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# TERMINATION OF PARENTAL RIGHTS

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The termination of parental rights (TPR) proceeding begins with the filing of a TPR petition to terminate parental rights which must contain allegations that at least one of the grounds listed in § 39.806, exists, and that termination is in the manifest best interests of the child and the TPR is the least restrictive means of protecting the child from harm. § 39.802(4).

The petition may be filed by the department, the guardian ad litem, or “any other person who has knowledge of the facts alleged or is informed of them and believes that they are true.” § 39.802(1).

## **Post-Permanency Hearing Petitions**

The most common TPR proceeding involves a post-permanency hearing petition. This occurs when the petition is filed at or after the twelve-month period has expired. §39.8055.

## **Pre-Permanency Hearing Petitions**

Chapter 39 of the Florida statutes does provide for the filing of termination petitions before the twelve month period has expired under several circumstances.

- 1.) If the court determines that the child(ren) has been adjudicated dependent, the parent(s) have been offered a case plan with services and they have materially breached the case plan before the time for the compliance expires. In order to prove that the parent has materially breached the case plan, the court must find by clear and convincing evidence that the parent is unlikely or unable to substantially comply with the case plan before time expires to comply with the case plan. § 39.806(1)(e)2.
- 2.) 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. Often used with § 39.806(1)(e) you do not need an adjudication of dependency nor do you need to wait the 12 months. § 39.806(1)(c).
- 3.) If extraordinary circumstances such as cases involving egregious abuse, a prior involuntary TPR, or incarceration for a substantial portion of the child’s remaining minority a TPR petition can be filed before the 12 month mark. § 39.806(1)(d)(f)(i).

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## ADVISORY HEARING

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Before the circuit court can hear a TPR petition, the parents (or if deceased, a living relative), the legal custodians, any person who has physical custody of the child, a grandparent entitled to priority for adoption pursuant to statute, any presumptive parent and the guardian ad litem or representative of the child, must be served to attend an advisory hearing. § 39.801(3)(a).

## **Contents of Notice**

The notice must contain the date, time and place of the advisory hearing as well as a copy of petition. It must further inform the parent(s) that “failure to personally appear at this advisory hearing constitutes consent to the termination of parental rights . . .” § 39.801(3)(a).

The TPR trial must be held within forty-five (45) days of the advisory hearing, but reasonable continuances may be granted. § 39.809(2).

## **Consent to Termination of Parental Rights**

If the parents appear at the advisory hearing, the court will provide them with a date, time and place for the termination hearing. If such notice is provided and the parent(s) fails to appear at the termination proceeding, such failure constitutes consent to termination of parental rights. § 39.801(3)(d).

## **Appointment of Guardian ad Litem**

- At the advisory hearing, if a guardian ad litem has not been appointed, the court shall appoint a guardian ad litem to represent the child’s best interests. § 39.808(2).
- To be successful in terminating parental rights, the petitioner must prove by clear and convincing evidence the grounds for TPR under § 39.806, and that TPR is in the manifest best interests of the child under §39.810, and that the TPR is the least restrictive means of protecting the child from harm.

## **Clear and Convincing Evidence**

The judge acts as the trier of fact and must make its findings by “clear and convincing evidence.” § 39.809(1).

- Clear and Convincing Evidence is an intermediate standard which requires that the evidence be credible, clear, and lacking in confusion such that the trier of fact is convinced of the matter's truthfulness without hesitancy.
- Clear and convincing is - “probable” “likely” “most likely” “will”.
- Clear and convincing is not - “may” “might” “could” “possible” “ideal”.

## **Manifest Best Interests (MBI)**

The court considers eleven statutory issues in determining Manifest Best Interests. See below for further explanation. § 39.810.

## **Least Restrictive Means (LRM)**

- Balances the parent’s fundamental liberty interest and the state’s compelling interest to protect child. This is a strict scrutiny analysis.
- Least restrictive means does not involve consideration relatives or any other type of placement - it has to do with whether services have been provided that would eliminate the need for TPR. § 39.810(1).

