Legal Briefs Newsletter

May 2005

Volume 2, Number 5

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Prospective Abuse

In this seminal case, the Florida Supreme Court held TPR of one child can support severing of parent's rights to another child. The child need not have suffered mistreatment before the courts can act.

Florida Supreme Court Decision

Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991)

Thomas and Mary Padgett are the biological parents of the child W.L.P. Two years before W.L.P. was born, Thomas Padgett's rights to five children from a previous marriage were terminated due to extreme neglect and possible sexual abuse. Mary Padgett's rights to a previous child were also terminated due to her chronic schizophrenia, several psychiatric hospitalizations and her inability to care for the child. The trial court issued a final order committing W.L.P. to the Department of Health and Rehabilitative Services for adoption based upon the substantial likelihood of future abuse and neglect of the child and found there was no less restrictive alternative available to protect W.L.P. from harm. The Padgetts appealed.

The Florida Supreme Court held that the termination of a parent's rights to one child under circumstances involving abuse or neglect may serve as grounds for permanently severing the rights to a different child. The Court held that legislative intent, prior case law and strong public policy concerns supported termination under such circumstances. The Court wrote that to require a child to suffer abuse in cases where mistreatment is virtually assured was illogical and directly averse to the fundamental policy of protecting the welfare of children. The Court further held that because parental rights are a fundamental liberty interest, strict scrutiny analysis applies, thus requiring proof that termination of parental rights is the least restrictive means of protecting the child from serious harm. The court narrowly defined least restrictive means as requiring, in ordinary cases, proof of a good faith effort to rehabilitate the family. TPR was affirmed.

Termination of Parental Rights

Insufficient Evidence/ Least Restrictive Means

In re C.W.W., 788 So.2d 1020 (Fla. 2d DCA 2001)

C.W.W. was born prematurely, with the presence of cocaine in her blood, and was placed in neo-natal intensive care. Within one week of her release from the hospital, the mother was arrested for possession of cocaine and marijuana and was sentenced to one year in county jail. While the mother was in jail and without offering the mother a case plan, the Department of Children and Families (DCF) petitioned for a dependency order and judgment terminating the mother's parental rights. At trial, the mother admitted to a five-year history of cocaine abuse but testified that she was receiving drug treatment through

the jail. The mother did not contest dependency adjudication but argued she should be allowed an opportunity to comply with a case plan. The trial court granted the TPR petition and expressed skepticism that the mother would ever complete a case plan with a goal of reunification despite her desire to do so. The mother appealed.

The Second District Court of Appeal (Second DCA) held that DCF neither presented clear and convincing evidence for terminating the mother's parental rights nor show ed that termination was the least restrictive means of protecting the child. The Second DCA found that the trial court's speculation regarding the mother's ability to successfully complete a case plan was not a valid basis for terminating her parental rights. Furthermore, DCF did not establish that the child would be harmed by the less restrictive alternative of remaining with her foster family while the mother worked on her case plan. The Second DCA reversed and remanded the case.

A court may allow some continued communication between the parent and children pending adoption, and even after adoption, if it determines that such contact is in the children's best interest.

State of Florida Dept. of Children and Families v. A.D., 2005 WL 1047282 (Fla.1st DCA)

When the mother's three children were adjudicated dependent and placed in foster care, the mother agreed to complete the various tasks in her case plan. Nine months after the case plan was accepted, the Department of Children and Families (DCF) filed a termination of parental rights (TPR) petition under §39.806(1)(e). The trial court granted the petition as to the two fathers but denied the petition as to the mother and found the mother had substantially complied with her case plan. The trial court also found that DCF had not proven that termination was in the child's best interests. DCF appealed.

The First District Court of Appeal (First DCA) held that, given the trial court's factual findings, the evidence did not support a denial of the TPR petition on the ground that the mother had substantially complied with her case plan. The First DCA also held the evidence did not support the trial court's conclusion that DCF had failed to demonstrate termination was in the best interests of the children. The First DCA also stated that termination of parental rights does not necessarily mean that all bonds are broken between parent and child; a court may allow some continued communication between the parent and children pending adoption, and even after adoption, if it determines that such contact is in the children's best interest. The First DCA reversed and remanded the case.

Dependency

Corporal Punishment

J.L. v. Department of Children and Families, 2005 WL 906192 (Fla. 4th DCA)

The Department of Children and Families (DCF) responded to a call regarding a five-year-old child with numerous marks and bruises to her buttocks. An investigation revealed the father had hit the child with a belt five times for misbehaving in school. The father's girlfriend had struck the child an additional three times the same day. The father then beat the child again a few days later. The father, who had previously attended a parenting course, admitted that he stripped the child naked during the beatings and added that he would continue to beat the child until the child "gets it." The trial court adjudicated the child dependent and the father appealed.

