Legal Briefs Newsletter

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Remember to visit the Statewide Guardian ad Litem website at www.guardianadlitem.org 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 or other suggestions to Liz Damski at Elizabeth.Damski@gal.fl.gov.

Congratulations to Hillary Kambour, Program Appellate Attorney for the 11th Circuit, for her part in arguing this very important case!

Dependency

Domestic Violence: Harm to child

In re: D.R. v. Department of Children and Family Services, 2005 WL 602520 (Fla. 3rd DCA)

D.R. was adjudicated dependent by the trial court. The mother appealed the adjudication. On appeal, the mother argues that D.R. did not suffer any harm from being present in the home during domestic violence incidents between the parents. The mother and father admitted to many domestic violence incidents. The mother and father testified that the child never saw the physical altercations and therefore did not suffer harm. However, the father testified that D.R. had tried to reconcile the parents many times after she witnessed verbal altercations between the parents.

The Third District Court of Appeal (Third DCA) upheld the trial court's dependency adjudication. The Third DCA found that D.R.'s attempt to reconcile her parents after they engaged in altercations reflects her awareness of the fights and shows that the fights disturbed her. D.R. did not enjoy the basic right to feel safe in her own home. D.R.'s dependency adjudication was affirmed.

Child Hearsay

D.W. v. Department of Children and Families, 2005 WL 497170 (Fla. 5th DCA)

M.W.'s father appealed his child's dependency adjudication. The father first argued the trial court erred in admitting M.W.'s hearsay statements without a showing that M.W. was competent to testify. The Fifth District Court of Appeal (Fifth DCA) rejected the father's argument and held it is the "particularized guarantees of trustworthiness" and not the competency of the witness, that ensure the reliability of a statement.

The father also argued that an adjudication based on sexual abuse was insufficient without medical evidence. The Fifth DCA held that medical evidence is not necessary to obtain a criminal conviction for sexual abuse, much less an adjudication of dependency. The order of adjudication was affirmed.

Abandonment

P.C. v. Department of Children and Family Services, 2005 WL 563087 (Fla. 2nd DCA)

The mother and her four children moved in with the mother's friend and both women agreed the friend would watch the children while the mother was at work. At trial, the friend testified the mother would often leave without informing the friend or would leave

and return several hours later than the agreed upon time. However, there was no testimony that the mother's schedule caused the friend to have extra responsibilities, that it disrupted the children's schedule, or that the children were left alone. There was testimony that the mother used cocaine, but there was no evidence the mother used cocaine in the children's presence. The mother also admitted throwing a plastic orange juice container in the direction of the oldest child and hitting her in the forehead, but the incident did not cause permanent marks or require medical attention. The trial court found dependency based on the mother's cocaine abuse, physical abuse of the oldest child and abandonment. The mother appealed.

The Second District Court of Appeal (Second DCA) held the evidence did not support a finding of abandonment because there was no showing the mother failed to provide for the children's support or that she failed to communicate with them. The Second DCA held that since there was no evidence presented that showed the child's physical, mental or emotional health was significantly impaired when the mother threw the plastic jug at the child, there could not be a finding of physical abuse. Finally, the Second DCA found there was no evidence presented that the mother's cocaine use was chronic or severe or that the children were affected so as to constitute harm to the children. The dependency order was reversed.

Interstate Compact on the Placement of Children (ICPC)

Department of Children and Families v. Teresa Fellows, 2005 WL 387543 (Fla. 5th DCA)

C.T., a dependent child in Florida, was sent to live with an aunt in New Hampshire after, in accordance with the Interstate Compact on the Placement of Children (ICPC), New Hampshire had completed a homestudy on C.T.'s aunt. C.T. was brought back to Florida by the Department of Children and Families (DCF) after New Hampshire reported the placement was deteriorating. After learning the aunt wanted C.T. placed back with her and C.T. had no relatives in Florida, the trial court ordered the child be returned to New Hampshire over the objection of New Hampshire authorities. DCF appealed.