## REVIEW THE PETITION

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The first step in addressing a TPR case is to review the petition.

- What TPR grounds are alleged?
- Does each element of the ground exist?
- What additional information or evidence is required?
- What and whose testimony is needed?
- What source of information is needed to find the TPR grounds?
- What will be testified to regarding MBI and LRM?

### Case Examples

The court cannot terminate on grounds that are not alleged in the petition as it is a violation of the parents' right of due process and right to notice and a fair hearing to consider grounds not pled in the petition.

See R.S. v. Department of Children and Families, 872 So. 2d 412 (Fla. 4th DCA 2004) Trial court's act of terminating mother's parental rights on ground that mother's period of incarceration would constitute a substantial portion of time before child would attain age of 18 years, violated mother's due process right to notice and fair hearing, where termination petition did not allege such ground for termination, and Department of Children and Families did not seek termination upon such ground during its opening statement in termination proceeding or by amendment of its termination petition.

### TPR Petition Must Contain Facts Supporting the Following Allegations

- At least one of the grounds for TPR has been met (See Grounds for TPR).
- The parents were informed of their right to counsel at all hearings they attended.
- A dispositional order adjudicating the child dependent was entered (if required).
- The manifest best interests of the child would be served by the granting of the petition - § 39.802(4); Rule 8.500.

### The Petition Shall Also Contain

- allegations as to the identity and residence of the parents, if known; and
- the age, sex and child's name; and
- a certified copy of the birth certificate of each child named in the petition; and
- when required by law, a showing that the parents were offered a case plan and have not substantially complied with it. See Rule 8.500(b)(4).

## **Grounds for TPR: Voluntary Surrender - § 39.806(1)**

When a parent has voluntarily signed a written surrender - § 39.806(1)(a).

- Must be written and signed before two witnesses and notary.
- The parent must consent to the entry of the order giving custody to the department.
- The department is willing to take custody of the child.
- The surrender can only be withdrawn if the court finds the surrender and consent were made under fraud or duress.
- The court must still consider manifest best interests. Even when a parent voluntarily surrenders the child for adoption, the court must determine that termination of parental rights is in the best interests of the child.

## **Case Examples**

Rathburn v. Department of Children and Families, 826 So. 2d 521 (Fla. 4th DCA 2002) Refusal to terminate father's parental rights, although father had voluntarily surrendered his rights, was not unreasonable as matter of law where there was no proof that termination was in manifest best interests of child. In considering manifest best interests of child, court expressed its concern that termination of father's rights would cut off any responsibility for financial support and would leave child without father.

Henriquez v. Adoption Centre, Inc., 641 So. 2d 84 (Fla. 5th DCA 1993) Finding that mother had freely and voluntarily surrendered her child for adoption was sufficiently supported by evidence, notwithstanding mother's claim that she had been acting under duress and had surrendered child, employees at adoption center testified they explained final nature of surrender documents and that mother was very deliberate in her actions.

## **Abandonment - § 39.806(1)**

A situation when the parent, legal custodian or caregiver, while being able, made no effort to support child; and no effort to communicate with child, sufficient to evince a willful rejection of parental obligation. If such efforts are only marginal efforts that do not demonstrate a settled purpose to assume all parental responsibilities, the court may declare the child abandoned. §39.01(1). A court may also find grounds of abandonment if the location of the parent is unknown and cannot be ascertained within 60 days. §39.806(1)(b); see also; § 39.803 (procedures when parent's location unknown.)

Abandoned newborn infants, as defined in § 383.50, are not included in this definition. § 39.01(1). Section 383.50(2) creates a presumption that the parent who leaves a newborn infant in accordance with that statute intends to leave the infant and consents to termination of parental rights.

