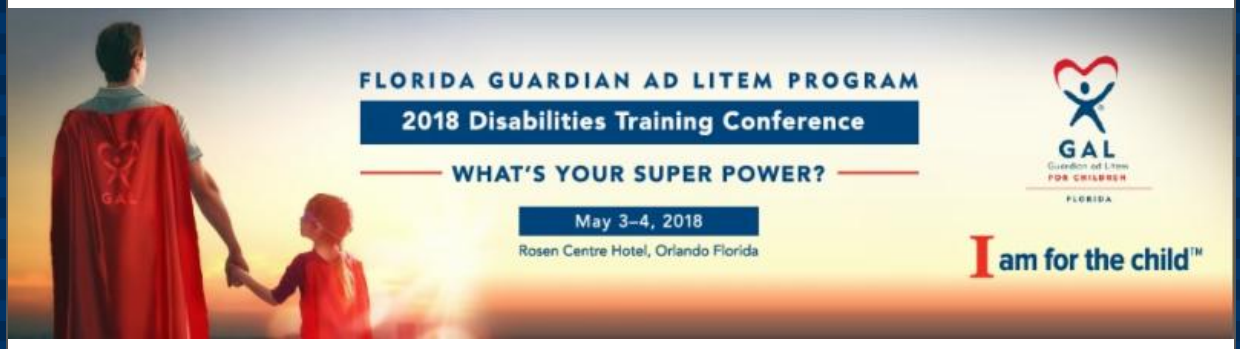
Florida Guardian ad Litem

Legal Briefs Newsletter

The GAL Program hopes that you and your family had a wonderful holiday season and are looking forward to an amazing New Year!



SAVE THE DATE: 2018 Disabilities Training Conference
May 3-4, 2018
Rosen Centre, Orlando, Florida

The United States Supreme Court denies certiorari review in M.L. v. Department of Children and Families

The United States Supreme Court has denied certiorari in M.L. v. Department of Children and Families. The high court declined to review the Fourth District's ruling that M.L. had waited too long to assert his rights. In his petition, the putative father argued

that his due process rights had been violated by application of the Florida paternity statutes and the case law interpreting them. He was joined in that argument by Florida's Children First, The National Center on Adoption and Permanency, The North American Council on Adoptable Children, The Children's Law Center of Minnesota, Kansas Appleseed, The Youth Law Center, Advocates for Children and Youth, and Attorney Richard F. Joyce as amici curiae. The amicus brief argued for due process rights not only for "a natural father who is actively seeking to prove his fitness to have a relationship with his child" but for "all parents" as well, suggesting biological parents must have notice and an opportunity to be heard regardless of the relationship they have with their children or the steps they have taken to establish the relationship with their child. The Guardian ad Litem Program filed the sole response, arguing that heightened due process requirements for putative fathers was neither constitutionally required nor in the best interests of children-J.L. in particular. The high court's rejection of the petitioner's writ and the argument from the amici paved the way for his adoption. *M.L. v. Dep't of Children & Fams.*, 227 So. 3d 142, 146 (Fla. 4th DCA 2017), *certiorari denied*, 2017 WL 6271691, U.S.Fla., Dec. 11, 2017

Read the Opinion

ADOPTION INTERVENTION AND BEST INTEREST OF CHILD-Transfer of custody to prospective adoptive parents under the Adoption Intervention Statute requires a best interest analysis considering all factors enumerated in section 63.082(6)(e) of the Florida Statutes.

W.K. v. Department of Children and Families, --- So.3d ---- (2017); 42 Fla. L. Weekly D1909, 42 Fla. L. Weekly D2043

The child was sheltered two months after birth and placed with foster parents. During the pendency of a petition to terminate parental rights, the mother executed a surrender and consent to adopt with Adoption by Shepherd Care ("ASC"), an adoption agency. The father also surrendered his rights to the Department. ASC intervened in the dependency case and filed a motion to transfer custody of the child to the prospective adoptive parents chosen by the mother. The trial court granted the motion to transfer custody of the child to the prospective adoptive parents.

The foster parents and the guardian ad litem program ("GAL") appealed the order transferring custody of the child, arguing that is was in the child's best interest to remain in the custody of the foster parents and to be adopted by them. The Fourth DCA dismissed the foster parents' appeal for lack of standing and affirmed the order below, finding that competent substantial evidence supported the trial court's decision.

