Legal Briefs Newsletter

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Welcome to 2005 and the January edition of the Legal Briefs Newsletter.

Remember 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.

Termination of Parental Rights

Substantial Compliance

In re: V.M., 2005 WL 17402 (Fla. 2nd DCA)

The Second District Court of Appeal (Second DCA) reversed the order terminating parent's parental rights to their three children. The children had been placed with the father. The father was making progress on a case plan in 2002 when a bruise was found on one of the children. The children were removed from the father and a termination of parental rights petition (TPR) was filed.

The TPR petition alleged grounds for termination under § 39.806(1)(c)(e). DCF claimed the children's lives, safety or health would be threatened irrespective of services provided by DCF. At trial, the GALs and the father's counselors testified that the father had demonstrated substantial improvement. The Second DCA held that the father had substantially complied with his case plan. The Second DCA also held that improvement was demonstrated, further improvement was possible, and the termination of the father's rights was an error. The order terminating parental rights was reversed and the case was remanded to determine if there were grounds for a one-parent TPR under section 39.811(6).

P.P. v. Department of Children and Families, 2004 WL 2600514 (Fla. 1st DCA 2004)

The parents appealed the trial court's order terminating their parental rights. The trial court found the parents had substantially complied with their case plans and returned two of the three children to the custody of the parents. However, a month later the children were removed from the parents a second time and DCF initiated termination proceedings. The trial court found the parents had failed to substantially comply with their case plan for twelve months under § 39.806(1)(e); they had engaged in egregious conduct, pursuant to § 39.806(1)(f); and their conduct towards the children threatened the children's safety irrespective of the provisions of services, pursuant to § 39.806(1)(c).

The First District Court of Appeal (First DCA) held that the termination of parental rights was not warranted under the statute that authorizes termination when parents fail to substantially comply with their case plan for 12 months because 12 months had not passed since children had been removed from home. Therefore, termination based on § 39.806(1)(e) was in error. The First DCA further held that the trial court did not

determine whether termination of parental rights was the least restrictive means of protecting the children and remanded the case for further proceedings.

Parties to the case

C.L.R. v. Department of Children and Families, 2004 WL 2308875 (Fla. 5th DCA)

The Department of Children and Families (DCF) filed a dependency petition against the mother and father of six children. At a hearing, DCF orally dismissed the dependency action as to the father and no further pleadings or papers were served on him.

The Fifth District Court of Appeal (Fifth DCA) found the trial court had erred in excluding the father from the dependency proceedings. The Fifth DCA held that dismissal of the dependency action against father did not make him a "non-party" to the dependency. Florida law does not require the filing of dependency actions against both parents. Parents who are not named in the petition are still "parties" to the action under Florida Rule of Juv. Procedure 8.210(a). As a party to the proceeding, father is entitled to notice of all proceedings, service of all proceedings and an opportunity to be heard. The Fifth DCA also held that a parent who is not named in a dependency petition is not entitled to appointed counsel. Finally, the Fifth DCA held that the appropriate remedy is a new hearing to permit the father to he heard on the issue of reunification.

No additional services could effect reunification

L.F. v. Department of Children and Families, 888 So.2d 147 (Fla. 5th DCA 2004)

When the mother failed to complete the case plan, the Department of Children and Families (DCF) filed a petition for the involuntary termination of her parental rights.

The trial court found that despite DCF's extraordinary efforts to assist the mother, the mother's lack of parenting skills placed the children at risk of physical danger. The trial court further ruled that there were no additional services that could have been offered to effect reunification. The Fifth DCA held that the findings of the trial court were supported by competent, substantial evidence and the trial court's order terminating the mother's parental rights was upheld.

Involuntary Termination: Failure to Appear

In re: A.N.D., 883 So.2d 910 (Fla. 2nd DCA 2004)

The Second District Court of Appeal (Second DCA) reversed the trial court's denial of the mother's motion to set aside her consent to the termination of her parental rights by default. Although the mother was ordered to appear at the adjudicatory hearing during a pretrial conference, the mother failed to appear. Her attorney appeared and informed the court that she was not attending the hearing due to severe sunburn. The trial court held that the mother consented to the termination of parental rights by default, in accordance with § 39.801(3)(d). The mother filed a motion to set aside the termination order. The trial court denied the motion and the mother appealed.

The Second DCA held that a properly filed motion to vacate a consent to termination of parental rights by default should be liberally granted. The Second DCA also held that the party seeking to vacate the consent to termination of parental rights by default must act with due diligence, demonstrate excusable neglect, and demonstrate the existence of a meritorious defense. Because the trial court did not apply this analysis to the mother's motion to vacate the order, the Second DCA reversed the judgment terminating the mother's parental rights and remanded the case back to the trial court to reconsider the mother's motion.

B.H. Sr. v. Department of Children and Families, 882 So.2d 1099 (Fla. 4th DCA 2004)

The Department of Children and Families filed a petition to terminate the father's parental

rights. The father lived in Minnesota and was served with notice of the advisory hearing approximately two weeks prior to the hearing itself. Although the father did not personally appear at the hearing, his counsel was present and the father, over the telephone, entered a denial to the TPR petition. Although the court originally accepted the denial, during a subsequent motion hearing, the court held the father consented to the TPR petition by failing to personally appear at the advisory hearing.

