



Legal Briefs Newsletter

June/July 2005

Volume 2, Number 6

We are pleased to announce that the National Association of Counsel for Children (NACC) has named Angela Orkin, Executive Director of the Florida Statewide Guardian ad Litem Office, as the winner of the NACC's 2005 Outstanding Legal Advocacy Award. A ceremony honoring Ms. Orkin will be held August 25, 2005 at the NACC 28th National Children's Law Conference in Los Angeles, CA. If you would like to learn more about the NACC visit their website at www.naccchildlaw.org.

Congratulations Angela!

Case Plans: Substantial Compliance

Failure to substantially comply may not be based on lack of financial resources or the department's failure to make reasonable efforts to reunify the family

K.J. v. Department of Children and Family Services, 2005 WL 1630823 (Fla. 4th DCA)

The Fourth District Court of Appeal (Fourth DCA) reversed a final order terminating parental rights (TPR) based on a mother's failure to substantially comply with her case plan.

The mother's case plan was designed primarily to resolve the mother's drug dependency. Unrebutted evidence showed that the mother made significant progress towards the goal of drug rehabilitation and demonstrated her amenability to treatment by remaining drug-free during and after her treatment at a residential drug treatment program. The mother was discharged from the program early for a rule violation (not drug relapse), which also resulted in a probation violation which resulted in a twenty-five month jail sentence.

The Fourth DCA held, "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." There was no evidence that the mother had the opportunity to obtain drug treatment comparable to that provided by the inpatient drug rehabilitation center while she was incarcerated. The record contains no evidence that the Department of Children and Family Services (the department) made reasonable attempts to provide the mother with services needed to meet the case plan goals.

The Fourth DCA found that the department failed to meet its burden of demonstrating by clear and convincing evidence that the termination was in the child's manifest best interest and that it was the least restrictive means of protecting the child from serious harm. The case was reversed and remanded with directions to consider a less restrictive alternative to termination. ⚖️

T.M. v. Department of Children and Families, 2005 WL 1523342 (Fla. 4th DCA)

The trial court terminated father's parental rights under § 39.806(1)(c), and § 39.806(1)(e). The trial court also found that the father had abandoned his child by failing to contact the child, the Department of Children and Families (the department), or his attorney after his release from prison.

The Fourth District Court of Appeal (Fourth DCA) held the following:

Abandonment § 39.801(3)(d). Father's parental rights could not be terminated on the ground of abandonment, where the ground was not alleged as a ground for termination in the petition. Father's failure to appear at adjudicatory hearing on petition to terminate his parental rights could not be viewed as consent to termination, where father did not receive notice of the changed date of the hearing.

Continued Involvement Threatens Child § 39.806(1)(c). Section § 39.806(1)(c) requires the father's conduct *towards the child* or other children demonstrate that his continuing involvement with the child threatens the child. The father has had no contact with the child for many years. The evidence was insufficient to establish that father engaged in conduct that demonstrated that his continuing involvement in parent-child relationship would threaten child's life, safety, and well-being.

Failure to Substantially Comply § 39.806(1)(e). Father's parental rights could not be terminated for failure to comply with case plan. The department made no effort to reunify father with child. Even though the father was incarcerated, the department must make reasonable efforts to reunify the family. Section 39.806(1)(e) provides a caveat to termination: failure to complete a case plan within twelve months of the adjudication of dependency is evidence of abandonment, abuse or neglect, "unless the failure to substantially comply with the case plan was due either to the lack of financial resources of the parents or to *the failure of the department to make reasonable efforts to reunify the parent and child.*" § 39.806(1)(e) (emphasis added).

The department in this case did not assist the father in securing the type of services he would need to substantially comply with his case plan while in prison. There was no evidence that father had ability to comply with case plan while incarcerated. The department could not maintain that it was the father's responsibility to seek assistance from prison officials in order to comply with the case plan. The department is not permitted to delegate its duty to make efforts to reunify the family. The department must present evidence that the father had the ability to comply with the case plan while in jail.

Finally, the department maintains that the father's failure to comply with the case plan since his release from prison justifies termination. The Fourth DCA held that the father's failure to comply with case plan during the two months between his release from prison and the date of adjudicatory hearing did not provide basis for terminating his parental rights because the area was battered by hurricanes during first month of that period, the department did not contact father during this period and offer services, the case plan had already expired, and the department had already filed its petition for termination and was simply awaiting the adjudicatory hearing.

The Fourth DCA reversed the order terminating the father's parental rights and remanded for further proceedings. ☞

Opportunity to Complete Case Plan

I.R. v. Department of Children and Family Services, 2005 WL 1398509 (Fla. 3d DCA)

The child was removed as a result of the mother's mental illness. The mother had been involuntarily committed because she refused to take her medications and this "significantly interfered with her ability to care for her child, thereby placing the child at risk of harm." Two months after the mother's case plan was signed, the Department of Children and Family Services (the department) filed a termination of parental rights (TPR) petition. The trial court terminated the mother's parental rights pursuant to section 39.806(1)(c), Florida

Statutes (2003), under which the court can terminate parental rights “[w]hen the parent or parents 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.”

