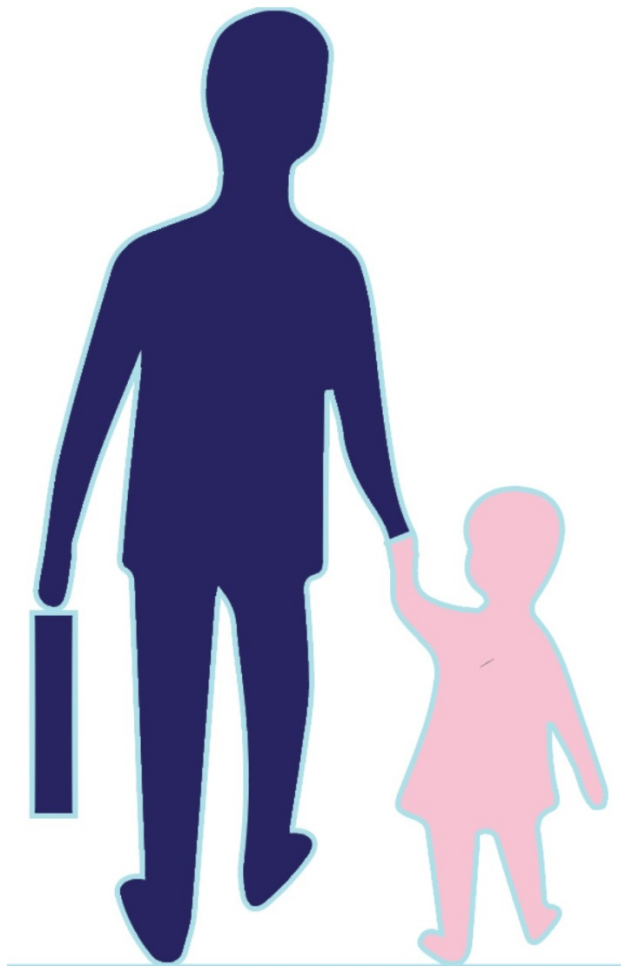


PRO BONO

APPELLATE PRACTICE GUIDE



defending best interests

WELCOME TO THE DEFENDING BEST INTERESTS PROJECT!

On behalf of everyone at the Guardian ad Litem Program, especially our Appellate Team, we welcome you to our Defending Best Interests Project, and we thank you for your selfless service on behalf of Florida's Children!

The GAL's mission is to represent Florida's abused, abandoned and neglected children by vigorously protecting their best interests in the dependency system, and you are playing a vital role in ensuring that favorable trial court rulings — essential for children's safety, health, and well-being — are upheld so the children involved can move out of the dependency system and have new beginnings.

We drafted this guide to help initiate you into law of Chapter 39 dependencies, especially as it relates to drafting appellate answer briefs in TPR (termination of parental rights) cases. We hope you find this guide to be a valuable resource that will assist you on your appellate briefs.

There is no higher calling than helping a child, and we are honored you chose to donate your valuable time to help us fulfill our mission and protect and serve as many children as possible.

Special thanks to Dave Krupski, GAL appellate attorney, for his hard work on this practice guide — and for his artwork for the cover.

Thank you again for being part of Defending Best Interests and playing a crucial role in helping Florida's children!

Sincerely,



Alan Abramowitz
Executive Director

Statewide Guardian ad Litem Program



Thomasina Moore
Director of Appeals

Director, Defending Best Interests Project

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TERMINATION OF PARENTAL RIGHTS APPEALS, GENERALLY

The overwhelming majority of DBI Project appeals involve “TPRs,” or termination of a mother or father’s parental rights to his or her children. TPRs are governed by Section 39.806(1), Florida Statutes.

The most-common path resulting in a TPR is as follows:

- (1) The Department becomes involved with a family, due to an acute event or ongoing issues (such as drug abuse, child neglect, etc.) and the Department files a shelter petition, which places the child in the care of the Department.
- (2) The Department then petitions the court for an order adjudicating the child to be dependent. Except in the most serious of cases (egregious abuse of a child, for example), the parents are concurrently given court-ordered case plans, with the goal being reunification with the child(ren). Typical case plan tasks include proving stable income, adequate housing, drug testing, psychological counseling, and parenting classes. (Case plans are designed to address the issues causing the dependency in the first place).
- (3) If, after 12 months have passed, the parent has not substantially complied with the case plan, or less than 12 months have passed and the parent has materially breached the case plan, the Department or GAL can petition the court to terminate the parents’ rights.

In order for the dependency court to terminate a parent’s rights to his or her children, the Department must prove three elements by “clear and convincing” evidence:

- (1) Presence of at least one of the statutory grounds for termination enumerated in Section 39.806(1);
- (2) That TPR is in the “manifest best interests” of the child, pursuant to the eleven statutory factors listed in Section 39.810, and;

- (3) TPR is the “least restrictive means” available to protect the best interests of the children (this third element is the due process / constitutional element of a TPR).

Practice Tip: Only one valid ground for termination is needed in order to uphold a termination of parental rights. The dependency court will usually grant a TPR and find multiple grounds were proven, and frequently, a parent will not challenge each and every ground in his or her initial brief. This alone is grounds for the trial court’s ruling to be upheld. *See, e.g., R.S. v. Dep’t of Children & Fams.*, 872 So. 2d 412, 413 (Fla. 4th DCA 2004) (outcome not impacted by reversal on one ground when another ground supports termination); *accord*, Fla. R. Juv. P. 8.525(i)(1) (“If the court finds one of the grounds for termination of parental rights have been established by clear and convincing evidence, the court shall enter a final judgment terminating parental rights.”).

Waiver (Part I): Along the same lines, if a parent does not raise an argument at the trial level, he or she cannot assert that argument on appeal. *See, e.g., Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) (noting a claim not raised in the trial court will not be considered on appeal); *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (holding the appellate court will not consider issues not presented to the trial judge on appeal from final judgment on the merits).

