Legal Briefs Newsletter

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Welcome to the first Statewide Guardian Ad Litem Newsletter

Welcome to the first edition of the Legal Briefs Newsletter! This is an exciting year for the Guardian Ad Litem Program. The Statewide Guardian Ad Litem Office was recently established, and I am honored to serve as your first Executive Director. Over the last few months, we have been working to establish a state office that will provide administrative support, secure additional resources, advocate for systemic changes on behalf of dependent children, and provide a clear vision for the future.

The Legal Briefs Newsletter is an example of my dedication to increased levels of communication and data sharing. The newsletter will provide current case summaries, legislative happenings and useful information regarding issues that affect the advocacy of children in Florida. Currently, we are developing a website containing a searchable library of case summaries, legislative news, volunteer GAL resources and other useful resources.

I thank you for your hard work and your strong advocacy for the children we represent.

Enjoy the Newsletter!

Angela H. Orkin, Executive Director, Statewide Guardian Ad Litem Office

Psychiatrist - Patient privilege

The Courts have held that the privilege applies

S.C. v. Guardian Ad Litem, 845 So.2d 953 (Fla. 4th DCA 2003);
E.C v. Guardian Ad Litem, 867 So.2d 1193 (Fla. 4th DCA)

A mature / competent dependent minor has privacy interests and is entitled to notice and an opportunity to be heard (in camera) prior to the release of psychotherapist's records *(4th DCA)*

In both *S.C.* and *E.C.* the courts entered an appointment order for a GAL giving the GAL access to all of the minor's records without the minor's consent. The child objected to the release on the grounds of psychotherapist/patient privilege provided by §90.503, Fla. Stat. (2001). The child moved to enjoin the GAL program from obtaining confidential / privileged records without formal petition and hearing pursuant to §61.403, Fla. Stat. (2001). The court held that the GAL does not have unrestricted access to the records of a dependent minor's treating therapist. A mature/competent dependent minor has privacy interests and is entitled to notice and an opportunity to be heard (*in camera)* prior to the release of psychotherapist's records.

Supplemental Materials:

The ABA Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (Approved August 2003) provided model standards for appointment and a model appointment order available at http://www.abanet.org/family/Approved%20standards%20practice.pdf .

Attorney Ad Litem for D.K. v. Parents of D.K., 780 So.2d 301 (Fla. 4th DCA 2001)

Parents involved in litigation cannot waive a dependent minor's psychiatrist-patient privilege

When a child's mental health records were requested by a court appointed psychologist to evaluate her family for child custody issues, the child through her attorney ad litem, asserted her psychotherapist-patient privilege. The minor was a 17-year old who asserted the privilege herself during her parent's dissolution action. The custody evaluator and the appointed psychologist did not articulate a specific reason for needing the child's records.

The court held that a minor child could assert the psychotherapist-patient privilege. Parents engaged in litigation, could not waive or assert their 17-year old daughter's privilege in dissolution of marriage action. When a child wishes to assert the psychotherapist-patient privilege…when the child is less than 12 years old, (the court) should determine whether the child is of sufficient emotional and intellectual maturity to make the decision on his or her own, and if so, then the court should appoint an attorney ad litem to assert the child's position. *Id.* at 308. Court's general determination of "best interests" does not prevail over child's specific privacy privilege. *Id.* at 309.

Hughes v. Schatzberg, 872 So.2d 996 (Fla. 4th DCA 2004)

The mother in a custody case had no standing to assert the psychotherapist-patient privilege for her nine-year old child, nor was the court required to appoint a guardian ad litem. In this case, the parties agreed to appoint a psychologist to counsel the child. After several months of counseling, the parties were unable to come to an agreement regarding custody. At trial, the father called the psychologist to testify. The mother contends that the psychologist should not have been permitted to testify without waiver of the psychotherapist-patient privilege on behalf of the child. The court held that the mother did not have standing to assert the privilege on behalf of the child where the mother was involved in litigation over the child's welfare. *Attorney Ad Litem for D.K. v. Parents of D.K.,* 780 So.2d 301, 307 (Fla. 4th DCA 2001). In the *D.K.* case, the minor was a 17 year-old who asserted the privilege. In this case, the child is nine years old and did not assert the privilege.