Williams v. Department of Health and Rehabilitative Services, 589 So. 2d 359 (Fla. 5th DCA 1991) 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.

In re R.D.D., 518 So. 2d 412 (Fla. 2d DCA 1988) Child abandoned who had been left on porch of husband's relatives and that mother made no effort to communicate with child for one and one-half years.

### *Abandonment – Incarceration Plus Additional Factors*

Incarceration may be evidence of abandonment § 39.01.(1). However, alone, it is usually insufficient evidence to terminate parental rights. Other “additional factors” for abandonment include: not visiting child or sending communications, interfering with placement, and not participating in services if offered.

- M.S. v. D.C., Jr., 763 So. 2d 1051 (Fla. 4th DCA 1999) Incarceration is a fact which the trial court may consider along with other factors, such as the father's willful commission of a crime, the foreseeable consequence of which is the father's incarceration during a majority of the children's lives, in determining whether clear and convincing evidence of abandonment exists.
- D.B. v. Dept. of Children & Families, 791 So. 2d 1225 (Fla. 5th DCA 2001) holding that incarceration plus the nature of the crime committed should be considered at termination proceedings.
- 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 child's care and visited him on a weekly basis, father attempted to maintain contact with child after imprisonment, even though 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 and Habitual*

- In re E.F., 639 So. 2d 639 (Fla. 2d DCA 1994) despite mother's contention that her incarceration was not a basis to terminate her parental rights; mother was not incarcerated on a single occasion, but returned to prison repeatedly.

### *Heinous Nature of the Crime*

- Turner v. Adoption of Turner, 352 So. 2d 957 (1st DCA 1977) the added circumstance that such is the result of [the father] having murdered the child's mother . . . demonstrated his unfitness to have any further parental relationship with this child.

### *Long Incarceration Foreseeable*

- 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.

### **Threatens Life, Safety, Well-Being - § 39.806(1)**

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. Often used with § 39.806(1)(c). The petitioner must show the demonstrated behavior harms or will prospectively harm child. This is proven with “before and after” testimony from guardian ad litem, caseworker and therapist (expert testimony).

### *Irrespective of Provision of Services (Futility)*

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 child would be threatened with harm despite any services provided to parent. See M.H. v. Department of Children and Families, 866 So. 2d 200 (Fla.1<sup>st</sup> DCA 2004).

- **Futile:** A parent participating in the services but their behavior continues or therapist testifies no improvement foreseeable, even with services (i.e., character disorders).
- **Not Futile:** father stated that he had discontinued his substance abuse, (evidenced by his negative urinalysis tests), and that he had ceased resorting to criminal activity to earn a living or to supply his drug habit, and father stated that he was taking whatever self-improvement courses he could in prison, and that he was determined to provide for his child's needs. In re J.B., 923 So. 2d 1201 (Fla. 2d DCA 2006).

### **Incarceration - § 39.806(1)(d)**

Incarceration may serve as a ground for TPR when the parent of a child is incarcerated in a state or federal correctional institution and either:

- The period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years;
- The incarcerated parent has been determined by the court to be:
  - a violent career criminal as defined in s. 775.084;
  - a habitual violent felony offender as defined in s. 775.084;
  - a sexual predator as defined in s. 775.21;
  - convicted of first degree or second degree murder in violation of s. 782.04 or a sexual battery that constitutes a capital, life, or first degree felony violation of s. 794.011; or
  - convicted of an offense in another jurisdiction which is substantially similar to one of the offenses listed in this paragraph.

As used in this section, the term "substantially similar offense" means any offense that is substantially similar in elements and penalties to one of those listed in this subparagraph, and that is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction; or

- The court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child and, for this reason, that termination of the parental rights of the incarcerated parent is in the best interest of the child.

### *Substantial Portion of Child's Remaining Minority § 39.806(1)(d)1*

- The measurement of the child's remaining minority runs from the date the TPR petition is filed.
- The court is limited to relying solely on the length of the parent's sentence and may not consider the quality of that time in the child's development. In re A.W., 816 So. 2d 1261 (Fla. 2d DCA 2002).