The Fourth District Court of Appeal (Fourth DCA) held that, although corporal discipline alone does not constitute abuse, a finding of dependency can be based upon evidence that a child is at substantial risk of imminent abuse. The fact that the bruises on the child were not the result of a single incident but of two different beatings in the same week, along with the father's acknowledgment that he intended to continue with that form of punishment, was enough to establish the child was in substantial risk of imminent harm. The Fourth DCA held that the trial court was not in error when if found the abuse the child suffered was excessive and likely to be repeated. The Fourth DCA affirmed the dependency adjudication.

Failure to Protect/Evidence: Rule 8.245(g)(3)(B)(ii), Florida Rules of Juvenile Procedure

A.B. v. Florida Dept. of Children and Family Services, 2005 WL 1026572 (Fla. 3d DCA)

D.S., a fifteen-year-old child, was removed from her mother after she disclosed to relatives that her stepfather sexually abused her. When D.S. told her mother about the abuse, the mother dealt with the information by praying and telling D.S. to lock her bedroom door. The mother never contacted authorities and continued to live with the stepfather. The mother also allowed the stepfather to beat D.S. with a leather strap because the mother felt he was "the king of the castle." After conducting an evidentiary hearing and considering D.S.'s deposition testimony, the trial court entered a dependency order and found the mother had neglected and abused D.S. by failing to protect her from the stepfather's sexual and physical abuse. The mother appealed and argued the admission of the child's deposition testimony violated her constitutional right to confrontation and cross-examination of her accuser.

The Third District Court of Appeal (Third DCA) held that the use of D.S.'s deposition testimony as evidence comported with the requirements of Rule 8.245(g)(3)(B)(ii), Florida Rules of Juvenile Procedure because the child was living in Pennsylvania (over 100 miles away) with her maternal grandparents at the time of the trial. At the deposition, the mother's counsel was given an opportunity to cross-examine the child and, in fact, did so. The Third DCA also held there was substantial competent evidence to support the trial court's findings that the mother neglected and abused her child by failing to protect her from the stepfather's sexual abuse. The Third DCA affirmed the dependency adjudication.

Findings of Fact

P.H. v. Department of Children and Families, 2005 WL 991687 (Fla. 5th DCA)

The child, who lives with his mother, was adjudicated dependent as to his father based on the father's alleged drinking problem and threatening behavior towards the child. The Department of Children and Families (DCF) drafted an order of adjudication but the father objected to the proposed order, arguing that an adjudication could hamper his ability to maintain employment. DCF agreed to the withholding dependency adjudication. The trial judge signed the order but crossed through the findings of facts in the order and wrote that she was incorporating by reference her findings made at the adjudicatory hearing.

The Fifth District Court of Appeal (Fifth DCA) held that the order was insufficient and the cause must be remanded for a proper order. The Fifth DCA held the trial court must enter an order setting forth the court's findings and the legal basis for the finding of dependency. The Fifth DCA reversed and remanded the case.

Child Custody

The order placing long-term custody of the child with the child's father is supported by competent substantial evidence.

S.E. v. Department of Children and Families, 2005 WL 991694 (Fla. 5th DCA)

K.E. was removed from her mother after an investigation revealed the child had a spiral fracture of the femur that could not have been broken without a large snapping sound and without the child screaming. The mother and the maternal grandmother were the child's caretakers within the 24 hours prior to the child's hospital admission. The child was adjudicated dependent as to the mother. The case plan had the goal of reunification with the mother. Although the mother had completed most of the tasks in her case plan, she failed to continue psychotherapy. The trial court entered an order placing the child in the long-term custody of the father and the mother appealed.

The Fifth District Court of Appeal (Fifth DCA) looked at the evidence presented to the trial judge. At the hearing, the Department of Children and Families (DCF) recommended that the mother successfully complete individual psychotherapy and supply a positive recommendation from the psychotherapist before the child be returned to her. Without the psychotherapist recommendation, both DCF and the child's Guardian ad Litem were concerned the child could not be safely returned to the mother on a full-time basis. The trial court found that the father could provide a more stable, safe environment. The trial court expressed concern because it was never resolved who inflicted the injuries upon the child. The Fifth DCA held there was competent, substantial evidence to place the child in the long-term custody of the father and affirmed the trial court's order.