The Fifth District Court of Appeal (Fifth DCA) held that the ICPC applies to a dependent child's natural parents as well as the dependent child's relatives. The Fifth DCA also held that once a receiving state rescinds its placement approval of a child, the sending state cannot return the child without reapplying for placement and beginning the ICPC process over again. The trial court erred in ordering the child's return to New Hampshire over the objection of New Hampshire authorities. The trial court's order was reversed and the case was remanded.

Termination of Parental Rights

Substantial Compliance with Case Plan

T.F. v. Department of Children and Family Services, 881 So.2d 702 (Fla. 1st DCA 2004)

The mother of four children presented unrebutted evidence that she had substantially complied with her case plan and that reunification with would not be detrimental to her children. The trial court entered an order terminating the protective services of the Department of Children and Families (DCF) and placed the children into the long-term relative care of the paternal grandparents. The mother appealed.

The First District Court of Appeal (First DCA) held that a child must be returned to a parent if the parent has substantially complied with the case plan and if reunification will not be detrimental to the child's safety, well-being and physical, mental and emotional health. Because the mother presented such evidence, reunification was required. The First DCA found the trial court's decision to close the case was based on unsworn assertions, hearsay and the court's personal knowledge of the case and not on competent substantial evidence. The order was reversed and the case was remanded.

Must address each child individually

Department of Children and Families v. P.K., 893 So.2d 678 (Fla. 5th DCA 2005)

Four children were removed from their mother due to hazardous conditions in the home and suspected physical child abuse by the mother. After the mother had failed to comply with her case plan, the Department of Children and Families (DCF) filed a termination of parental rights (TPR) petition. The trial court held that, although DCF had proven the mother had failed to complete her case plan under §39.601(7), TPR was not in the children's best interests. The trial court denied the TPR petition and DCF appealed.

The Fifth District Court of Appeal (Fifth DCA) held the trial court failed to address each child on an individual basis in the final judgment and reversed the trial court's order. On remand, the Fifth DCA instructed the trial court to consider the specific situation and status of each child and make appropriate permanency arrangements as disposition may not be the same for all of the children.

No Case Plan Filed Until Seven Months After TPR Petition Filed

In re: H.F. v. Department of Children and Family Services, 893 So.2d 641 (Fla. 2nd DCA 2005)

The mother appealed the final order terminating her parental rights. The Department of Children and Families (DCF) based the termination of parental rights (TPR) petition on two grounds: § 39.806(1)(c) and (1)(e). However, the Second District Court of Appeal (Second DCA) found the case plan had not been filed and approved by the trial court until approximately seven months after the TPR petition was filed. The Second DCA therefore held it was error for the trial court to terminate the mother's rights based on § 39.806(1)(e).

The Second DCA found that under § 39.806(1)(c), the trial court must find that, irrespective of any services provided by DCF, the child's life, safety and well-being would be threatened by continued interaction with the parent. The Second DCA held that, although DCF presented evidence of the mother's failure to complete a parenting course, they did not show the mother's failure threatened the child in any way. The trial court's order was reversed and the case was remanded.

Prior Involuntary Termination

R.K. v. Department of Children and Families, 2005 WL 497267 (Fla. 5th DCA)

A.K.'s mother admitted to a 15-year history of drug abuse and prostitution. The mother's rights to an older sibling were terminated due to her failure to complete a case plan. Although she voluntarily entered a drug treatment program while she was pregnant with A.K., she left before completing the program and subsequently refused voluntary services. The trial court terminated the mother's parental rights to A.K. pursuant to §§39.806 (1)(c) and (1)(i) and the mother appealed. To terminate parental rights under section 39.806(1)(c), the court must find by clear and convincing evidence that "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." Section 39.806(1)(i) provides that a petition for termination of parental rights may be filed "[w]hen the parental rights of the parent to a sibling have been terminated involuntarily."