- The court must consider whether the time for which a parent is expected to be incarcerated in the future constitutes a substantial portion of the time before the child reaches eighteen, not whether the time the parent has been incarcerated in the past was a substantial portion of the child's life to that point. In re J.D.C., 819 So. 2d 264 (Fla. 2d DCA 2002).
- Incarceration – Substantial Period of Time.
  - W.W. v. Department of Children and Families, 811 So. 2d 791 (Fla. 4th DCA 2002) holding that incarceration for a period constituting twenty-five percent of the child's minority was not a substantial portion of the child's minority. See also B.C. v. Department of Children and Families, 887 So. 2d 1046 (Fla. 2004).
  - A.W., 816 So. 2d at 1264 holding that remaining incarceration constituting twenty-six percent and thirty-two percent of the remaining minority of the children did not constitute a substantial portion of child's minority.

PRACTICE TIP: Incarceration may be alleged as a factor under § 39.806(1)(d)3, in which the court determines the continued relationship would be harmful to the child.

### **Failure to Substantially Comply With Case Plan § 39.806(1)**

This ground can be tried when a child has been adjudicated dependent and the parent fails a case plan has been filed with the court and one of the following two conditions exists:

- **Substantial Compliance:** Failure of parent to substantially comply with filed and approved case plan for 12 months constitutes evidence of continuing abuse, neglect, or abandonment, for purposes of terminating parent's parental rights unless the failure was due to lack of resources or failure of the department to make reasonable efforts. §39.806(1)(e). Substantial compliance is defined as the "Circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child". § 39.01(71).
- **Material Breach:** Court must find by clear and convincing evidence that the parent is unlikely or unable to substantially comply with the case plan before the time expires to comply. § 39.806(1)(e)2. The TPR petition can be filed prior to the 12 month period. This subsection of the statute notes that time is of the essence for permanency of children in the dependency system.

The 12-month period begins to run after the child's placement in shelter care or the entry of a disposition order placing the custody of the child with the department or a person other than the parent and the approval by the court of a case plan with a goal of reunification with the parent, whichever came first. § 39.806(1)(e). However, for material breach, the TPR petition can be filed prior to the 12-month period.

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 father failed to substantially comply with case plan; department could not say whether father had ever been given copy of case plan, and department had made no effort to contact father while he had been 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. Department of Children and Families, 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 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 - § 39.806(1)**

When a parent 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 or the child's sibling. § 39.806(1)(f).

### **No Case Plan Required - Can File Petition at Any Time**

#### **Egregious conduct:**

- Can be one incident if so severe as to endanger the life of the child. In some circumstances, egregious conduct may involve someone other than the child or the child's sibling.

**OR**

- May be a failure to protect. This requires capability, opportunity, and knowing failure to prevent egregious abuse (i.e., had knowledge of abusive history).

The egregious conduct or failure to protect:

- is conduct by the parent that is deplorable, flagrant or outrageous by a normal standard and can include acts or omissions.
- must threaten life, safety, or physical, mental or emotional health of the child or the child's sibling
- in cases where egregious conduct did not directly harm the child but raises the specter of future harm, evidence must establish a nexus between the egregious conduct and the likelihood of future abuse, neglect or specific harm to the child.

Note the definition of sibling for purposes of this subsection: another child who resides with or is cared for by the parent or parents regardless of whether the child is related legally or by consanguinity. § 39.806(1)(f)2.