The Fourth DCA held that father's telephone appearance constituted a personal appearance, for purposes of the hearing. § 39.801(3)(d). The Fourth DCA held there is no strict or per se prohibition against a parent's appearance by phone if it is sanctioned by the parties or the court. The Fourth DCA reiterated that constructive consent in termination cases are disfavored and are not meant to be a "gotcha" practice used when a parent fails to appear or is delayed by circumstances beyond their control. Since the father was not seeking to delay the proceedings and had a reasonable explanation of why he could not be present, the Fourth DCA held the trial court abused its discretion by entering the constructive consent, reversed the termination order and remanded the case for further proceedings.

Appeal

Order on Pretrial Conference

In re: R.B., 2005 WL 120499 (Fla. 2nd DCA)

The mother appealed an "order on pretrial conference" that was entered in a termination of parental rights proceeding. The Second District Court of Appeal (Second DCA) held that an order on pretrial conference is not appealable. Interlocutory appeals of nominal orders are only allowed under circumstances listed under Florida Rule of Appellate Procedure 9.130. Despite the fact that dependency and termination proceedings do not conclude with a single final order, the Second DCA held that Florida Rule of Appellate Procedure 9.146 did not create a new category of non-final appeals and therefore, Rule 9.130 would apply in the mother's case.

Since the order challenged by the mother did not depart from the essential requirements of the law resulting in irreparable injury to her, the appeal was treated as a petition for writ of certiorari and was denied.

Evidence Review: Impeachment of Party or Witness by Prior Conviction

Lois Sears, Esq.

Florida Evidence Code § 90.610

Hypothetical

JANIE JO SHADY is called as a witness by parents in a Termination of Parental Rights Trial. Ms. Shady testifies that the parents work for her successful new company, and have been offered long-term employment, which includes free family housing, use of company vehicles, and lavish fringe benefits. A review of criminal history reflects that Ms. Shady has several recent felony convictions, and a recent conviction for credit card fraud.

Procedure for impeachment of party or witness by prior conviction

The Proponent must show that the witness was previously **convicted** of a crime:

1. That was punishable by death, or imprisonment in excess of one year under the

law under which the witness was convicted (i.e., **any felony**);

2. If the witness admits the conviction, the questioner may ask
    a. How many times, and
    b. Whether the witness has ever been convicted of a crime involving dishonesty regardless of the punishment (can be either a misdemeanor or felony
3. If the witness denies the conviction,
    a. The opposing party may produce the record of conviction BUT
        i. If a witness does not admit his prior convictions, the only proper method of impeachment is to introduce certified records of the convictions. *Green v. State*, 720 So.2d 1150, 1151 (Fla. 4th DCA 1998)
    b. Counsel may NOT ask any questions of the witness unless he or she has knowledge that the witness has in fact been convicted of the crime or crimes. *See Brown v. State,* 787 So.2d 136 (Fla. 4th DCA 2001) and *Holmes v. State*, 757 So.2d 620 (Fla. 3rd DCA 2000).
4. The following are not acceptable:
    a. Evidence inadmissible in a civil trial if it is **so remote** in time as to have no bearing on the present character of the witness; and/or
    b. **Juvenile adjudications** (inadmissible)

Notes

Response to objection as to "Relevance": Florida Evidence Code 90.608: Who May Impeach: Any party, including the party calling the witness, may attack the credibility of a witness by showing prior convictions subject to the remoteness argument.

Florida Evidence Code 90.410: Offer to Plead Guilty; Nolo Contendere; Withdrawn Pleas of Guilty. : Evidence of plea of guilty, later withdrawn, plea of nolo contendere, or offer to plead guilty or nolo contendere to the crime charged or any other crime is **inadmissible** in any civil or criminal proceedings.

If the witness denies the conviction, the proponent may provide the parties and Court with the certified record of conviction. See Florida Evidence Code 90.955 - Public Records.

Websites Resources

ABA Center on Children and the Law – Links of Interest to Child Advocates:

http://www.abanet.org/child/links.html

We've done a lot of Web-surfing lately to find links that may be of interest to those who are lawyers for children, guardians ad litem, judges, juvenile/family court system personnel, and other child advocates. *Quoted from website*

Adolescence Directory Online (ADOL)

http://www.education.indiana.edu/cas/adol/mental.html

This electronic guide provides information regarding adolescent issues and secondary education, including mental health risk factors for adolescents. The guide provides links to groups and information dedicated to the following issues: Abuse, Adolescent Development, Attention Deficit - Hyperactivity Disorder, Autism, Bipolar Disorder (Manic - Depression), Conduct Disorders, Depression, Eating Disorders, Grieving, Panic Disorder, Retardation, Sexual Abuse and Suicide.

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

National Court Appointed Special Advocate (CASA):

www.casanet.org or www.nationalcasa.org

This is the website for the national child advocacy organization, this site includes information about the work of CASA programs as well as a library with links about several important topics impacting children, including HIV, cultural awareness, and advocacy.