“In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.” *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)

Waiver (Part II): In addition, if an appellant parent fails to challenge any aspect of the TPR order on appeal, he has conceded that issue for purposes of the appeal. *See, e.g., Coolen v. State*, 696 So. 2d 738, 748 n. 2 (Fla. 1997) (noting that the failure to fully brief and argue issues constitutes a waiver of those claims).

THE ROLE OF A TRIAL JUDGE IN TPR CASES, THE NATURE OF TPR APPEALS, AND STANDARDS OF REVIEW

Chapter 39 dependency cases differ from traditional civil or criminal law cases in one important aspect: the judge assumes the role of both the decider of legal issues, as well as the fact finder. It is this second role — as fact finder — that is at issue in the overwhelming majority of TPR appeals.

When children are removed from their parents' care, custody and control, the children are placed under the jurisdiction of the circuit court pursuant to section 39.013, Florida Statutes. The state is exercising its police power to protect its children under the common law doctrine of *parens patriae* codified by the legislature in Chapter 39, Florida Statutes. *In Interest of Ivey*, 319 So. 2d 53, 58 (Fla. 1st DCA 1975).

When dependency court jurisdiction attaches the court is *in loco parentis* and “[i]t is the dependency court which is charged under Florida law with protecting the rights and interests of dependent children, section 39.001, Fla. Stat. (2003), and it does so through various devices, including periodic judicial reviews and appointments of guardians ad litem and attorneys ad litem.” *Buckner v. Family Services of Cent. Florida, Inc.*, 876 So. 2d 1285, 1287 (Fla. 5th DCA 2004).

Florida's appellate courts allow a great deal of deference to the factual findings of a trial judge. In order for a parent to successfully challenge the factual findings of the trial judge, he must convince the Court that the findings were not supported by any “competent, substantial evidence.” *L.F. v. Dep't of Children & Fams.*, 888 So. 2d 147 (Fla. 5th DCA 2004). In termination of parental rights cases where the judge's factual findings are at issue, “the standard of review is highly deferential.” *N.L. v. Dep't of Children & Fams.*, 843 So. 2d 996, 999 (Fla. 1st DCA 2003).

Simply put, appellate courts are not in the business of reweighing the evidence adduced at trial, and second-guessing the trial judge's findings, as the trial judge — who actually sees and hears the witnesses testify — is in the best position to make determinations of credibility and the weight that should be afforded to each witness's testimony.

Well over 90% of parents' challenges to TPRs come in the form of these “substantial competent evidence” challenges. One great Florida

Supreme Court case to cite liberally in your answer briefs in these cases is *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 961 (Fla. 1995):

The appellate court's task on review is not to conduct a *de novo* proceeding, reweigh the testimony and evidence given at the trial court, or substitute its own judgment for that of the trier of fact. Instead, it will uphold the trial court's finding if upon the pleadings and evidence before the trial court, there is any theory or principle of law which would support the trial court's judgment in favor of terminating parental rights.

See also T.M. v. Dep't of Children & Fams., 971 So. 2d 274 (Fla. 4th DCA 2008):

As the opinion in *E.A.W.* makes clear, we have no authority to reweigh the Mother's testimony and find it credible. The fact is that the mother's attempted explanation for the serious injury to her baby while in her care was expressly rejected by the trier of fact.

ANATOMY OF A TPR ANSWER BRIEF

The elements of any answer brief in a Chapter 39 case are regulated by both the Florida Rules of Appellate Procedure and each DCA's administrative orders regarding dependency cases. The following is a high-level synopsis of each element, along with some practice tips for each section.

(Note: our paralegal will assist you by taking care of the ministerial sections of the answer brief, such as the table of contents, table of citations, and certificate of service pages . . . this summary deals only with the substantive aspects of an answer brief):

1. ***Statement of Facts / Statement of the Case***: This section is our chance to highlight the facts establishing grounds for TPR, and — especially — the facts surrounding the child(ren) at issue, and how their best interests are served by terminating the parent's rights.

Aim to draft this section as straightforward as possible, highlighting the facts that you will use in the argument section to support your case. Argument is strictly prohibited in the Statement of Facts; so too is characterization of testimony (e.g., “Dr. Jones’ testimony that the father broke his infant son’s leg constitutes substantial competent evidence of abuse.”)

Practice Tips: [In] addition to avoiding any argumentative language in the Statement of Facts, try to divide up the section into 1-2 page themes, to make your story as easy to follow/read as possible. Don't just recite the timeline of the events, and don't just copy the facts as recited by the trial judge. The TPR order will likely provide you a great roadmap of the pertinent facts in the case, but you cannot just cite the TPR order in support of your stated facts. The judge's findings of facts enjoy “...the presumption of correctness and will not be overturned on appeal unless clearly erroneous or lacking in evidentiary support.” *J.Y. v. Dep't of Children & Fams.*, 10 So. 3d 168 (Fla. 5th DCA 2009). However, the TPR order is the judge's *characterization* of the facts, not proof that some fact was in fact established at trial. Regarding witness testimony, the best practice is to cite to the trial testimony and quote what the witness actually said. Regarding documentary evidence admitted at trial, cite the document

itself.

2. **Summary of the Argument:** The most important word in this section's title is "Summary." Combine your best facts with your best legal argument for each issue, and succinctly state them in the summary section. An effective summary convinces an appellate judge that we win the case . . . he or she should only have to read the actual argument section to confirm his decision. And keep this section brief; for most TPRs based on "substantial competent evidence" challenges, the summary should be a page or less, total.

3. **The Argument:** The "meat" of the answer brief. A few practice tips:
 - Standard of Review: if the case is a typical "substantial competent evidence" challenge (a challenge to the fact findings of the trial judge), include the *E.A.W.* case and its excellent language regarding the role of the appellate courts in TPR cases);

 - If at all possible, mirror the organization of issues used by the appellant. (DCA judges tell us all the time it is frustrating to them when the answer brief does not track the initial brief);

 - Avoid judgmental terms ("clearly," "obviously," etc); supply the Court the pertinent legal analysis to follow, and add the most pertinent facts that demonstrate we win.