Practice tip: Expert testimony may be required to prove one or more of these elements depending on the circumstances of the case.
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*Failure to Protect Can Be Enough for Egregious Conduct*

## Case Examples

- In re K.A., 880 So. 2d 705 (Fla. 2d DCA 2004) A parent who was not present during, or who did not participate in, physical abuse may still have his parental rights terminated if he knowingly failed to protect the child from egregious abuse.
- N.L. v. Department of Children and Family Services, 843 So. 2d 996 (Fla. 1st DCA 2003) Substantial evidence did not support termination of mother's parental rights on ground that mother had engaged in egregious conduct or had the opportunity and ability to prevent egregious conduct detrimental to child and failed to do so; record contained no evidence that mother was physically present when child was abused by mother's boyfriend, no evidence in the record showed long-term abuse or a pattern of abuse of child that might have formed a basis for a finding that mother "knowingly failed to prevent" the abuse of child by mother's boyfriend, and there was no evidence in the record that mother's boyfriend was physically abusive or violent in the past with children or with anyone else.
- In re B.J., 737 So. 2d 1227, 1228 (Fla.2d DCA 1999) When there is "evidence that a child suffered abuse by one or both of the parents present, there is clear and convincing evidence of egregious abuse to support termination of parental rights of both parents."

### *Egregious Conduct towards Sibling – Nexus Required*

#### **Aggravated Child Abuse, Sexual Battery or Sexual Abuse, Chronic Abuse - § 39.806(1)**

Parent has subjected child to aggravated child abuse, commits sexual battery or sexual abuse, or chronic abuse. § 39.806(1)(g).

#### *Aggravated Child Abuse § 827.03*

- Subjects the child to aggravated battery;
- Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
- Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.

#### *Commits Sexual Battery or Sexual Abuse § 39.01*

#### *Chronic Abuse*

The Second DCA has defined chronic abuse as: "abuse began shortly after child's birth and continued through the next five years, interrupted only by the father's incarcerations, ..." In re D.A.D. II, 903 So. 2d 1034 (Fla. 2d DCA 2005).

- Does not need to be egregious, but must be chronic.

#### **Murder or Involuntary Manslaughter - § 39.806(1)**

When a parent has committed murder or voluntary manslaughter of another child, or a felony assault that results in serious bodily injury to a child, or aided or abetted, attempted, conspired, or solicited to commit such a murder or voluntary manslaughter or felony assault.

- Must have conviction - Killing is not murder or voluntary manslaughter until conviction. If the parent has not been convicted, then the egregious conduct ground may be the appropriate ground.

### **Nexus of Harm Required**

- J.F. v. Department of Children and Families, 890 So. 2d 434 (Fla. 4th DCA 2004)  
In order for TPR to be based solely on single act of committing manslaughter or felony assault against another child, state must prove that, based on totality of circumstances surrounding petition, parent currently poses substantial risk of significant harm to current child or children and that termination of parental rights is least restrictive means of protecting current child or children from harm.

### **Involuntary TPR of Sibling - § 39.806(1)**

Grounds for TPR exist when the parental rights to a sibling have been involuntarily terminated. However, the parental rights to a subsequent-born child may only be terminated under this section if there is clear and convincing evidence of a prior involuntary TPR for a sibling, a substantial risk of significant harm to current child, and termination is the least restrictive means of protecting child from harm. The circumstances leading to the prior involuntary termination will be highly relevant to the determination of whether the current child is at risk and whether termination is the least restrictive way to protect child. See Department of Children and Families v. F.L., 880 So. 2d 602 (Fla. 2004). Evidence that nothing has changed in the parent's life to diminish the risk of harm, should be sufficient evidence.

- Proof of nexus required (i.e., termination of parental rights concerning the current child is necessary for the same or substantially the same reason termination was necessary to protect the prior child(ren) from harm).
- Note: Conflict among circuits: The Second District Court of Appeal considers terminations of parental rights resulting from consents by nonappearance to be voluntary and, therefore, not a prior involuntary termination of parental rights under section 39.806(1)(I). The Fifth District Court of Appeal holds that prior terminations resulting from a parent's failure to appear are involuntary because the terminations are based on allegations other than a voluntary surrender of parental rights. The Third and Fifth District Courts of Appeal require that trial courts receive clear and convincing evidence sufficient to terminate a parent's parental rights even when the parent fails to appear for arraignment or the adjudicatory hearing. Under the case law of these districts, the failure to appear is treated as a consent to proceed to trial in the parent's absence and not as consent to the termination of parental rights. Moreover, termination cannot occur without clear and convincing evidence that termination serves the child's manifest best interests.