The DCA originally rendered an opinion that incorrectly held that parents possess a fundamental right to choose the permanent adoptive placement for their children, rather than only a statutory right to participate in permanent adoptive placement proceedings per section 63.082(6)(e) of the Florida Statutes. In so holding, the Court improperly placed greater weight on a parent's choice than the other factors enumerated in section 63.082(6)(e). However, based on the GAL's Motion for Rehearing, the Court substituted the original opinion and corrected the erroneous language. In its substituted opinion, the DCA explained that under section 63.082(6)(d) of the Florida Statutes, if a court determines that the prospective adoptive parents are qualified to adopt the child and that the adoption is in the best interests of the child,

the court shall promptly order the transfer of custody of the minor child to the prospective adoptive parents.[AJ1] The Court then discussed the factors in determining the best interest as enumerated in section 63.082(6)(e) of the Florida Statutes, and noted that the mother's right to choose the adoptive family was but one of the factors in the statute. Concluding that trial court's findings were supported by competent substantial evidence in the record, the DCA affirmed the trial court's decision.

http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0063/Sections/0063.082.html

Practice Tips: Florida Statute § 63.082(6) permits intervention in a dependency case where parental rights have not been terminated and parents have executed a consent for placement with qualified adoptive parents. In these cases, courts must not only ask whether a parent's chosen adoptive placement is appropriate, but also whether that choice is actually in the best interest of the child.

The Florida Legislature revised section 63.082(6)(e) in 2016 to ensure all children subject to that statute receive the same best interests' consideration by the court as any other child in the Chapter 39 dependency system. Subsection (6)(e) enumerates the factors the court should consider when determining whether a transfer of custody meets the best interests of child. All eight factors should be considered when relevant, and no one factor should be given more weight than the others.

Read the Opinion

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§39.806(1)(c) AND LEAST RESTRICTIVE MEANS-the trial court's findings that additional services would be futile was sufficient to establish least restrictive means. Court order denying TPR reversed and case remanded for findings regarding the Manifest Best Interest factors.

R.W. v. DCF & GAL v. R.A.D. & R.W., 2017WL5041968 (Fla. 5th DCA Oct. 31, 2017) [5D17-2010, 2012, 2027, cons.]

After a hearing on a petition to terminate parental rights, the trial court concluded that the Department proved grounds for termination against both parents under section 39.806(1)(c) (continuing involvement threatens, irrespective of services) and section 39.806(1)(l) (three or more removals caused by parent), and against the mother under section 39.806(1)(j) (chronic substance abuse), of the Florida Statutes (2017). However, the court denied the TPR petition based on failure to satisfy the least restrictive means test, and adjudicated the children dependent. On appeal, the Fifth DCA found the trial court misconstrued the least restrictive means test, specifically as it applied to section 39.806(1)(c).

After recounting the trial court's factual findings about the parents' lengthy history with the Department, the prior provision of six case plans to the mother and four to the father, and the repeated findings that additional services would be futile as to these parents, the DCA held that the trial court's legal conclusion that the least restrictive

means test required the parents be given a case plan was inconsistent with its findings that there was no reasonable basis to believe the parents would improve, and was contrary to Chapter 39 and prevailing case law.

The DCA recognized that while least restrictive means ordinarily requires the provision of a reunification case plan, no case plan is required where, as here, the trial court determines that termination is proper pursuant to section 39.806(1)(c), in addition to other subsections listed in § 39.806(2), Fla. Stat. (2017). The DCA concluded that that termination in this case, without the use of a case plan, was the least restrictive means to protect the children and remanded the case for manifest best interest findings.

Practice Tip: In its opinion, the DCA essentially adopted the least restrictive means argument advanced by the GAL and concluded that where the Department (petitioner) proves grounds pursuant to 39.806(1)(c), they thereby prove that termination is the least restrictive means to protect the children from serious harm.

Read the Opinion

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§39.806(1)(c) AND FUTILITY-termination of father's parental rights order reversed where the Department did not offer evidence to establish that the provision of mental health and substance abuse services to father would be futile.