The Fifth District Court of Appeal (Fifth DCA) held the circumstances surrounding a prior involuntary termination are highly relevant to a court's determination of whether a current child is at risk. Drug addiction is one type of behavior that may warrant termination of parental rights because it can constitute harm to a child and the parent may not be amenable to treatment. The Fifth DCA held the risk of future neglect to A.K. was high considering the mother's past and current conduct. The Fifth DCA held the trial court did not abuse its discretion in terminating the mother's parental rights. The order was affirmed.

No Case Plan Offered

W.R. v. Department of Children and Family Services, 2005 WL 475583 (Fla. 4th DCA)

The child S.R. was sheltered in 2001 when she was three days old. Without offering the mother a case plan, the Department of Children and Families (DCF) filed a termination of parental rights (TPR) petition. A hearing on the TPR petition was held in August of 2002, but a year and a half passed before the trial court entered the order terminating the mother's rights. The order contained a number of factual errors including a finding that there was no evidence that the mother had addressed her mental health and substance abuse issues. The mother appealed and argued the trial court's findings were not supported by substantial competent evidence.

The Fourth District Court of Appeal (Fourth DCA) held that in addition to proving the existence of factors required in §§ 39.806 (1)(c) and (1)(i), DCF must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child and establish that termination is the least restrictive means of protecting the child from harm. The Fourth DCA found DCF never offered the mother a case plan, services or an opportunity to be reunited with S.R., nor did the record did indicate why the trial court thought the mother would not be amenable to services. The mother had taken advantage of prison services to help her become a better parent without being requested to do so by the agency. The Fourth DCA held DCF did not establish that termination of the mother rights was the least restrictive means of protecting S.R. The Fourth DCA reversed the order and the case was remanded.

Belated Appeal

In re: B.H. v. Department of Children and Family Services, 893 So.2d 639 (Fla. 2nd DCA 2005)

The mother filed a pro se appeal of the order terminating her parental rights after her attorney had failed to file an appeal within the requisite time period. The Second District Court of Appeal (Second DCA) dismissed her appeal as untimely filed. The mother then filed a pro se motion for relief with the trial court and claimed she had not received timely written notice of the termination order, thus denying her right to timely appeal the order. The trial court denied the motion for relief and found the grounds for attacking the termination order on the merits were not properly raised in a motion for relief and were matters for direct appeal. The trial court also observed the Second DCA had previously dismissed the mother's appeal of the termination order and found the doctrines of res judicata and collateral estoppel barred the mother from arguing the issue of notice.

The mother appealed the trial court's holding.

The Second DCA held the trial court properly denied the mother's motion for relief on the merits. The proper vehicle for relief to obtain a belated appeal is a petition for writ of habeas corpus in the trial court. However, the Second DCA added, an appeal for lack of appellate jurisdiction is made without prejudice to the appellant's right to pursue whatever remedies may still exist. The trial court's order was reversed in part. The case was remanded for the trial court to conduct an expedited evidentiary hearing to consider whether the mother is entitled to a belated appeal.

Adoption

Foster Parents

Buckner v. Family Service of Central Florida Inc., 876 So.2d 1285 (Fla. 5th DCA 2004)

While the Jeffrey and Debbie Buckner (the Buckners) were the foster parents of S.H., a strong relationship developed between them and the child. When the Department of Children and Families (DCF) refused to approve their adoption of S.H., the Buckners filed suit against DCF individually and as next friend of the child. The trial court dismissed the Buckners' petition with prejudice and ruled it had no authority over placement of the child except to review the appropriateness of the adoptive placement and that it could not

interfere with DCF's selection of an adoptive family. The trial court also found the Buckners had failed to show they had legal standing to sue on behalf of S.H. The Buckners appealed.

The Fifth District Court of Appeal (Fifth DCA) held that, although any adult with knowledge can file a termination of parental rights petition on behalf of a child, that does not apply in adoption petitions. The Fifth DCA held the Buckners' effort to "self-appoint themselves" as next friends and initiate an action on behalf of the child would usurp DCF's statutory authority. The Fifth DCA also rejected the Buckners' argument that a fundamental liberty interest existed in the strong familial bond that had developed between them and the child. The Fifth DCA stated that adoption is not a right, but rather a statutory privilege. The case was affirmed.