Interstate Compact on the Placement of Children (ICPC)

H.P. v. Department of Children and Families, 838 So.2d 583 (Fla. 5th DCA 2003)

The trial court adjudicated two children dependent after finding their father had physically abused one of the children on more than one occasion. The father had previously been given custody of the two children in a divorce decree. When the mother, in Massachusetts moved for custody of the children, the trial court awarded custody to the mother. The trial court found that the information furnished by the mother, including verification of income, photographs of her home and background checks by law enforcement, constituted a home study. The trial court further found that the delays inherent in the Interstate Compact on the Placement of Children (ICPC) made the compact unconstitutional to the extent that it precluded or delayed placement of children with non-offending parents when no detriment to the children is shown. The trial court retained jurisdiction of the case because of the father's case plan and possible reunification. The father and the Department of Children and Families (DCF) appealed.

The Fifth District Court of Appeal (Fifth DCA) held that because the trial court retained jurisdiction of the matter, the case fell within the requirements of the ICPC. The Fifth DCA found that it was error to find that delays inherent in the ICPC render it unconstitutional to the extent that it precludes or delays placement of children in custody of non-offending parent when no detriment to the child is shown. The Fifth DCA held the trial court's anticipated delay in the home study was speculative and noted that if there is concern with the timeliness of a home study, an investigation can be made to determine whether private sector licensed agencies are available. The Fifth DCA vacated the trial court's order and instructed the court to comply with the ICPC.

Summary of 2005 Legislative Session

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The Florida Legislature concluded its 2005 session on May 6, 2005. The following is a brief summary of the substantive legislation of interest that passed. The bills are on their way to the Governor for his signature, and at this time, we do not anticipate any of these bills will be vetoed. If you would like to read the full text of the bills, you can view them on the Legislature's website: www.leg.state.fl.us.

SB 348/HB 145 – Amends §§ 39.013, 39.0132, and 39.814

This bill, called the Family Court Efficiency bill, is a joint product of the Family Court Steering Committee and the Children's Court Improvement Committee. It is the first legislative step toward implementing the Unified Family Court concept. In addition to the references to Chapter 39, the bill also amends Chapters 61, 63, and 741. The legislation provides authority for the Supreme Court to create a unique identifier to identify persons who have cases in multiple divisions of court and coordinate these cases where

appropriate. The changes to Chapter 39 impact admissibility of evidence and precedence of orders. Theses changes are intended to facilitate coordination and avoid duplication of judicial efforts in situations where placement of, custody, or parental time with a child is at issue in multiple or subsequent proceedings.

EFFECTIVE DATE: JULY 1, 2005

SB 498/HB 809 – Creates § 39.5075

This bill directs DCF to determine the citizenship of children in its custody and report such information to the court at the first judicial review. The provision requires DCF file a petition with the court to determine whether the child meets the criteria for special immigrant juvenile status and for those who do, states DCF must file papers with federal authorities to adjust the child's residency status. The progress of the application must be addressed at each judicial review. DCF is authorized to develop administrative rules to implement this section.

EFFECTIVE DATE: JULY 1, 2005

SB 758/HB 407 – Amends §§ 39.202, 39.301 and 39.302

This bill provides access to DCF's records to staff of children's advocacy centers operating pursuant to § 39.3035. Similar language was passed in SB 1098.

New subsection (22) is added to § 39.301 that states when a protective investigation is closed and a person is not identified as a caregiver responsible for the abuse, neglect or abandonment alleged in the report, the fact that the person is named in some capacity in the report may not be used to adversely affect the interests of that person. The prohibition applies to any use of the information in employment screening, licensing, child placement, adoption or any other decisions by a private adoption agency or a state agency or its contracted providers. The amendments to § 39.302 are similar and address investigations of institutional abuse.

EFFECTIVE DATE: Upon signature of the Governor

SB 1090/HB 883 – Amends § 39.407

Called the "Psychotropic Meds" bill, this bill establishes a protocol for DCF to request continuation or initiation of the provision of psychotropic medication to children in its custody. Some features of the bill are: a requirement that informed consent be obtained before administering such medication; a mandate that DCF provide all the medical information in its custody to the physician evaluating the child; creation of a list of information to be provided to the court by the physician; and provisions for emergencies when the provision of medication must be done prior to a court order. In circumstances where DCF is advised that a child needs psychotropic medication, a motion must be served on all parties and a hearing must be held when there is an objection to the motion.

Separate from the procedure established under Chapter 39, § 1006.0625 was created which states that a public school may not deny any student access to programs or services because the student's parent has refused to place the child on psychotropic medication.

