could not be a prevailing party for purposes of § 57.105.

The Fifth DCA stated:

"Even assuming that the appellees' status as participants was not dispositive and that they were, in fact, parties to the proceeding, the trial court's order would nevertheless be deficient for its failure to make the requisite findings under § 57.105, *see* Department of Health & Rehabilitative Services v. Carr, 501 So.2d 30, 31 (Fla. 2d DCA 1986), or specific findings as to both the number of hours reasonably expended on the litigation and the reasonable hourly rate. *See* Kelly v. Tworoger, 705 So.2d 670, 673 (Fla. 4th DCA 1998)."

Evidence Review[1]

Business Records: Florida Evidence Code §90.803(6)

How to offer a Business Record into Evidence

- What is your occupation?
- Does your job involve working with records of your organization or agency?
- Have the exhibit marked.
- Show the exhibit to opposing counsel.
- Ask permission to approach the witness.
- Show exhibit to witness.
- Establish foundation.

Foundation Elements[2]

- It is necessary to call a witness that can show that each of the foundation requirements is present – not necessary to have person who actually enabled entry of evidence.
- The report was prepared by a person with a business relationship with the company (not necessarily an employee).
- The informant (the source of the report) had a business duty to report the information.
- The written report was prepared "at or near the time" with the facts or events.
- It was a routine practice of the business to prepare such reports.
- The report was reduced to written form.
- The report was made in the regular course of business.

Sample Questions

- I am handing you what has been marked GAL exhibit 1.
- Can you identify it?
- What kind of record is it?
- Would this report be prepared by an agent of your organization or agency?
- Does that agent have a duty to prepare this report?
- Would that agent have personal knowledge of the information contained in the report?
- Would this report have been prepared at or near the time of the event described in the report?
- Is the making of the report a regular practice of your organization or agency?
- Would the report have been kept in the course of a regularly conducted business activity.

Possible Objections[3]

- Lack of foundation.
- Relevance.
- *Lack of trustworthiness*: When the sources of information or other circumstances show lack of trustworthiness business records are not admissible (i.e. made in preparation for litigation). § 90.803(6)
- *Double hearsay*: Qualifying the business record only eliminates the first level of hearsay (not needing to have the person that made the record on the stand). It does not eliminate the double hearsay of statements made by non-employees of the business.

Response to Objections[3]

- "This statement is admissible as a business record pursuant to Florida Statutes § 90.803(6). I have shown through the testimony of (the witness) who is a custodian of the record or person who has knowledge of the record-keeping system that the statement is contained in a:
    - memorandum, report, record, or data compilation;
    - recording acts, events, conditions, opinions, or diagnoses, made at or near the time the acts or events took place;
    - by or from information transmitted by one with personal knowledge of the act or event;
    - where such record is kept in the course of a regularly conducted business activity; and
    - it was the regular practice of the business to make such a record."[1]

[1] Ehrhardt, Florida Evidence, § 90.803(6) (2002 Edition)
2 Edward J. Imwinkelried, Evidentiary Foundations (2nd ed. 1989) p. 262-263
3 Anthony Bocchino and David Sonenshein, Federal Rules of Evidence with Objections, 6th ed. (NITA 2003) p. 741

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