 - Substantive footnotes: Plain and simple, do not use them. Far too many appellate judges abhor their use. If a point is important enough to raise in the brief, it is important enough to be included in the body of your argument.

4. **The Conclusion:** This section is not "Summary of Argument, Part II." Just say something along the lines of "The trial court acted expressly in the best interests of the children when it terminated the mother's parental rights. Therefore, this Court should uphold the TPR order in its entirety." As with substantive footnotes, far too many appellate judges have strong feelings against the use of conclusions that are anything more than conclusory.

TERMINATION OF PARENTAL RIGHTS: THE LAW

Every legitimate TPR requires three distinct elements:

- (1) At least one statutory ground for TPR, listed in Section 39.806(1);
- (2) TPR is in the child's manifest best interests, per the 11 statutory factors of Section 39.810; and
- (3) TPR is the least restrictive means available (the procedural due process / constitutional prong of a TPR).

As stated throughout this manual, the vast majority of parents' appeals regarding judges' decisions to terminate their parental rights involve "competent substantial evidence" challenges to statutory grounds (the first element). By contrast, challenges to a trial court's "manifest best interests" holdings or its "least restrictive means" ruling have become rarer and rarer in the past two years, for at least two reasons:

First, in late 2015, the Florida Supreme Court handed down the seminal *S.M. v. Dep't of Children & Fams.* decision, which substantially curtailed least restrictive means challenges, by expressly holding that the "fundamental right protected" by the least restrictive means test "is the right to *parent*, *i.e.*, to have the care and custody of a child and to bring the child up within the bonds of family, not merely to be an occasional presence in the life of the child." *S.M.*, 202 So. 3d 769, 780 (Fla. 2015). After *S.M.*, least restrictive means challenges have become less and less frequent.

The other reason for appellants' main focus on the "grounds" element in appeals is that "manifest best interests" challenges are just really difficult to make, for the simple reason that in virtually every one of these cases, it truly is in the child's best interests for the parent's rights to be terminated.

Thus, in this section, we will mainly focus on the law regarding grounds for TPR, as well as common arguments made by parents' attorneys, and the best caselaw out there to cite regarding each argument.

STATUTORY GROUNDS FOR TPR **UNDER SECTION 39.806(1)**

In order for a TPR to be valid, the Department must prove, by clear and convincing evidence, that at least one statutory ground exists to terminate a parent's rights. As listed in Section 39.806(1), those grounds are:

-Consent Surrender: Section 39.806(1)(a)

-Abandonment: Section 39.806(1)(b)

-Continuing Involvement: Section 39.806(1)(c)

-Incarceration: Section 39.806(1)(d)

-Failure to Substantially Comply with or Material Breach of a Case Plan: Section 39.806(1)(e)

-Egregious Abuse: Section 39.806(1)(f)

There are further statutory grounds for TPR, such as murder (Section 39.806(1)(h)) or the child being conceived by sexual battery (Section 39.806(1)(m)), but as the overwhelming majority of all TPR appeals involve challenges to one of the six statutory grounds listed above, those are the six we will focus upon.

Practice Tip: As stated above, only one valid ground for termination is needed in order to uphold a termination of parental rights. The dependency court will usually grant a TPR and find multiple grounds were proven, and frequently, a parent will not challenge each and every ground in his or her initial brief. This alone constitutes a basis for the trial court's ruling to be upheld. *See, e.g., R.S. v. Dep't of Children & Fams.*, 872 So. 2d 412, 413 (Fla. 4th DCA 2004) (outcome not impacted by reversal on one ground when another ground supports termination); *accord*, Fla. R. Juv. P. 8.525(i)(1) ("If the court finds one of the grounds for termination of parental rights have been established by clear and convincing evidence, the court shall enter a final judgment terminating parental rights.")

VOLUNTARY SURRENDER: SECTION 39.806(1)(A)

-Statutory Text: *[T]he parent or parents have voluntarily executed a written surrender of the child and consented to the entry of an order giving custody of the child to the department for subsequent adoption and the department is willing to accept custody of the child.*

When a parent voluntarily surrenders his or her parental rights, it is rare for the parent to then appeal on the basis that the surrender was somehow invalid. It does occur, though, from time to time.

In order for an appellate court to invalidate the consent surrender, the parent must prove that the surrender and consent was obtained by fraud or under duress. *See* § 39.806(1)(a)(2) (noting “the surrender and consent may be withdrawn after acceptance by the Department only after a finding by the court that the surrender and consent were obtained by fraud or duress”). Basic contract law regarding fraud and duress applies in this context.

Duress is “a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do and act or make a contract not of his own volition.” *T.G. v. Dep’t of Children & Fams.*, 9 So.3d 48 (Fla. 4th DCA 2009) (citing *Herald v. Hardin*, 95 Fla. 889, 116 So. 863, 864 (1928)). Thus, in order to prove duress, “it must be shown (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side.” *City of Miami v. Kory*, 394 So.2d 494 (Fla. 3d DCA 1981). Remember, in TPR cases the burden is on the parent to demonstrate duress and the court’s order will be upheld if it is supported by competent and substantial evidence. *A.W. v. Dep’t of Children & Fams.*, 204 So. 3d 588, 589 (Fla. 4th DCA 2016).

Practice Tip: even in situations of consent surrender, the dependency court must still make the required findings, pursuant to Section 39.810, that TPR is in the child’s manifest best interests.