The Third District Court of Appeal (Third DCA) held that the department filed the TPR petition without giving the mother the opportunity to complete her case plan. The mother's case plan was approved on August 6, 2003, and the TPR petition was filed October 3, 2003. The Third DCA held that even though § 39.806(1)(c), Florida Statutes, does not require a twelve-month period to complete the case plan, the Third DCA held that the termination was still unwarranted.

The trial judge erred in terminating the mother's parental rights under § 39.806(1)(c) when, according to the testimony of the mental health expert, improvement was possible if the mother was offered the proper treatment. The department could not have offered proper services because they did not have a proper diagnosis until after the TPR petition was filed. The mother stated that she was in favor of receiving treatment for her mental illness.

The evidence presented did not demonstrate that the mother's risk of future neglect was high. In fact, the mental health expert stated that with proper psychotherapy, the mother would have the tools she would need to manage her disorder and prevent future psychotic breaks.

Any alleged neglect occurred before the dependency order and the mother had taken steps to comply with the case plan and improve her situation. The Third DCA reversed the TPR and remanded for the trial court to consider less restrictive alternatives to termination and a new case plan that incorporates the mental health expert's recommendations. ¶

Substantial Compliance with Case Plan and Change of Custody

D.G. v. Department of Children and Families, 903 So.2d 1042 (Fla. 5th DCA 2005)

The trial court entered a permanent custody order changing the child's custody from the mother to the father pursuant to § 39.521(3)(b), Florida Statutes (2005). The Fifth District Court of Appeal held that it was error to change custody to the father when the mother had substantially complied with her case plan (which had the sole goal of reunification) absent a finding that reunification would be detrimental to the child. *D.S. v. Department of Children and Families*, 900 So.2d 628 (Fla. 5th DCA 2005). ¶

Contempt: Attorney's Fees

Must state legal basis for award of attorney's fees

Department of Children and Family Services v. J.B., 898 So.2d 980 (Fla. 5th DCA 2005)

When the Department of Children and Families (the department) had not completed a timely home study, the trial court held the department in contempt. The trial court granted the mother's motion for attorney's fees. The department appealed.

The Fifth District Court of Appeal (Fifth DCA) held that attorney's fees could be awarded when the fees are expressly provided for by statute, rule, contract, or as a sanction if the court makes the appropriate findings. In this case, awarding the attorney's fees was improper as neither the mother nor the trial court cited any legal authority for awarding fees.

The department argued that the court lacked jurisdiction to award attorney's fees because the case was closed. The Fifth DCA held that even though the written fee order was entered after the dependency case was closed, the court orally awarded fees prior to closing the case and therefore retained jurisdiction. ¶

Termination of Parental Rights: Abandonment

Abandonment is an intentional act

F.L.M. v. Department of Children and Families, 2005 WL 1163227 (Fla. 4th DCA)

When F.L.M.'s parents died, he left Guatemala and moved to Florida to live with his brother. F.L.M. filed a petition to adjudicate himself dependent based on abandonment. Although the trial court granted the petition at the adjudicatory hearing, the Judge later refused to sign the order and later denied the dependency petition. F.L.M. appealed.

The Fourth District Court of Appeal held that abandonment is an intentional act of renouncing responsibility for a child's welfare and the death of a parent does not fall within the meaning of abandonment under the dependency statute. There were no allegations or evidence that other persons who qualified as caregivers had abandoned F.L.M. The order denying the dependency petition was affirmed. ¹⁵

Termination of Parental Rights: Egregious Conduct

A generalized finding of harm is not enough to establish a sufficient nexus between the conduct and the specific harm to the children to support a finding of egregious conduct

In re D.A.D. II, 903 So.2d 1034 (Fla. 2d DCA 2005)

The father appeals the termination of parental rights (TPR) to two of his children. The Second District Court of Appeal (Second DCA) affirmed the termination order.

The TPR petition was based on § 39.806(1)(f), Florida Statutes (2003). To terminate parental rights on the ground of egregious conduct, "there must be a nexus between the conduct and the abuse, neglect, or specific harm to the child." *C.B. v. Department of Children and Families*, 874 So.2d 1246, 1254 (Fla. 4th DCA 2004). The Second DCA held that the trial court did not find that the father's murder of someone in the family home while the mother and children were in another state, and alleged participation in a murder-for-hire plot, was connected to any specific harm to the children. The trial court made only a generalized finding of harm. A "generalized finding of harm was not enough to establish a sufficient nexus between the conduct and the specific harm to the children to support a finding of egregious conduct within the meaning of § 39.806(1)(f)."

However, the Second DCA did find that the father's other conduct, which comprised an "unrelenting pattern of abuse, abandonment, and neglect was egregious conduct sufficient to terminate parental rights."

The trial court found that the father committed chronic abuse under § 39.806(1)(g). The father's abuse began shortly after child's birth and continued through the next five years, interrupted only by the father's incarcerations, which only contributed to his abandonment of the children. The Second DCA agreed.