### **Case Examples**

- Department of Children and Families v. A.S., 927 So. 2d 204 (Fla. 5th DCA 2006) - Consent under § 39.801(3)(d) does not end the judicial labor of the trial court; it must then proceed to receive evidence to support the grounds alleged in the petition for termination.
- R.H. v. Department of Children and Family Services, 860 So. 2d 986 (Fla. 3d DCA 2003) The trial court erred when it terminated the father's parental rights without the taking of any evidence in support of such termination.

## SINGLE PARENT TERMINATIONS § 39.811(6)

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### **Single Parent TPR Grounds**

The parental rights of one parent may be severed without severing the parental rights of the other parent only under the following circumstances:

- Child has only one surviving parent;
- Identity of prospective parent unknown;
- Parent whose rights are being terminated became a parent through single-parent adoption;
- Protection of the child demands termination of one parent; or
- Parent whose rights are being terminated meet any of the criteria in § 39.806(d) and (f)-(i);
  - Egregious conduct;
  - Aggravated child abuse, sexual battery or sexual abuse, or chronic abuse;
  - Committed murder or voluntary manslaughter of another child;
  - Involuntary TPR of sibling;

Example to show importance of single parent termination issue: Two parents in first judgment; if one parent's TPR is reversed, the remaining parent becomes a single parent TPR. If no single parent findings in the first judgment then Court of Appeal will reverse and remand for single parent findings. Delays permanency.

## MANIFEST BEST INTEREST

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The second aspect of the proof required for a TPR, is whether such termination is in the manifest best interests of the child. There are eleven listed factors for the court to explicitly consider. The final judgment must contain findings of fact which address the manifest factors or the TPR is subject to reversal. In re A.C., 751 So. 2d 667 (Fla. 2d DCA 2000) (Final judgment terminating mother's parental rights did not satisfy the statutory requirement that the trial court consider and evaluate the manifest best interests of the children were neither the trial court's final judgment nor the transcript of proceedings contained any finding of fact or conclusions of law as to the manifest best interests of the children. There must be evidence and specific findings from the court that termination is the child's best interests. The final judgment is subject to reversal if it does not contain specific findings as to the manifest best interests of the child.). The court should address the factors in all cases, including cases where a parent consents by default.

PRACTICE TIP: The court should make separate findings (with regard to each of the factors) for every child on the petition. It is possible TPR may be in the best interests of one child but not all.

The following is a list of each of the factors in § 39.810 and evidence or testimony which may be relevant to each.

- Any suitable permanent custody arrangement short of adoption with a relative of the child. § 39.810(1).
  - The availability of a nonadoptive placement with a relative may not receive greater consideration than any other factor listed in § 39.810 and may not be considered as a factor weighing against TPR.
  - IF a child has been in a stable or preadoptive placement for not less than 6 months, the availability of a different placement, including placement with a relative, may not be considered a ground to terminate parental rights.

PRACTICE TIP: Evidence of the efforts to locate relatives by the Department and GAL Program should be presented.