C.W. v. Department of Children and Families, 2017 WL 4844895 (Fla. 1st DCA Oct. 27, 2017)[1D17-2696]

In another recent opinion addressing section 39.806(1)(c) as grounds for terminating parental rights, the First DCA reversed the trial court's order terminating father's parental rights based on the Department's concession of error.

The trial court terminated father's parental rights based on section 39.806(1)(c); however, father was not offered any services to address his mental health or substance abuse issues, and the Department did not offer any evidence to establish that the provision of such services would be futile. No other grounds for termination were plead in the petition, nor proved at trial.

Practice Tips: To avoid unnecessary delays to permanency, any and all relevant grounds that exist in a case should be pled in a petition to terminate parental rights and proved at trial.

Read the Opinion

CONTEMPORANEOUS OBJECTIONS AND APPEAL-the trial court terminated the mother's rights to her autistic teenaged son based on medical neglect and case plan noncompliance. DCA affirmed

because the order was supported by the evidence and challenges were not preserved below.

E.S. v. Department of Children and Families, 2017WL4966896 (Fla. 4th DCA Nov. 1, 2017)[4D17-2183]

The Fourth DCA affirmed the order terminating mother's parental rights finding the record was replete with evidence to support the trial court's order and that any challenges to the admission of evidence were neither preserved for appellate review, nor supported by the record.

The Court noted its task was not to conduct a de novo review or reweigh the evidence. The trial court's thorough, well-reasoned, 55-page final judgment was supported by the record. The mother challenged the testimony of expert witnesses based on failure to review certain records in reaching their opinions. Those challenges were not preserved and, in any event, went to the weight of the evidence, not its admissibility. Similarly, the mother's claim that non-expert witnesses were allowed to give speculative expert opinions was neither preserved nor supported by the record.

Practice Tips: To raise an evidentiary error on appeal, an objection must be made at the trial when the alleged error occurred (contemporaneous objection rule). Failure to do so bars appellate review in the absence of a fundamental error that puts into question the validity of the trial itself.

Read the Opinion

IMPLIED CONSENT BY FAILURE TO APPEAR-mother's failure to appear at trial to terminate her parental rights was not due to "forces or circumstances beyond [her] control"; therefore, default by consent was proper.

C.R. v. Department of Children and Families, 225 So.3d 393 (2017)

Mother appealed the termination of her parental rights based on her failure to appear at trial, arguing that the trial court abused its discretion in entering a default consent (a/k/a/ implied consent by failure to appear) because she was unable to attend the trial due to circumstances beyond her control. The Fifth DCA disagreed, stated that mother chose to be absent, and distinguished the facts before it from those in E.A. v. Dep't of Child. & Fams., 894 So.2d 1049, 1052 (Fla. 5th DCA 2005), which was relied upon by mother.

Read the Opinion

39.521(3)(b) and 39.522(3) AND PERMANENT PLACEMENT WITH NON-OFFENDING PARENT-trial court erred by applying wrong statutory provision

resulting in permanent placement of child with non-offending father without proper findings.

K.C. v. Department of Children and Families, 227 So.3d 783 (2017)

Mother appealed the trial court's order awarding permanent custody of her child to the non-offending Father by erroneously applying section 39.521(3)(b), Florida Statutes (2015), rather than section 39.522(3), although Mother had been diligently working on case plan with a goal of reunification.

Section 39.521(3)(b) addresses the appropriate placement for a child at disposition and allows the court to place a child with a non-offending parent under certain circumstances and with various conditions. Section 39.522(3) addresses post-disposition changes of custody in cases where the issue before the court is whether a child who is placed in the custody of one parent should be reunited with the other parent and requires, inter alia, a finding that the safety, well-being, and physical, mental, and emotional health of the child would not be endangered by reunification and that reunification would be in the best interest of the child.

Here, the trial court ordered Mother to comply with a case plan instituted in 2016 with the goal of reunification. Throughout the pendency of the case plan, the trial court held review hearings and found that Mother was working diligently toward the completion of the plan. Despite Mother's progress, the trial court subsequently gave Father permanent custody and closed the case, without making a finding that reunification with Mother would either endanger the child or not be in the child's best interest pursuant to section 39.522(3) of the Florida Statutes. Accordingly, the Fifth DCA reversed and remand the matter for an evidentiary hearing.