Finally, the Second DCA held that when the Department of Children and Family Services pursues TPR, it is not required to offer the parent a case plan with the permanency goal of reunification. ¹⁵

Consent to Adoption

Legal father's consent to adoption is required under § 63.062 (1) Florida Statutes (2003)

In re S.M.A.L., 902 So.2d 328 (Fla. 2d DCA 2005)

The child's mother and putative biological father consented to termination of parental rights so that the child could be placed for adoption. When the legal father appeared at the various hearings and objected to the adoption, the trial court held, according to § 63.082, Florida Statutes (2003), that the legal father had no standing to object. The trial court later terminated the legal father's rights to the child and the legal father appealed.

The Second District Court of Appeal (Second DCA) held the trial court erred in its interpretation of § 63.082 and found the legal father's consent to the adoption was required as a person required to consent to adoption under § 63.062 (1), Florida Statutes. Furthermore, the Second DCA cited *Department of Health & Rehabilitative Services v. Privette*, 617 So.2d 305 (Fla.1993), in which the Florida Supreme Court recognized a presumption of legitimacy to children born of a legally valid marriage and the child's right to maintain that legitimacy if doing so is in the child's best interests. The order terminating parental rights was reversed and the case was remanded. ¶

Shelter Hearing: Due Process

R.J. v. Department of Children and Families, 2005 WL 1630583 (Fla. 4th DCA)

The mother appeals a non-final order removing her children. She argues that the trial court violated her due process rights by reconsidering a shelter petition that the assigned judge had twice previously denied after evidentiary hearings. She pointed out that the Department of Children and Families (the department) had failed to allege any new facts or circumstances constituting an emergency different from the one previously alleged. The department stated that it "had nothing new to offer."

The Fourth District Court of Appeal (Fourth DCA) held that the successor judge simply reconsidered the same facts and arguments that another circuit judge had twice found insufficient to establish probable cause to shelter. The successor judge's order was vacated as the Fourth DCA found that the "procedures employed to achieve that result operate to deny the mother essential due process." ¶

Websites Resources

American Bar Association Center on Children & the Law: The goal of the ABA Children's Law Division is to improve the lives of children through advances in law, justice, knowledge, practice, and public policy. This site includes child welfare tips and child advocacy links. www.abanet.org/child. ¶

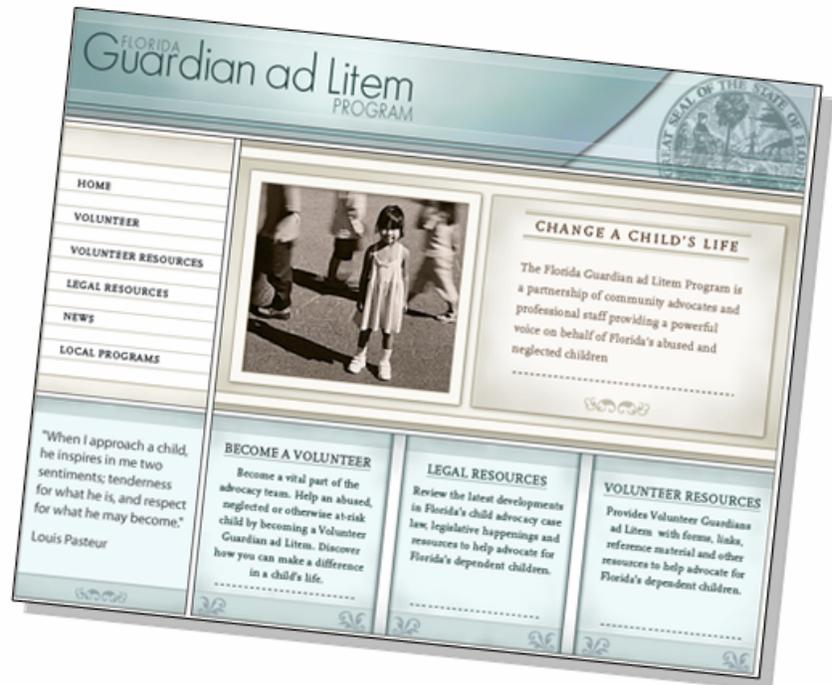
National Association of Counsel for Children (NACC): The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association. The NACC is dedicated to providing high quality legal representation for children. Our mission is to improve the lives of 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. www.naccchildlaw.org. ¶

National Clearinghouse on Child Abuse and Neglect Information
The US Department of Health and Human Services' Administration for Children and Families provides a searchable state-by-state listing of laws regarding child abuse and neglect such as reasonable efforts requirements. www.nccanch.acf.hhs.gov. ¶

The Annie E. Casey Foundation

The primary mission of the Foundation is to foster public policies, human service reforms, and community supports that more effectively meet the needs of today's vulnerable children and families. www.aecf.org. ¶

Florida Statewide Guardian ad Litem Program Website



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

- www.guardianadlitem.org
- Features Legal and Volunteer Resources
- Local Program Links & Local Non-Profit Information
- Case Summary Library organized by topic with search function
- Useful Web Links
- Archived Legal Briefs Newsletters (2004 and 2005)
- Statutory and Legislative Resources
- Volunteer Application, information, forms, FAQs
- News, Program Progress Reports and more!