- 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. § 39.810(2).
  - Guardian ad litem should testify beyond what was gleaned from the documents in the file.
  - Testimony that the guardian ad litem talked to providers and they described continued troubling behavior.
  - Testimony regarding the parent's employment, and housing
  - Guardian ad litem's observations about the parents.
- 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. § 39.810(3).
  - Testimony of service worker – services offered, services completed, issues that led to dependency resolution, consistency and concerns about visitation
  - Expert testimony – psychological evaluations, diagnosis, opinion if child would be at risk if returned to parents
- 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. § 39.810(4).
  - Expert testimony
  - Diagnosis of child

- How parent's conduct affected child
- Guardian ad litem testimony that they have observed abilities and needs
- Testimony regarding services being offered and the need to continue services
- 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. § 39.810(5).
  - The guardian ad litem's observations during visitation between the child and the parent
  - Behavior before and after visits
  - Behavior before and after placement
  - The child's wishes
- 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. § 39.810(6).
  - Child is receiving services and the child will continue to receive services
  - Expert testimony – behavioral or emotional needs will or will not continue
  - Placement
- 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. § 39.810(7).
  - Guardian ad litem testimony
  - Length of time child has been in placement
  - Guardian ad litem witnessed interaction between child and parental substitute
  - Observation of visitation as to each child
  - The home will lead to permanent placement
  - Testimony of foster parent and child, if appropriate
- The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. § 39.810(8).
  - Guardian ad litem testimony, service worker testimony
  - Length of time in placement – permanency
  - Educational stability, stability with therapists, etc

- The depth of the relationship existing between the child and the present custodian. § 39.810(9).
  - Not a comparison between foster parents and parents – depth of bond and harm to child if placement isn't continued
  - Discuss the difference between the child's behavior/school work/development when he entered foster care and as of the day of trial
  - Guardian ad litem testimony, service worker testimony, expert testimony
  - Child's adjustment to foster care
  - Observation of the child with the present custodian
  - Length of time child been with the present custodian
  - Child's opinion regarding adoption
  - Custodian / Child Testimony
- 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. § 39.810(10).
- The recommendations for the child provided by the child's guardian ad litem or legal representative. § 39.810(11).
  - Guardian ad litem reviewed file, length of time on the case, met with child, discussed with child the possibility of adoption, how guardian ad litem came to his recommendations.

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## LEAST RESTRICTIVE MEANS

### **Least Restrictive Means (LRM)**

The court must consider whether termination of parental rights is the least restrictive means of protecting the child from serious harm. The least restrictive means element is the second prong of constitutional strict scrutiny analysis. Before a person may be deprived of a fundamental right (*e.g.*, the right to parent), the state must demonstrate the existence of a compelling interest and must further that interest through the least intrusive means available. Thus LRM is a legal issue not something a witness should testify about other than services offered or why service is not required (egregiousness, etc.) In general, the inquiry should be were the parents offered a case plan and whether they had an opportunity to comply.

The parent(s) may argue that placement of the child(ren) with a relative or in some other arrangement will/should preclude termination. Alternatively, they may argue that if the Department failed to investigate a potential relative custodian, the petition should not be granted. Both arguments should fail as they find no support in Florida law and are directly contrary to Padgett v. Department of Health & Rehab. Servs., 577 So. 2d 565 (Fla. 1991).

In Padgett the Florida Supreme Court explained that the state's compelling interest is the protection of children and that least restrictive means requires that, in ordinary cases, the state demonstrate that it made a good faith effort to rehabilitate the parent and reunite the family through provision of a case plan. Padgett, 577 So. 2d at 570-571. Nowhere does Padgett or subsequent Supreme Court precedent tie the distinct issue of placement to analysis of the constitutional preconditions to termination of parental rights. The Supreme Court recognized a parent's interest in maintaining parental ties is essential, but child's entitlement to environment free of physical and emotional violence at the hands of his or her most trusted caretaker is more so, and state has a compelling interest in protecting all citizens, especially a child, against the clear threat of abuse, neglect, and death .

- Padgett v. Dept. of Health & Rehabilitative Services, 577 So. 2d 565, 571 (Fla. 1991). The department "ordinarily must show that it has made a good faith effort to rehabilitate the parent and reunite the family."
- LRM "simply requires that measures short of termination should be utilized if such measures can permit the safe re-establishment of the parent-child bond."
- Sometimes LRM does not require a case plan.
  - In re T.M., 641 So. 2d 410 (Fla. 1994), the court held that termination of parental rights without the use of plans or agreements was the least restrictive alternative in cases of severe or continuing abuse or neglect or in cases of egregious abuse.

