



Legal Briefs Newsletter

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Florida Supreme
Court Decision

Welcome to the November edition of the Statewide Guardian ad Litem Office Legal Briefs Newsletter. We have added a new section -- Evidence Review. We hope that you find this information helpful!

Please 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.

DCF Consent to Adoption

The Supreme Court held that DCF's consent is not mandatory when DCF unreasonably withholds consent to adoption

B.Y. v. Department of Children and Families, 2004 WL 2534335 (Fla.)

Grandmother sought to finalize adoption of her two of her grandchildren. The Department of Children and Families (DCF) refused to consent to the adoption, arguing that because the grandmother had not obtained permanent housing, the home investigation could not be completed and that adoption subsidies would not be paid to the grandmother in the absence of DCF's consent to the adoption. The trial court held that DCF unreasonably withheld consent and finalized the adoption. On appeal, the Fourth District reversed, holding that DCF's consent was mandatory and that, absent DCF's consent, the trial court could not finalize the adoption.

The Florida Supreme Court reversed the Fourth District and upheld the trial court's decision to finalize the adoption. The Court held that DCF unreasonably withheld its consent and that finalizing the adoption advanced the best interests of the children. ☞

Termination of Parental Rights

Tardiness: Court's adjudication of dependency or termination may not stand on appeal

In re E.S. v. Department of Children and Families, 862 So.2d 903 (Fla. 2nd DCA 2003)

Parental rights were terminated by "default" for "failure to appear" when a parent was 20 minutes late to the adjudicatory hearing. The parent's attorney moved to have the default set aside and the case heard. The trial court denied the motion. Reversing, the Second District held that the trial court abused its discretion. An adjudication of dependency or termination of parental rights may not stand on appeal if the court bases it on default for parent's tardiness. ☞

Involuntary Termination: Failure to Appear

In re: T.S., 855 So.2d 679 (Fla. 2nd DCA 2003)

When an involuntary termination is based on a parent's failure to appear at the

adjudicatory hearing, it is not considered involuntary for the purposes of §39.806(1)(i). ¹

Substantial Compliance / Least Restrictive Means Test

In re: K.W., 2004 WL 2633612 (Fla. 2nd DCA)

The child in this case was placed shortly after birth in the care of the maternal aunt and cousin. DCF filed to terminate parental rights when the mother failed to substantially comply with her case plan. The trial court terminated mother's rights. On appeal, the court assessed two issues: first, the evaluation of manifest best interest of the child and, second, the least restrictive means of protecting the child.

The court determined it was in the manifest best interest of the child for the placement with the cousin to be an adoptive placement rather than a long-term custody arrangement. The court considered the young age of the child, the fact that the child had been in the cousin's home since birth, the cousin's wish to adopt the child, and the mother's lack of progress in compliance with the case plan.

DCF must show that termination is the least restrictive means of protecting the child. The court states that *Padgett* "describes the least restrictive means as those that offer the parent a case plan and time to comply with the plan so as to obtain reunification with the child." *Padgett v. Dep't of Health & Rehabilitative Servs.*, 577 So.2d 565 (Fla. 1991). In this case, the mother failed to comply with the case plan. Because there was no parent child bond to reestablish, long-term relative placement was not in the best interest of the child and was not required by the "least restrictive means" test. ¹

J.J. v. Department of Children and Families, 2004 WL 2600136 (Fla. 4th DCA)

The trial court ruled that DCF proved by clear and convincing evidence that the parents were unable to substantially comply with their case plans but that DCF failed to show that termination of parental rights was in the manifest best interests of the children. The trial court afforded DCF a chance to "re-notice the matter for trial" in order present evidence under the Manifest Best Interest Statute § 39.810 that was not submitted during the termination trial. The trial court declared § 39.811 unconstitutional as an improper limit on the powers of the court, as it provides trial courts with only two options if they find grounds for termination have not been established by clear and convincing evidence: (1) adjudicate or readjudicate the children dependent if grounds for dependency have been established, or (2) dismiss the petition if grounds for dependency have not been established.

The Fourth District reversed, holding that the trial court abused its discretion in affording DCF the opportunity for a "do-over" of the three-day trial. In addition, the court held that § 39.811 is constitutional and remanded for trial court to fashion an order that complies with § 39.811. ¹

Jurisdiction: Uniform Child Custody Jurisdiction Act

D.S. v. Department of Children and Families, 2004 WL 2632929 (Fla. 5th DCA)

Where the lower court found that Connecticut was the child's home state (under the UCCJA), it had only emergency jurisdiction to enter a shelter order and not subject matter jurisdiction to terminate parental rights. Under the UCCJA, emergency jurisdiction does not confer upon the Florida court the power to make permanent custody determinations. Connecticut's jurisdiction continues until the Connecticut court relinquishes it to Florida. In this case, the Florida court did not follow the UCCJA provisions requiring the Florida court communicate with the Connecticut court. The Fifth District reversed the termination of parental rights. ¹

Relative Placement

Home study and No compelling reasons not to place child with non-offending parent

A dependent child is a child “at substantial risk of imminent abuse, abandonment, or neglect by the parent or parents

Clear and convincing evidence

In re. L.B.W., 863 So.2d 480 (Fla. 2nd DCA 2004)