ABANDONMENT: SECTION 39.806(1)(B)

-Statutory Text: *“Abandoned” or “abandonment” means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver, while being able, has made no significant contribution to the child’s care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both. For purposes of this subsection, “establish or maintain a substantial and positive relationship” includes, but is not limited to, frequent and regular contact with the child through frequent and regular visitation or frequent and regular communication to or with the child, and the exercise of parental rights and responsibilities. Marginal efforts and incidental or token visits or communications are not sufficient to establish or maintain a substantial and positive relationship with a child. A man’s acknowledgement of paternity of the child does not limit the period of time considered in determining whether the child was abandoned. The incarceration, repeated incarceration, or extended incarceration of a parent, legal custodian, or caregiver responsible for a child’s welfare may support a finding of abandonment.*

§ 39.01, Florida Statutes.

Unlike consent surrender, abandonment is one of the statutory grounds that generates the most parent appeals. The key inquiry the appellate court will make — as borne out by the applicable caselaw — is whether the parent has made *real* effort to be an actual parent to his or her child . . . given his or her particular situation. Some case examples to illustrate this point:

- ***Court orders “no contact”:*** Mother's conduct in not contacting children did not constitute abandonment where court had ordered mother to have no contact with children and, prior to order, mother had visited children as often as she was allowed to and had attempted to give children gifts. *Williams v. Dep’t of Health & Rehab.Servs.*, 589 So. 2d 359 (Fla. 5th DCA 1991);
- ***No effort to communicate:*** Child abandoned who had been left on porch of husband's relatives and the mother made no effort to communicate with child for one and one-half years. *In re R.D.D.*, 518 So. 2d 412 (Fla. 2d DCA 1988);

- ***Diligent search and publication:*** If the identity or location of a parent is unknown and a petition for termination of parental rights is filed, the court shall conduct an inquiry to determine the identity or location of the parent(s). If the inquiry fails to identify any person as a parent or prospective parent, the court shall so find and may proceed without further notice. If the inquiry identifies any person as a parent or prospective parent, the court shall require notice of the hearing to be provided to that person. However, if such parent or prospective parent's, location is unknown, the court shall direct the petitioner to conduct a diligent search for that person before scheduling an adjudicatory hearing regarding the petition for termination of parental rights to the child. § 39.803(1)-(5);
- The diligent search must include, at a minimum, inquiries of all known relatives of the parent or prospective parent, inquiries of all offices of program areas of the department likely to have information about the parent or prospective parent, inquiries of other state and federal agencies likely to have information about the parent or prospective parent, inquiries of appropriate utility and postal providers, and inquiries of appropriate law enforcement agencies. § 39.803(6);
- If the inquiry and diligent search identifies a prospective parent, that person must be given the opportunity to become a party to the proceedings by completing a sworn affidavit of parenthood and filing it with the court or the department. § 39.803(8);
- If, however, the location of the parent or prospective parent cannot be ascertained through the process of the diligent search for the purpose of service of the petition, the petitioner must file a sworn affidavit attesting to same, and seek to terminate parental rights by publication. *See Dep't of Children & Fams., 953 So.2d 659 (Fla. 5th DCA 2007)*. If a party to a proceeding for termination of parental rights is known but his or her whereabouts are not, § 39.803(5) requires a court to direct the petitioner to conduct a diligent search to locate the party, unless it would be in the best interest of the child to proceed without actual notice. If a party entitled to personal service cannot be so served, § 39.801(3)(b) thereafter compels notice to be given as required by the rules of civil procedure. Accordingly, when personal service cannot be made on an affected parent, service by publication

may be made on any known party for proceedings to terminate parental rights. *Id.* at 661.

- ***The Effect of Incarceration on the Abandonment Analysis:*** Incarceration may be evidence of abandonment § 39.01(1). However, alone, it is usually insufficient evidence to terminate parental rights, absent additional factors. Other such additional factors for abandonment include: not visiting the child or sending communication, interfering with the child's placement, and not participating in services if offered.

In re J.B., 923 So. 2d 1201 (Fla. 2d DCA 2006): Department failed to provide clear and convincing evidence that incarcerated father abandoned child, as necessary to support termination of parental rights. Before his incarceration, father actively sought custody of child, bought supplies for the child's care and visited him on a weekly basis. The father attempted to maintain contact with the child after imprisonment, even though the child's young age made it difficult for him to establish any kind of bond with him, and father had nearly completed his term of incarceration.

- ***Multiple/Habitual Offenders:*** the fact a parent is a multiple/habitual offender can support a finding of willful abandonment of a child under Section 39.806(1)(b). *In re E.F.*, 639 So. 2d 639 (Fla. 2d DCA 1994).
- ***The Heinous Nature of the Crime:*** the more serious/intentional the crime, the more likely the court will view the crime as a parent's intentional choice to place the parent/child relationship at risk, and support a finding of abandonment. *Turner v. Adoption of Turner*, 352 So 2d 957 (1st DCA 1997).
- ***Length of Incarceration is a Factor:*** *M.S. v. D.C., Jr.*, 763 So. 2d 1051 (Fla. 4th DCA 1999) Father's murder of children's "mother figure" in their home, which resulted in father's incarceration well past children's age of majority, demonstrated egregious abuse and abandonment such that continuation of father's parental relationship with children would be harmful and against their best interests.

Practice Tips: To support the trial court’s ruling that a parent abandoned his or her child, it is important to highlight facts that demonstrate the parent’s involvement in the child’s life was “token” at best, and not at all substantive. Regarding incarceration, it is beneficial to highlight the intentional nature of the crime he or she committed, as well as the fact the parent was aware that if caught, he or she would go to prison and abandon the child.

CONTINUING INVOLVEMENT: SECTION 39.806 (1)(C)

-Statutory Text: *When 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. Provision of services may be evidenced by proof that services were provided through a previous plan or offered as a case plan from a child welfare agency.*

Per Section 39.806(1)(c), this ground for TPR has two main elements:

- (1) continuation of the parent/child relationship threatens the child, and
- (2) further services provided by the Department would be futile.