Practice tip: Under either provision, 39.521(3)(b) or 39.522(3), the trial court must make a finding regarding the best interest of the child.

Read the Opinion

UNPLED GROUNDS AND IMPLIED CONSENT- termination of parents' parental rights pursuant to 39.806(1)(e) as to one child was improper since there was no adjudication of dependency and no case plan filed. DCA held unpled grounds were not tried by implied consent.

T.H. v. State, Department of Children and Families, 226 So.3d 915 (2017)

The Department filed a petition to terminate Mother's parental rights as to S.H. based on section 39.806(1)(b), (1)(c), and (1)(e) and based on section 39.806(1)(b) for Father. After the petition was filed, Mother gave birth to another child, T.D.H., who was sheltered and placed with his paternal grandmother. The Department filed a supplemental petition for termination of parental rights with respect to T.D.H., alleging a failure to substantially comply with the case plan under section 39.806(1)(e) for both parents. The termination of parental rights was granted as to both children.

The Mother and Father argued that the termination with respect to T.D.H. was error, as the Department did not plead a valid ground for termination. The Department and the Guardian Ad Litem conceded error, but argued that unpled grounds were tried by implied consent and established. The DCA disagreed and reversed the termination as to T.D.H. holding that the parents were not on notice that the court could terminate their parental rights as to T.D.H. based on unpled grounds.

Practice Tip: in addition to addressing the above, this opinion also provides a good factual analysis regarding abandonment pursuant to §39.806(1)(b).

Read the Opinion

DISESTABLISHINIG PATERNITY, PRIVETTE AND CHAPTER 742.18-Privette best interest inquiry applies only in contested cases where a child faces the threat of being declared illegitimate, and the legal father faces the threat of losing parental rights which he seeks to maintain. Section 742.18 of the Florida Statutes provides a mechanism by which a man may disestablish his paternity without the requirement that another putative father is willing to establish paternity.

L.G. v. Department of Children and Families, 227 So.3d 653 (2017)

L.G. was never married to the mother, but he acknowledged paternity on the child's birth certificate. During the dependency proceedings, L.G. petitioned to disestablish paternity based on newly discovered evidence-namely, a recent DNA test showing that he was not the biological father of the child.

The trial court denied the petition, ruling that it could not disestablish paternity unless another putative father was willing to "step in" and establish paternity. The trial court's ruling was based upon Department of Health and Rehabilitative Services v. Privette, 617 So.2d 305 (Fla. 1993), which held that before a blood test can be ordered to determine paternity in cases where the child is born legitimate, the trial court must find that the child's best interests will be better served by the blood test.

Upon the Department's confession of error, the Fourth DCA reversed noting that after Privette was decided, section 742.18 of the Florida Statutes was enacted, providing a mechanism by which a man may disestablish his paternity and avoid further obligation to support the child, without the requirement that another putative father must be willing to establish paternity. The DCA held that a Privette "best interests" inquiry applies only in contested cases where a child faces the threat of being declared illegitimate and the legal father also faces the threat of losing parental rights which he seeks to maintain. Neither situation applied in the instant case where the child was not born legitimate, and the legal father did not seek to maintain his parental rights.

Read the Opinion

STANDING TO CHALLENGE PATERNITY-section 742.18, Fla. Stat. (2017) does not preclude an individual from challenging a paternity determination pursuant to section 742.10(4).

In Interest of Y.R-P., --- So.3d ---- (2017)

In a pending dependency proceeding with competing paternity claims, O.R., the biological father, filed a motion to disestablish paternity for J.R.-P., the purported father who was named as father on birth certificate. The trial court conducted an evidentiary hearing on O.R.'s motion where both DCF and the GAL supported O.R., contending that it was in the child's best interest to establish O.R.'s paternity and to disestablish J.R-P.'s paternity. The trial court agreed and disestablished J.R-P.'s paternity, determined that he was not a parent or party to the dependency proceeding, and dismissed him from the dependency case.