Grandmother wanted custody of grandchild, but the trial court held the grandmother was in “failing health” and, therefore, was not a suitable relative placement for the child. The only testimony regarding the health of the grandmother was that of the 62 year-old grandmother who testified she was a diabetic but had it under control. She also testified that she was able to care for this 2 year-old child and that it would not be a hardship to do so. The mother’s two older children were in the legal care and custody of the grandmother because of dependency. The state provided no evidence of “failing health.” The Second District held that the state failed to show clear and convincing evidence that the grandmother was not a suitable relative placement and reversed the termination. ¶

Good Faith Effort to Rehabilitate and Reunite

Termination must be supported by clear and convincing evidence

K.H. v. Department of Children and Families, 846 So.2d 544 (Fla. 3rd DCA 2003)

Father, who resides in Virginia, had his rights terminated to two of his children. The family has no direct ties to Florida. The court in this case has jurisdiction under the UCCJA, which provides for emergency jurisdiction if the child is present in the state and the child is subject to or threatened with mistreatment or abuse. § 61.517(1) Fla. Stat. (2002). The Department of Children and Families (DCF) did not give the father a case plan for two years and he rarely appeared at hearings citing financial burden.

The Third District held that the termination was not supported by clear and convincing evidence. There must be a “good faith effort to rehabilitate the parent and reunite the family, such as through a current performance agreement or other such plan.” *Padgett v. Dep’t of Health and Rehab. Servs.*, 577 So.2d 565 (Fla.1991). DCF did not provide a case plan until nearly two years after the children were taken into custody. There was no record evidence to support the termination – no guardian ad litem report, no report from any expert. The court reversed the termination. ¶

Placement with Non-Offending Parent

Best Interest Standard Inappropriate

G.S.H. and Department of Children and Families v. K.H, 2004 WL 2245793 (Fla. 1st DCA)

The mother consented to dependency, and the court placed the child with maternal grandparents. Father (a non-offending parent) filed a motion to modify the placement of child. DCF conducted a home study in which they approved custody with the father. The trial court denied father’s motion, finding it was not in the best interests of the child to change placement. The First District reversed the trial court’s order denying father’s motion as the trial court improperly applied the best interest standard. There must be “compelling reasons” not to place a child with a non-offending parent when there is a positive home study. ¶

Dependency

Substantial Risk of Imminent Abuse

R.M. v. Department of Children and Families, 2004 WL 2559679 (Fla. 5th DCA)

The father appealed his son’s dependency adjudication. The Fifth District found the child dependent under the “substantial risk of imminent abuse” statute. This court found there was competent substantial evidence to support the dependency adjudication based on the father’s history of violent behavior. In four years of the mother’s and father’s relationship, the mother reported the father to the police six times, and the father threatened the mother with a gun, attacked her while she was pregnant, and smashed her car window while she was holding her daughter (not the child at issue) in her arms, causing glass to fly into

daughter’s eye. ¶

Legislative Happenings

Recently passed legislation

Florida Statutes § 63.062(7), Florida Statutes (2004)

§ 63.062 Persons required to consent to adoption

If parental rights to the minor have previously been terminated, the adoption entity with which the minor has been placed for subsequent adoption may provide consent to the adoption. In such case, no other consent is required. The consent of the department shall be waived upon a determination by the court that such consent is being unreasonably withheld, provided that the petitioner has filed with the court a favorable preliminary adoptive home study performed by a licensed child-placing agency, a child-caring agency registered under § 409.176, or a licensed professional or agency described in § 61.20(2).

¶

Evidence Review

Hearsay Exception: Spontaneous Statement

Florida Evidence Code: § 90.803 (1) Hearsay Exceptions

Spontaneous Statement: Defined

Spontaneous statement – A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness. (Availability of declarant immaterial.)

Example

Witness Jane Doe, Visitation Supervisor for the Department, is testifying during direct examination at a TPR trial regarding her observations during a recent visit between a twelve year old boy (who had been removed from his parents due to ongoing alcohol abuse issues) and his father:

Witness

“They were sitting together on the couch starting to put together some walkie talkies that the dad brought....and all of a sudden the child waved his hand by his nose, shook his head and commented, “Ugh, my goodness dad, you really smell like beer, yuk!”

Father’s Attorney

Attorney for the Father: “Objection, HEARSAY”

Foundation for § 90.803(1) Spontaneous Statement

Procedure

The proponent must show that:

1. An event occurred;
2. The declarant observed or experienced the event;
3. The declarant made a statement describing or explaining the event while it was occurring or immediately thereafter.

Sample Predicate Questions

1. Preliminary questions, i.e., Name, employment, etc.?
2. What were you doing on (date)?
3. For how long of a period did you observe them?
4. Where was the child in relation to the father? How close were they situated?
5. Where were you in relation to the father and son?
6. Were you able to see them and hear their conversation?
7. What were your observations?

8. What, if anything, did the child say to explain why he was waving his hand in front of his nose? 🗣️

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

Websites Resources

The Annie E. Casey Foundation: www.aecf.org

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. 🗣️

Internet Mental Health: www.mentalhealth.com

This site contains links for common disorders, organizations, search engines, and medical sites. 🗣️

National Council of Juvenile and Family Court Judges: www.ncjfcj.org

The NCJFCJ is dedicated to serving the nation's children and families by improving the courts of juvenile and family jurisdictions. Their mission is to better the justice system through education and applied research and improve the standards, practices and effectiveness of the juvenile court system. 🗣️