Almost all of the appellate challenges to a Section 39.806(1)(c) TPR center around the “futility” requirement. Parents routinely argue that no evidence was adduced at trial regarding this requirement. Irrespective of the provision of services means there is no reasonable basis to believe the parent would improve. The court must find any provision of services would be futile or that the child would be threatened with harm despite any services provided to the parent. *See M.H. v. Dep’t of Children & Fams.*, 866 So. 2d 200 (Fla.1st DCA 2004).

Practice Tip: the best evidence of futility is usually the trial testimony of the Department’s expert psychiatrist, combined with the sheer number of services that have already been supplied to the parent, usually over the course of years. (If the parent hasn’t changed or improved the first five times he was given services, why would he suddenly improve on the sixth time?)

Prospective Abuse/Neglect: The courts are not going to wait until the child is actually abused or neglected, if that abuse/neglect is deemed likely. Rather, prospective abuse or neglect is a valid ground for termination where the evidence shows (1) the parent’s past conduct or current mental health condition makes the risk of future harm to the child likely, and (2) there is no reasonable basis to conclude that past behaviors will improve. *D.B. v. Dep’t of Children & Fams.*, 87 So. 3d 1279, 1282 (Fla. 4th DCA 2012).

INCARCERATION: SECTION 39.806(1)(D)

The two main subsections of Section 39.806(1)(d) that generate the most appeals are subsections (1) and (3).

A. Subsection 1: Incarceration constitutes “significant portion” of a child’s minority:

Section 39.806(1)(d)(1) provides for termination of parental rights when that incarceration will constitute a “significant portion” of the child’s minority. *See* § 39.806(1)(d)(1), Fla. Stat. (2016). Importantly, “when determining whether the period of time is significant, the court shall consider the child’s age and the child’s need for a permanent and stable home.” *Id.*

Amended in 2012, the newly-written Section 39.806(1)(d)(1) does not focus solely on a quantitative analysis (*i.e.*, “‘x percent’ of a child’s minority constitutes ‘substantial’ while ‘y percent’ does not”). After this statutory amendment, courts must not only examine the length of time a parent is in prison, but also the effect that sentence has upon a child, and his or her need for permanency and a stable home environment. As the Fourth District explained this year in *J.S.*, 183 So. 3d at 1183:

Incarceration must be more than a quantitative analysis. Thus, the court must look both at the length of the incarceration as well as its effect on the child's need for permanency. In other words, the statute requires both a quantitative and qualitative dimension to the inquiry.

The *J.S.* Court found in favor of termination – that the father’s incarceration constituted a “significant portion” of the child’s minority and would negatively affect the child’s need for permanency – because of the following factors: (1) the father would spend 7 total years of the child’s total minority incarcerated; (2) the only home the child had ever known was with his grandmother and half-sister; (3) the child had no relationship with his father; and (4) the father wrote the child one letter six months prior to the adjudicatory hearing. *See Id.* at 1183-84. *See also B.K. v. Dep’t of Children & Fams.*, 166 So. 3d 866, 874-75 (Fla. 4th DCA 2015) (ruling that the “length of the child’s current placement, her young age, and the fact that B.K. could not take custody of S.C. for several years at a minimum, would

weigh in favor of termination given the actual effect of incarceration on the parent-child relationship”).

Practice Tips: when arguing to uphold the court’s ruling finding grounds for TPR under Section 39.806(1)(d), it is important to not only discuss the sheer amount of time throughout the child’s minority the parent will have spent in prison, but also — and primarily — the effect the imprisonment will have on the child. To this end, courts are more likely to view the imprisonment as fitting within the meaning of subsection (d)(1) when the child is young, and when the parent makes little to no effort to maintain the relationship while he or she is in prison.

B. Subsection (d)(3): Continuing the relationship is harmful to the child.

For a court to terminate parental rights based on incarceration under Section 39.806(1)(d)(3), the Department must establish “by clear and convincing evidence that continuing the parental relationship . . . would be harmful to the child and, for this reason, that termination of the parental rights of the incarcerated parent is in the best interests of the child.” § 39.806(1)(d)(1), Fla. Stat. (2016).

In conducting this analysis, courts “shall consider the following factors”:

- (a) The age of the child.
- (b) The relationship between the child and the parent.
- (c) The nature of the parent’s current and past provision for the child’s developmental, cognitive, psychological, and physical needs.
- (d) The parent’s history of criminal behavior, which may include the frequency of incarceration and the unavailability of the parent to the child due to incarceration.
- (e) Any other factor the court deems relevant.

Id.

Evidence that the parent has actually neglected or harmed the child is not necessary to terminate parental rights pursuant to Section 39.806(1)(d)(3). In *Dep't of Children & Fams. v. J.S.*, 183 So. 3d 1177 (Fla. 4th DCA 2016), the father argued that “despite his incarceration, no evidence existed that he had neglected or harmed the child, or would be a danger to the child” upon reunification. *Id.* at 1180.

The Fourth District flatly rebuked this “no evidence” argument, in holding the Department met its burden:

As the Department argued, the only home which the child has ever known is with his grandmother and half-sister, whom the grandmother already has adopted. The failure to terminate the father's parental rights would cause the child to sit in limbo for the next four years, during which the child may realize that he may not be staying in his home if the father, with whom he has no relationship, comes back and takes him away. Terminating the father's parental rights allows the child to be adopted by his grandmother and have permanency.

Id. at 1183-84.

CASE PLAN NONCOMPLIANCE: SECTION 39.806(1)(E)

A. The Statute.

One of the most-common grounds found to establish TPR in dependency cases is a parent's noncompliance with his or her case plan. Per Section 39.806(1)(e), termination of parental rights is proper when:

- (1) The parent fails to substantially comply with the case plan for a period of 12 continuous months after an adjudication of the child as a dependent child, or the child's placement into shelter care, whichever occurs first. Section 39.806(1)(e)(1);
- (2) The parent materially breaches the case plan (regardless of how long her or she has been subject to the case plan). Section 39.806(1)(e)(2); or
- (3) The parent has not been in substantial compliance with the case plan for at least 12 of the past 22 months. Section 39.806(1)(e)(3).