Attorney Ad Litem Appointment

"Great weight" given to GAL recommendations

The GAL is the appropriate person with standing to recommend the appointment of an attorney ad litem

G.L. & P.L v. Department of Children & Families, 767 So.2d 584 (Fla. 5th DCA 2000)

The GAL is the appropriate person with standing to recommend the appointment of an attorney ad litem in a dependency case. A third party has no standing to procure independent legal counsel for dependent children if the GAL objects to the representation. The appointment of an attorney for dependent children is at the discretion of the court. The court should give great weight to the recommendations of the GAL and the factors that necessitate the appointment.

Supplemental Materials:

Chart
State Requirements for Representation of Children in Abuse and Neglect Cases: Please e-mail me at Elizabeth.damski@gal.fl.gov if you would like an electronic copy sent to you.

Chart
Linda Rio, American Bar Association Child Custody Project, *Appointment Laws in Adoption, Guardianship, Unmarried Parent and Divorce Cases* available at < http://www.abanet.org/family/familylaw/Chart7_ApptLawsAdoptions.pdf > (last visited March 13, 2004).

Adoption of TPR Petition

No need to re-file petition

If a petitioner dismisses a TPR petition, it is

Guardian Ad Litem v. In re K.D., 864 So.2d 1213 (Fla. 4th DCA)

dismissed without prejudice unless another party adopts the petition within 72 hours

DCF voluntarily dismissed a TPR against a father in the middle of the adjudicatory hearing. The GAL noticed the parties that it would be adopting the petition pursuant to Florida Rule of Juvenile Procedure 8.500(f) – "The petition shall be dismissed and the court loses jurisdiction unless another party adopts the petition within 72 hours". By doing so, the GAL would continue the TPR without interruption. If a petitioner dismisses a TPR petition, it is dismissed without prejudice unless another party adopts the petition within 72 hours. The adopting party does not need to re-file petition. The trial court required compliance with "every statutory guideline set forth" in Chapter 39 – including re-service on the father. "[T]he judge may consider in-court testimony previously given…if the recorded testimony itself is made available to the judge."

Due Process – Committed Minors

Pre-commitment hearing and appointment of counsel if child objects to mental health residential placement

If child objects to placement in residential mental health treatment center, there must be:

Pre-commitment hearing

&

Appointment of Attorney ad Litem

M.W. v. Davis, 756 So.2d 90 (Fla. 2000), Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350 (Fla. S. Ct. March 6, 2003)

The court held that the Juvenile Court Rules Committee was to submit proposed procedures that "at a minimum, these procedures would include a hearing in which the child has a meaningful opportunity to be heard." Id. At 109.

In March of 2003, the Florida Supreme Court adopted an amendment to its rules of juvenile procedure. The rule governing involuntary placement of a dependent minor in residential treatment incorporates both a **pre-commitment hearing** and **appointment of counsel** for a child when that child objects to residential placement. The amended rule has an express exception that provides if the child's condition is so severe that to wait for a placement hearing would be detrimental to the child, the court may order placement immediately. The same exception applies if counsel for the child is not immediately available. If no attorney is available, the child must be present and given the opportunity to be heard.

Appropriateness Hearings

The court's jurisdiction over a dependent child

Challenging DCF's jurisdiction over child

- **Has DCF followed its own internal procedures in an expeditious manner?**
- **Was selection arbitrary or capricious?**
- **Best interest v. risk of harm to child**
- **Irreparable harm**

I.B. and D.B., v. Department of Children & Families, 2004 WL 1228862 (Fla. 5th DCA 2004)

The foster parents in this case wanted to adopt a child who had been placed with them for sixteen months. After the parental rights were terminated, DCF wanted to move the child to a relative placement. The court held that the foster parents would be directly affected by the court's judgment and intervention was appropriate. Foster parents can intervene in a DCF proceeding when they will either gain or lose by the direct legal operation and effect of the judgment. In addition, the district court held that child's best interests should have been considered before the circuit court ruled on DCF's motion to change placement.

Department of Children & Families v. J.C., 847 So.2d 487 (Fla. 3d DCA 2002)

When DCF placed a child with a different guardian, the GAL requested a good cause hearing to review appropriateness of the placement. DCF contended it had exclusive jurisdiction over the child. The court ordered the return of child to pre-adoptive placement pending the appropriateness hearing. DCF then filed a motion to prevent the appropriateness review.