EFFECTIVE DATE: JULY 1, 2005

SB 1098/HB 1929 – Amends §§ 39.0132, 39.202, and 119.07

This bill provides a statutory basis for a Guardian ad Litem to maintain as confidential those records in the GAL's possession concerning the best interests of a child. The new language is found in § 39.0132(4):

2. Any information related to the best interests of a child, as determined by a guardian ad litem, which is held by a guardian ad litem, including but not limited to medical, mental

health, substance abuse, child care, education, law enforcement, court, social services, and financial records; and any other information maintained by a guardian ad litem which is identified as confidential information under this chapter; is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such confidential and exempt information may not be disclosed to anyone other than the authorized personnel of the court, the department and its designees, correctional probation officers, law enforcement agents, guardians ad litem, and others entitled under this chapter to receive that information, except upon order of the court. This subparagraph is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill also amends § 119.07 to provide an exemption from public records for identifying information of volunteers GALs and Program staff. The new language is as follows:

The home addresses, telephone numbers, places of employment, and photographs of current or former guardians ad litem, as defined in s. 39.820, and the names, home addresses, telephone numbers, and places of employment of the spouses and children of such persons, are exempt from subsection (1) and s. 24(a), Art. I of the State Constitution, if the guardian ad litem provides a written statement that the guardian ad litem has made reasonable efforts to protect such information from being accessible through other means available to the public. This subparagraph is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature.

Lastly, the bill provides access to DCF's records to staff of children's advocacy centers operating pursuant to § 39.3035. Similar language was passed in SB 758.

EFFECTIVE OCTOBER 1, 2005

SB 1314/HB 1319 – Amends §§ 39.0132, 39.701, and 409.1451

This bill allows dependent children to petition the court to retain jurisdiction of their cases for 1 year past their eighteenth birthday to determine whether appropriate aftercare support, Road-to-Independence Scholarship, transitional support, mental health, and developmental disability services, to the extent otherwise authorized by law, have been provided or to meet any requirement of federal law with respect to the court's ongoing jurisdiction pending issuance of a Special Immigrant Juvenile Visa. If such a visa is pending, the court's review hearings shall be solely for the purpose of determining the status of the petition/application and the court's jurisdiction terminates upon the final decision of the federal authorities.

Subsection (12) is created in § 39.0132 which states "the court shall encourage the Statewide Guardian ad Litem Office to provide greater representation to those children who are within 1 year of transferring out of foster care."

In the amendments to § 39.701, the law requires DCF to provide information on how to apply for Medicaid services, if the child is eligible. Section 39.701 provides that DCF must inform the child that if he or she is eligible for the Road to Independence scholarship, he or she may continue to reside in the current foster care home or another home under the supervision of DCF. The law requires that the child be given notice of his or her right to petition for the court's continuing jurisdiction past his or her eighteenth birthday and that the child be encouraged to attend all judicial review hearings occurring after his or her seventeenth birthday. Lastly, the new law mandates that DCF enroll all young adults in KidCare, regardless of the timing of the enrollment period.

EFFECTIVE DATE: JULY 1, 2005

HB 1659/SB 1908 – Creates § 390.01114

This bill is the parental notice of abortion bill, the legislative implementation of a constitutional amendment passed by the voters. It provides that notice shall be provided by a physician performing or inducing the termination of a pregnancy of a minor before such inducement or termination of the pregnancy. The statute outlines a number of exceptions when notice to the minor's parents is not required, and in certain circumstances a judicial waiver of notice can be obtained. When a child seeks a judicial waiver, the court must advise the minor that she has a right to court appointed counsel and the court shall provide her with counsel upon her request at no cost.

EFFECTIVE DATE: The act takes effect upon the adoption of rules and forms by the Supreme Court, but no later than July 1, 2005.

SB 2542/HB1935 – Amends multiple sections of the Florida Statutes

This bill is called the Article V Glitch bill, and it amends numerous statutory chapters to resolve issues related to the Article V, Revision 7 funding transition for the court system. Relevant to Guardian ad Litem, amendments were passed to provide statutory authority for guardians ad litem to access records related to the best interests of children in § 39.822:

(3) Upon presentation by a guardian ad litem of a court order appointing the guardian ad litem: (a) An agency, as defined in chapter 119, shall allow the guardian ad litem to inspect and copy records related to the best interests of the child who is the subject of the appointment, including, but not limited to, records made confidential or exempt from s. 119.07(1) or s. 24(a), Art. I of the State Constitution. The guardian ad litem shall maintain the confidential or exempt status of any records shared by an agency under this paragraph.

(b) A person or organization, other than an agency under paragraph (a), shall allow the guardian ad litem to inspect and copy any records related to the best interests of the child who is the subject of the appointment, including, but not limited to, confidential records.

For the purposes of this subsection, the term "records related to the best interests of the child" includes, but is not limited to, medical, mental health, substance abuse, child care, education, law enforcement, court, social services, and financial records.

Additionally, a technical change was made to § 39.821 concerning background checks.

EFFECTIVE DATE: JULY 1, 2005 except as otherwise provided.

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