Practice Tip: The vast majority of parents' challenges to a TPR based upon case plan noncompliance are "substantial competent evidence challenges"; in other words, they are non-legal in nature, and simply ask the Court to perform an impermissible re-weighing of the evidence adduced at trial. Cite to the *E.A.W.* decision, and then go through all the services the Department offered the parent, in addition to all the ways the parent was not in substantial compliance with his or her case plan.

B. Case Examples.

- *In re A.D.C.*, 854 So. 2d 720 (Fla. 2d DCA 2003): In proceeding to terminate father's parental rights, inadequate evidence existed to support trial court's finding that the father failed to substantially comply with the case plan. The department could not say whether father had ever been given copy of the case plan, and it had made no effort to contact father while he was incarcerated;

- *In the Interest of D.R.*, 812 So. 2d 447 (Fla. 2d DCA 2002) Proper to terminate father's parental rights when, although incarcerated at time of hearing, he failed to comply with terms of case plan by committing additional crimes and violating probation.
- *In re D.N.O.*, 820 So. 2d 1064 (Fla. 2d DCA 2002) A court may terminate parental rights when the parent only begins to comply with the case plan just before the termination hearing.
- *P.O. v. Dep't of Children & Fams.*, 840 So. 2d 360 (Fla. 4th DCA 2003) Record supported finding that mother failed to substantially comply with her case plan, and thus termination of her parental rights was warranted, even though the department failed to provide any real services to mother; the crux of mother's case plan was the resolution of her drug problem, yet, over the course of her case plan, mother persisted in her drug usage and evidenced resistance to treatment.

EGREGIOUS CONDUCT: SECTION 39.806(1)(F)

A. The Standard:

For a court to terminate parental rights under Section 39.806(1)(f), the Department must establish he or she engaged in “egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct that threatens the life, safety, or physical, mental, or emotional health of the child.” § 39.806(1)(f)(1), Fla. Stat. (2016).

Importantly, “egregious conduct may include an act or omission that occurred only once but was of such intensity, magnitude, or severity as to endanger the life of the child”). *Id.*

B. Actions or Inactions Constituting Egregious Conduct (case examples):

- ❖ ***Failure to seek prompt medical care: J.T. v. Dep’t of Children & Fams.***, 908 So. 2d 568, 571 (Fla. 2d DCA 2005) (holding the mother’s failure to obtain adequate medical care primarily because she did not want to alert the Department was egregious abuse endangering the child); ***T.M. v. Dep’t of Children & Fams.***, 971 So. 2d 274 (Fla. 4th DCA 2008) (recognizing the prospect of serious injury if the child was returned, because of a number of factors, including that the mother did not take the child to the hospital for over 24 hours after the incident caused a broken femur); ***T.L.***, 990 So. 2d at 1269 (affirming findings of egregious abuse under Section 39.806(1)(f) where severe injuries occurred 24-48 hours prior to the child being taken to the emergency room, and injuries would have been noticed by a layperson).
- ❖ ***Failure to administer medications for known illnesses: C.S. v. Dep’t of Children & Fams.***, 178 So. 3d 937 (Fla. 4th DCA 2015) (holding a father’s *inaction* — *i.e.*, failure to provide necessary medication to his daughter to prevent serious disease — constituted egregious abuse under Section 39.806(1)(f)).

- ❖ ***Broken bones where the only medically-plausible explanation is abuse: K.A. v. Dep't of Children & Fams.***, 880 So. 2d 705, 708 (Fla. 2d DCA 2004) (finding egregious conduct based upon the existence of a “spiral” leg fracture, among other injuries).

C. **Practice Points:**

- ❖ ***No “nexus” requirement regarding abuse to one child and prospective harm to that child’s sibling:*** Prior to the amendment of the statute in July 2014, proof of nexus between the egregious conduct toward the child and the potential harm to the child’s sibling was required. This is no longer a statutory requirement (although the Second DCA has questioned the constitutionality of the amendment and cautions the prospective application of the statute, especially in cases where the department seeks termination of a parent's right to a sibling without proof of a nexus). *See In re B.F. v. Dep't of Children & Fams.*, 2016 WL 166669 (Fla. 2d DCA 2016).
- ❖ ***If egregious abuse is proven, TPR is automatically the “least restrictive means” available:*** In egregious abuse cases, LRM does not require a parent be given a case plan. Termination is the LRM because only an elimination of rights can adequately protect the child from the harm that the parent demonstrated. *In the Interest of T.M.*, 641 So. 2d 410 (Fla. 1994).

MANIFEST BEST INTERESTS

The second prong of a valid TPR is the trial court must make specific findings of fact regarding the eleven statutory “manifest best interests” factors listed in Section 39.810. These factors are all used by the trial court to determine whether termination of parental rights is in the best interests of the children. This prong is one where the GAL often has the most important voice on these appeals, as it is our mission to represent the best interests of children.

A. The Statute:

The eleven MBI factors of Section 39.810 — which are meant to be non-exhaustive — are as follows:

- (1) Any suitable permanent custody arrangement with a relative of the child. However, the availability of a nonadoptive placement with a relative may not receive greater consideration than any other factor weighing on the manifest best interest of the child and may not be considered as a factor weighing against termination of parental rights. If a child has been in a stable or preadoptive placement for not less than 6 months, the availability of a different placement, including a placement with a relative, may not be considered as a ground to deny the termination of parental rights.
(emphasis added).
- (2) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child.
- (3) The capacity of the parent or parents to care for the child to the extent that the child’s safety, well-being, and physical, mental, and emotional health will not be endangered upon the child’s return home.
- (4) The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.

(5) The love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.

(6) The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.

(7) The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.