The court held that the trial court had jurisdiction/authority to prevent DCF from changing child's placement and in maintaining child's status quo until appropriateness hearing. DCF

does not have exclusive jurisdiction over a dependent minor. The court has the authority/jurisdiction to prohibit DCF from changing a child's placement pending an appropriateness hearing. The court has the ability to prevent irreparable harm. The court found that to remove the child from his pre-adoptive placement would cause irreparable harm.

Department of Children & Families v. GAL of C.R., 855 So.2d 688 (Fla. 1st DCA 2003)

Court may balance

- **Best interests**
- **Risk of harm**

DCF contended that the court went beyond the authority granted in § 39.812(4), Fla. Stat. (2002), when it substituted its judgment for the judgment of DCF regarding children's placement. DCF argued that in an appropriateness hearing the court could only rule as to whether DCF had followed the correct internal procedures and had not made a placement in an arbitrary and capricious manner. The court held the trial court did not exceed its jurisdiction by considering children's **best interests** and **balancing risk of harm** when it reviewed appropriateness of prospective adoptive placement of children. Chapter 39 provides express statutory authority for a trial court to exercise judicial review of appropriateness of adoptive placement. § 39.812(4), Fla. Stat. (2002).

Department of Children & Families v. Adoption of B.G.J., 819 So.2d 984 (Fla. 4th DCA 2002)

"Statutory scheme presumes that DCF is in the best position to determine which family is appropriate for adoption placement..."

The trial court lacked the authority to place child for adoption with foster parents contrary to the selection of adoptive parents by DCF where the trial court found the selection of the adoptive parents to be appropriate. The court cannot interfere with DCF's decision if decisions are made according the DCF policy and are made in an expeditious manner.

The statute § 39.812(4), Fla. Stat. (2001) allows for an appropriateness hearing of an adoptive placement. This "statutory scheme presumes that DCF is in the best position to determine which family is appropriate for adoption placement…" DCF followed its internal policies -- match staffing and keeping siblings together. The trial court did not hold that DCF's selection was inappropriate and therefore the court must follow DCF's selection.

Department of Children & Families v. B.Y, 863 So.2d 418 (Fla. 4th DCA 2003)

...consent to an adoption is firmly reposed in DCF.

The trial court finalized an adoption in which DCF had not approved because DCF lacked a home study. DCF appealed the trial court's decision and argued that the court may not consent to or finalize an adoption without DCF's consent. The decision to grant consent to an adoption "is firmly reposed in DCF and may not generally be intruded upon by the judiciary." The court may not mandate DCF's consent to an adoption. DCF can withhold or grant its consent, even if it is based on a failure to conduct a final home study if DCF "has concerns about the prospective placement."

Legislative Happenings

Recently passed legislation

House 723: Relating to Foster Care Services – passed April 30, 2004

Many times in foster care, children are moved from school to school, leading to a disruption not only in their lives, but also in the progress of their education. House Bill 723 requires that DCF, the Department of Education and local district school boards enter into interagency agreements to keep foster children in their home schools, stabilize their education and improve planning for their educational goals. Visit www.flsenate.gov for full discussion and text of bill.

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

Senate 512: Relating to Independent Living Transition Services — passed April 30, 2004

Senate Bill 512 provides for more children to be included in independent living transition services programs. Children who qualified for services were defined as youth "in foster care" and are now defined as "youth in the legal custody of the Department of Children and Families." The bill recognizes community-based providers as entities providing independent living transition services. The bill also requires judicial review of the youth's progress in their independent living skills. Visit www.flsenate.gov for full discussion and text of bill.

Senate 2046: Relating to Adoption – passed April 30, 2004

Senate Bill 2046 restricts the DCF from removing a child who has lived with a foster parent for at least 6 months from foster parent or court-ordered custodian unless: the court ordered the removal, the foster parent or guardian agrees to the removal, or the child is in danger of abuse or neglect. The bill also gives the court the authority to determine if DCF has "unreasonably" withheld its consent to an adoption and authorizes the court to select adoptive parents that have not received the department's consent, in certain situations. Visit www.flsenate.gov for full discussion and text of bill.

Websites Resources

ABA Center on Children and the Law http://www.abanet.org/child/

Florida Statutes & Constitution http://www.flsenate.gov/Statutes/index.cfm?submenu=-1&Tab=statutes

The Florida Bar Online

http://www.flabar.org/

National CASA website

http://www.nationalcasa.org/