J.R.-P. appealed and challenged O.R.'s standing. Relying upon section 742.18, of the Florida Statutes, J.R.-P. argued that a biological father lacks standing to disestablish another's paternity and that he was the only person who could seek to disestablish his paternity. The Second DCA held that although section 742.18 provides a mechanism by which J.R-P. could have sought to disestablish his own paternity if he had been so inclined, it does not preclude a child's biological father from proceeding as a challenger. Specifically, section 742.10(4) opened an avenue for O.R. to challenge paternity.

Affirming the trial court's order, the DCA concluded that in the context of a chapter 39 proceeding, the child's best interest is the appropriate standard in deciding whether a biological father has standing to challenge paternity of a child born out of wedlock as between two males who were not married to the child's mother.

Practice Tip: Florida Rule of Juvenile Procedure 8.226(a) allows the trial court to conduct proceedings under chapter 742 either as part of the chapter 39, proceeding or in a separate action under chapter 742 of the Florida Statutes.

Read the Opinion

Added Training to GuardianadLitem.org

Availble on the Florida Statewide Guardian ad Litem website now are the following new additions:

- Extended Foster Care and Related Issues

Join Guardian ad Litem on the airwaves!

GAL Executive Director Alan Abramowitz, Rep. Patricia Williams (foster mom & GAL volunteer) and Supervising Attorney Christine Meyer from Jacksonville will be the guests on WFSU's public affairs show "Perspectives," discussing our legislative agenda, the state of child welfare & how to help more children.

Tune in this Thursday, Jan 11 at 11 a.m.

Perspectives is broadcast LIVE on 88.9, WFSU-FM and wfsu.org. You can participate by calling 850-414-1234 or 800-926-8809. You can also e-mail your questions and comments to perspectives@wfsu.org.

Highlights

JUVENILE LAW CERTIFICATION - A TOOL TO IMPROVE PRACTICE

The Florida Bar Board of Governors approved the new certification area in Juvenile Law in 2014. Board certified attorneys must meet the following standards:

- Practice law for a minimum of five years preceding the application date;
- Demonstrate substantial involvement and practical experience in juvenile law;
- Demonstrate by peer review reputation for special competence in juvenile law, and character, ethics, and reputation for professionalism;
- Satisfy juvenile law continuing legal education requirements; and
- Receive a passing grade on the examination required of all applicants, unless the applicant is eligible for a strictly limited examination exemption.

All board certified lawyers are evaluated for professionalism and tested for expertise. Certification recognizes attorneys' special knowledge, skills and proficiency in various areas of law and professionalism, as well as ethics in practice. It is the Florida Bar's highest level of evaluation of the competency and experience of attorneys by the Supreme Court of Florida.

The Statewide Guardian ad Litem Program is pleased to announce the following attorneys who are now board certified in Juvenile Law. We appreciate your commitment to excellence and your continued dedication to advocate on behalf of Florida's abused, abandoned and neglected children.

Congratulations to:

Brad Bobbitt
Kathleen Clendining
Troy Farquhar
Sharlene Gianfortune
Dave Gould
Laura Klossner
Sharon Hornett
Liza Ricci
Brittany Rutan

Please join us in congratulating the winners of the ***Statewide GAL Annual Awards*** for 2017. You can read more about these Superheroes at: **Statewide Annual Awards**

Audrey Schiebler Volunteer of the Year: Christine Hoyne, Volunteer, 16th Judicial Circuit - Key West

Non-Profit of the Year: Speak Up for Kids of Palm Beach County - West Palm Beach

Leadership Award: Susan Somers, Supervising Attorney, 11th Judicial Circuit - Miami-Dade

Angela Orkin Dedication Award: Karen Orchowski, State Office

Executive Director Award: Meliza Frias, Attorney, 11th Judicial Circuit - Miami-Dade

Daniel P. Dawson Award: Natalee Hamilton, Attorney, 19th Judicial Circuit - Port St. Lucie

Community Advocate of the Year: Ben Plechaty & 5th Grade Glass, 18th Judicial Circuit - Viera

Circuit Team Award: Vince Rieger (Volunteer), Pat Smith (Volunteer), Pam Peterson (CAM), Kari Marsland-Petit (Attorney), 6th Judicial Circuit - Clearwater

Barbra Sessa Award: Janet Anderson, Attorney, 20th Judicial Circuit - Fort Myers

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