(8) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(9) The depth of the relationship existing between the child and the present custodian.

(10) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(11) The recommendations for the child provided by the child's guardian ad litem or legal representative.

Practice Tips:

- ***No one factor is greater than any other:*** there are no “super factors” when it comes to the court’s MBI analysis. *See, e.g., Guardian ad Litem Program v. T.R.*, 987 So. 2d 1269, 1271 (Fla. 1st DCA 2008) (holding that any one of the eleven manifest best interest factors “may not receive greater consideration than any other factor weighing on the manifest best interest of the child”).

- ***The overall best interests of the child is what governs the inquiry:*** a court must review the totality of the factors in making its MBI determination. See, e.g., *V. W. v. Dep't of Children & Fams.*, 863 So. 2d 480, 482-83 (Fla. 2d DCA 2004) (noting that a trial court is not required to give each MBI factor a certain weight, but to look at all relevant factors, including factors that may not be listed in the statute).
- ***MBI challenges are very hard for parents to argue on appeal:*** For the simple reason that in these cases, it is almost always truly in the child's best interest for the parent's rights to be terminated, MBI challenges are almost never successful. So long as the judge made detailed and written findings regarding the MBI factors, and so long as there is some factual basis for those findings, the appellate court will uphold the ruling. The most effective way to draft an answer brief on MBI is to simply go through the factors, and match up record facts with each of the statutory factors, to demonstrate to the Court that the trial court got it right.

LEAST RESTRICTIVE MEANS

The least restrictive means prong of the TPR test “is tied directly to the due process rights that must be afforded to a parent before his or her parental rights are terminated and is intended to protect both the rights of both the parent and the child.” *S.M. v. Dep’t of Children & Fams.*, 202 So. 3d 769, 778 (Fla. 2016).

In this section, we explain (1) the nature of the least restrictive means test, (2) how LRM is established/proven in TPR cases, and (3) common arguments asserted by parents in LRM appeals:

A. The Nature of the Right.

- Parents possess a *fundamental liberty interest* in their relationship with their children. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).
- Although parents have the God-given right to the care, custody and companionship of their children, the right is not absolute. Rather, it is subject to the overriding principle that it is the ultimate welfare or best interests of the children, which must prevail. *In re Camm*, 294 So. 2d 318 (Fla. 1974).
- The nature of parental rights include *obligations* as well as rights: parents have a fundamental constitutional right to be a parent. “Being a parent requires *parental obligations* to care for the child, specifically to ensure the child’s life, safety, well-being, and physical, mental, and emotional health. *See* § 39.806(c), Fla. Stat. (2016).” *S.M. v. Dep’t of Children & Fams.*, 202 So. 3d 769, 782 (Fla. 2016).
- The “right” of a parent to a bond with the child is important, but ultimately the health, welfare, and safety of the child must be paramount. Being a parent requires parental obligations to care for the child, specifically to ensure the child’s life, safety, well-being, and physical, mental, and emotional health. *S.M.*, 202 So. 3d at 782.

- It is error to prioritize the parents’ rights over the best interests of the child and delay permanency. *A.A.*, 171 So. 3d at 77
- ***Putting it all together:*** “Parents have a fundamental liberty interest in being a parent to their children.” *S.M.*, 202 So. 3d at 778 (emphasis added). In other words, “the focus of the least restrictive means prong is whether the parent has the ability to be a parent to the child, with all the responsibilities that it entails, and not merely to be an occasional presence in the life of the child.” *Id.* at 772 (emphasis added).

Practice Tip: the above passage from *S.M.* is the most-important sentence now regarding least restrictive means analysis in Florida TPR law, as we now discuss:

B. Establishing LRM has been satisfied in TPR cases.

In this section, we discuss LRM principles and caselaw, as applied to specific statutory grounds for termination of parental rights:

- ***Consent surrender (Section 39.806(1)(a)):*** By entering a consent through a surrender of parental rights, a parent is expressly agreeing that TPR is the least restrictive means of protecting the child, and once the consent is valid, the parent cannot later challenge LRM upon appeal. *In re G.M.*, 36 So. 3d 869 (Fla. 2d DCA 2010);
- ***When a case plan has been provided to the parent, and the court later finds grounds exist for TPR (Section 39.806(1), (b), (c), (d), and (e)):*** to satisfy the least restrictive means prong, the Department must ordinarily prove that before it files a petition to terminate the parent’s rights, the Department made “a good faith effort to rehabilitate the parent and reunite the family. *Padgett v. Dep’t of Health & Rehab. Servs.*, 577 So. 2d 565, 571 (Fla. 1991).

In other words, where a case plan is given, the only proper analysis by the court is whether the parents received a constitutionally adequate opportunity to substantially comply with the plan. *In re Z.C.*, 88 So. 3d 977, 993 (Fla. 2d DCA 2012) (Altenbernd, J., concurring).

When a parent has had ample opportunity to comply, “belated attempts to become a good [parent] amount to too little too late in terms of the least restrictive means test.” *J.C. v. K.K.*, 64 So. 3d 157, 163-64 (Fla. 4th DCA 2011).

- ***Egregious Abuse Cases (Section 39.806(1)(f))***: In egregious abuse cases, LRM does not require a parent be given a case plan. Termination *is* the LRM because only an elimination of rights can adequately protect the child from the harm that the parent demonstrated. *In the Interest of T.M.*, 641 So. 2d 410 (Fla. 1994).