Case Plans

By Thomas Young and Dawn Marie Farmer

Case plans are a critical, yet frequently underused road map in the quest for securing appropriate and timely permanency for children involved in dependency court. Poorly drafted case plans commonly lead to the antithesis: delay. Fortunately, both of these distractions can be avoided with an understanding and full utilization of the roles of the guardian ad litem (GAL) and the court in shaping the case plan.

The required elements of the case plan are specified in federal and state law at 42 U.S.C. § 675(1)(C); 45 C.F.R. 1356.21(g); and §§ 39.601, 39.701(6)(b), Fla. Stat. (2004). So, determining whether a case plan is complete is as simple as comparing the case plan with the governing statutes and regulations. Failure without justification of the case plan to incorporate each required element should trigger heightened scrutiny of the case plan's sufficiency.

For the GAL, assessment begins at the case planning conference, and continues through internal and judicial review. GAL volunteers, staff, and counsel should point out *prima facie* deficiencies in the case plan and request agreed modification to correct significant inadequacies. When necessary modification does not occur voluntarily, GAL counsel should object to court approval of the case plan and be prepared to substantiate its objection with law and evidence. In situations where deficiencies are discovered after the court has approved the case plan, GAL counsel should move the court for an order amending the case plan, pursuant to § 39.601(9)(f), Fla. Stat. (2004).

The court's role in assuring sufficiency of the case plan is defined in statute as including determination that the plan is "...consistent with the requirements for the content of a plan as specified in this chapter," § 39.603(1)(c), Fla. Stat. (2004), which includes all federal requirements. [§ 39.601(8), Fla. Stat. (2004); *see also* U.S. Const. art. VI.] Thus, Florida law contemplates that the court will perform a substantive and meaningful review before providing its stamp of approval.

The stated permanency goal, placement, and services for the child and parent(s) comprise not only required elements of the case plan but also the "factual" elements of the plan. Here again, the court bears ultimate responsibility for determining "[w]hether the plan is meaningful and designed to address facts and circumstances upon which the court based the finding of dependency...." [§ 39.603(1)(f), Fla. Stat. (2004)]. However, with court dockets burgeoning, courts understandably rely on the parties to prepare and submit appropriate case plans.

As a participant in the case planning arena—and as the only party exclusively representing the child's best interests—the GAL occupies a unique position from which to assist the court in approving only legally and factually sufficient case plans and, in turn, assuring timely and appropriate permanency outcomes for the child. A strong case plan not only reduces delay, but also contributes to a full evidentiary record, which reduces the likelihood of delay flowing from a reversal on appeal.

Although the GAL is charged with multiple tasks, case plan advocacy must remain among the highest priorities. The importance of making a thorough initial assessment to ensure

that the case plan adequately addresses the reasons the child was removed from a home cannot be understated. Similarly, familiarity with federal and state law governing required content is critical. With consistent, continuous dialogue between all members of the GAL team (volunteer, staff, and program attorney) concerning case plan content, progression of case plan tasks, and ongoing evaluation of case plan appropriateness, the GAL and, ultimately, the court will better protect the child's best interests by eliminating unnecessary and harmful delay.

The above article is for informational purposes only and does not constitute legal advice.

Websites Resources

Florida Immigrant Advocacy Center: www.fiacfla.org

The Florida Immigrant Coalition is a network of groups and individuals working together for fair treatment of Florida's immigrants. The Coalition meets its mission through advocacy, community empowerment, public education, technical assistance and referral.

Facts for Families: www.aacap.org/info_families/index.htm

Facts for Families offers information for parents and families on issues affecting children and adolescents, such as depression, teen suicide, stepfamily problems, and child sexual abuse. Information from the American Academy of Child & Adolescent Psychiatry website.

National Association of Social Workers (NASW):

NASW works to enhance the professional growth and development of its members, to create and maintain professional standards, and to advance sound social policies.

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