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### MOST COMMON REVERSALS IN TPR

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- Evidence is not clear and convincing. For example, the doctor did not see the parent, or testimony was given in form of possibilities and not probabilities.
- Therapist testimony not provided
- Failure to prove essential elements of statutory basis, i.e., no "proof of conduct towards child" under 1(c) but evidence of futility
- Incarceration cases
- Mental illness –There should be a diagnosis and services should be tailored for that mental illness.

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### PROVING HARM

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The act or omission by the parent(s) must result in some type of harm to the child. Thus, for example, substance abuse, alone, without resulting in harm to the child, is not grounds for termination of parental rights.

#### **How do you Show Harm?**

- Before & After Testimony

- Child had night terrors, bedwetting, poor grades in school, aggressive behavior and no longer has those issues.
- Evidence of developmental delays
- Evidence of medical problems
- Evidence of educational problems
- Therapist Testimony – Expert Testimony

### Case Examples

- C.C. v. Department of Children and Family Services, 812 So. 2d 520(Fla. 1st DCA 2002.) - Parent's substance abuse does not alone establish prospective neglect; trial court must determine whether substance abuse will affect a parent's ability to provide the care and support the children need in the future.
- W.N. v. Department of Children and Family Services, 919 So. 2d 589 (Fla. 3d DCA 2006) Substantial competent evidence in proceeding to terminate father's parental rights established a nexus between father's drug abuse and his ability to provide for child's health and safety; father twice entered substance abuse counseling pursuant to reunification plan and twice relapsed; father repeatedly tested positive for cocaine and other drugs during extended period he was given to complete plan, father appeared for last day of trial on drugs; father lived in same building where child ingested cocaine, with mother who surrendered her parental rights and also abused drugs; and father failed to visit child, pay child support, or acknowledge that his drug use put child at risk.

Criminal conduct must be tied to some discernable harm to the child. See P.S. v. Department of Children and Family Services, 863 So 2d 392 (Fla. 3d DCA 2003) (must connect act of parent to abuse, neglect or specific harm to the child).

### Nexus between Act of Parent as One Child and Harm to Another Child

The petitioner must also prove that an act or omission committed on or with respect to a sibling, presents imminent danger to the other child not yet injured. If the parent fails to acknowledge the danger to the one child, this is evidence that the other children are at risk. R.F. v. Florida Department of Children and Families, 770 So. 2d 1189 (Fla. 2000).

### Domestic Violence

Florida courts have consistently held that child abuse and neglect can result from being exposed to acts of domestic violence. A.D. v. Department of Children and Families, 837 So. 2d 1078, 1079 (Fla. 5th DCA 2003). See also, F.R. v. Dept. of Children & Families, 826 So. 2d 449 (Fla. 5th DCA 2002). When "children witness incidents of domestic violence, *both verbal* and physical abuse between parents, . . . the children are at risk of being 'harmed' -- impaired mentally and emotionally -- if they remain in the custody of the abusive parents . . ." T. R. v. Dept. of Children & Fams., 864 So. 2d 1278 (Fla. 5th DCA 2004)(emphasis added). Moreover, "a court can adjudicate a child dependent on the basis of neglect when the State presents evidence indicating that the child is permitted to live in an environment which causes the child's physical, mental, or emotional health to be significantly impaired." D.D. v. Dept. of Children & Fams., 773 So. 2d 615,617 (Fla. 5th DCA 2000).

PRACTICE TIP: Visit [www.GuardianadLitem](http://www.GuardianadLitem) to view statutes, studies, and case summaries related to Domestic Violence in Resources by Topic section.