C. Common LRM arguments by parents . . . and how to defeat them.

- ***“The court erred by not considering the bond between the parent and the child.”***: The bond between a parent and child is not properly part of the LRM analysis. *S.M. v. Dep’t of Children & Fams.*, 202 So. 3d at 772;
- ***“The court erred by not considering less restrictive means to achieve permanency through other options, such as a permanent guardianship.”***: “The least restrictive means prong does not require the trial court to consider a permanent guardianship, instead of adoption, after the grounds for termination have been established by clear and convincing evidence and reunification would not be in the manifest best interests of the child.” *S.M.*, 202 So. 3d at 772;
- ***“The court erred by not considering all other available alternatives short of TPR.”***: Despite its name, the “least restrictive means” test does not literally require the court to consider all theoretically possible arrangements short of TPR. “In spite of the name, ‘least restrictive means’ does not mean that no alternative to termination of parental rights is conceivable by a court.” *J.P. v. Dep’t of Children & Fams.*, 183 So. 3d 1198 (Fla. 1st DCA 2016);

- ***“The court erred because the Department did not prove supervised visitation by the parent would be harmful to the child.”***: “We note the uniformity of judicial precedent rejecting the notion that termination is impermissible under the least restrictive means test simply because some limited and highly restricted contact with a parent may pose no harm.” *Dep’t of Children & Fams. v. B.C.*, 185 So. 3d 716 (Fla. 1st DCA 2016); and
- ***“The parent has improved with services provided after the Department filed its TPR Petition; thus, TPR cannot be the least restrictive means available.”***: It is improper to look beyond the date of the petition to the future possibility that, with additional time the parent may finally improve and work towards reunification. *Guardian ad Litem Program v. Dep’t of Children & Fams.*, 207 So. 3d 1000, 1004 (Fla. 5th DCA 2016).

COMMON ABBREVIATIONS IN TPR CASES

- ***CPI:*** Child Protective Investigator (often the first official of the Department who makes contact with a family to institute the dependency process)
- ***Department:*** Florida Department of Children and Families
- ***GAL:*** Florida Guardian ad Litem Program
- ***ICPC:*** Interstate Compact on the Placement of Children
- ***MBI:*** Manifest Best Interests (one of the three elements of a valid termination of parental rights)
- ***LRM:*** Least Restrictive Means (another of the three elements of a valid termination of parental rights)
- ***TPR:*** Termination of Parental Rights

Practice Tip: In your appellate briefs, you do not need to define names like GAL or the Department to the Court; it is well-versed in Ch. 39 dependency nomenclature.

UNIFORM CONVENTIONS FOR APPELLATE BRIEFS

In order to facilitate uniformity among all GAL appellate briefs, please use the following conventions when drafting your brief for the DBI Project:

A. Citations

- ***Case citations*** should use italics only (no bold or underlined text):

Example: *In re Adoption of Baby E.A.W.*, 658 So. 2d 961 (Fla. 1995).

Practice Tip: When introducing a case using a leader such as *see* or *see, e.g.*, appellate courts expect a parenthetical after the cited case, describing the proposition cited, or quoting the cited case.

- ***Statutory citations*** should follow this format:

Under Florida Rules of Appellate Procedure, rule 9.800, “[e]xcept for citations to case reporters, all citation forms should be spelled out in full if used as an integral part of a sentence either in the text or in footnotes. Abbreviated forms as shown in this rule should be used if the citation is intended to stand alone either in the text or in footnotes.”

Examples:

Section 39.806(1)(f), Florida Statutes (2017), as an integral part of a sentence.

§ 39.806(1)(f), Fla. Stat. (2017). As a stand alone.

Note: When discussing statutes in the body of your brief, it is perfectly permissible to short cite them after you have provided the full cite as either an integral part of a sentence or as a citation sentence. For example, “Section 39.806(1)(f),” would be acceptable under these circumstances.

- ***Citations to the Record on Appeal:*** The two main sources you will cite regarding the appellate record are (1) the actual record (including the trial court’s underlying TPR order that is being challenged in the appeal), and (2) the transcript of the TPR hearing:

- Record cites should follow the format “R. #”: “Six-year-old D.B. was sheltered by the Department on June 1, 2016. R. 360.”
- Citations to a hearing transcript should follow the format “T. page: line”: “Dr. Neidigh testified that further services to the father would be futile due to his unwillingness to admit wrongdoing. T. 131:14-16.”

B. Brief Formatting Conventions

- ***Font:*** Use Times New Roman, 14 pt.
- ***Guardian ad Litem Program:*** Use “GAL.” The use of the possessive is also acceptable from time to time (*e.g.*, “We adopt the statement of facts as laid out by the Department.”).
- ***Department of Children and Families:*** Use “the Department.”
- ***The Appellant Mother or Appellant Father:*** Use “the mother” or “the father” (no capitalization). Also, the parents’ actual names must never be used . . . you can use their initials, but limit this practice, as briefs with multiple sets of initials become confusing; it is much clearer to just name the person by title rather than his or her initials.
- ***The Child(ren) At Issue:*** Use their initials, and try to include their ages and gender throughout the brief. (*e.g.*, “The mother’s six-year-old daughter, E.G., was sheltered in June 2016 because . . .”).
- ***Other family members / relatives:*** Do not use the full name of any family relative not a party to the case, if using the name of the relative will divulge the name of the parent or a child. (For example, if the father is D.J. and his brother is Robert Jones, naming the brother will impermissibly divulge the last name of the father).

REVIEWING THE RECORD ON APPEAL: TIPS

When you are assigned an appeal, you will be given a fair amount of material, including:

1. The parent's Initial Brief;
2. The Record on Appeal (which is usually at least 500 pages); and
3. The Transcript of the TPR hearing (which is usually hundreds of pages as well).

While every appellate attorney has his or her own "process" in reviewing an appellate record, there are documents in every appeal that are always especially pertinent. They include:

- The trial court's TPR order (the underlying order being appealed);
- The Department's (or the GAL's) petition for termination of parental rights;
- The original petition for dependency;
- The case plan entered into by the court (if applicable); and
- The transcript of the TPR hearing.

The two most important documents in any appeal are the TPR order and the Initial Brief. After digesting both documents, you will have a good idea of the issues in the case, and be able to pinpoint where in the record you need to read further. (In our experience often, a significant portion of the appellate record is irrelevant to the issues raised on appeal).