

## First District Court of Appeal *Contempt*

**J.A.H. v. State, 2009 WL 3278715 (Fla. 1st DCA)**

The defendant appealed a conviction of direct criminal contempt based on happenings a dependency proceeding. The trial court held the defendant in contempt "based on his statements, demeanor, and behavior during [the] hearing, all of which was captured on the CourtSmart audio and video system." The defendant argued that the trial court violated the procedural due process requirements of Florida Rule of Criminal Procedure 3.830.

The First District Court of Appeal (First DCA) agreed with the defendant and reversed the trial court's conviction. Rule 3.830 requires that the trial court follow six steps in order to adjudicate a conviction of direct criminal contempt. "Failure to follow the procedural steps of rule 3.830 constitutes fundamental error that requires reversal of the contempt judgment. See *Hutcheson v. State, 903 So.2d 1060, 1062 (Fla. 5th DCA 2005)*."

1. Direct criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court.
2. The judgment of guilt shall include a recital of those facts upon which the adjudication of guilt is based.
3. Prior to the adjudication of guilt, the judge shall inform the defendant of the accusation against him and inquire as to whether he has any cause to show why he should not be adjudged guilty of contempt by the court and sentenced therefore.
4. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances.
5. The judgment shall be signed by the judge and entered of record.
6. The sentence shall be pronounced in open court.

The First DCA held that the trial court failed to recite the facts upon which the adjudication was based, and the trial court failed to give the defendant notice of the contempt charge or opportunity to explain his behavior before the trial court sentenced him.

The judgment of contempt was reversed and remanded.



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## Second District Court of Appeal *Sufficiency of Order*

**In re J.S., 18 So.3d 712 (Fla. 2d DCA 2009)**

The mother appealed the trial court's order terminating protective services and placing

her children in permanent guardianship with the maternal grandparents. The mother argued that she was making progress on her case plan and the children were in a stable environment therefore granting permanent guardianship was improper.

The Second District Court of Appeal (Second DCA) reversed the trial court's decision. First, in the "written order, the trial court was required to explain why reunification was not possible by either referring to *specific* findings of fact made in its order adjudicating the child[ren] dependent or by making separate findings of fact[.]" § 39.6221(2)(a), Fla. Stat. (2008)." The trial court's written order only generally referred to "the circumstances from which the court previously based its findings that the children are dependent." Second, the trial court's written order granting permanent guardianship failed to adequately explain why reunification with mother was not possible.

The Second DCA found that the mother was making a "determined effort to rehabilitate herself" (she obtained a domestic violence evaluation and was halfway through her domestic violence classes, was waiting on a background check for a prospective job, was doing a "great job," and was "getting the help that she needs"), and the children were in a secure and adequate placement.



### Read the Opinion

#### *Drug Use, Nexus, Case Plan Compliance*

**In re S.F., 2009 WL 3320186 (Fla.2d DCA)**

The parents appealed the trial court's order terminating their parental rights. The trial court terminated their parental rights based on their continued involvement with drugs which threatened the well-being and safety of the children pursuant to § 39.806(1)(c).

The Fourth District Court of Appeal (Fourth DCA) reversed the trial courts order. To terminate parental rights based on § 39.806(1)(c), the trial court must find "first, that continued interaction with the parent threatens the life, safety, or health of the child, and second, that this threat cannot be remedied by the provision of services." *T.H. v. Dept of Children & Family Servs., 979 So.2d 1075, 1082 (Fla. 2d DCA 2008)*. A parent's drug abuse, alone, cannot be the basis for termination of parental rights. "The initial case manager, current case manager, and guardian ad litem all testified that the parents did not place the children in an environment that negatively affected their physical, mental, or emotional well-being. Likewise, there was no clear and convincing evidence of a nexus between either the Mother's or the Father's drug use and any existing abuse, neglect, or specific harm to the children."

The trial court also determined that the parents failed to comply with their case but the Fourth DCA found that the trial court did not distinguish its findings between the mother and father, or the children. The Fourth DCA held that the trial court erred when it terminated the parental rights to the baby, who was nine months old at the time of termination, as twelve months had not passes since he was removed from his father's custody. "Section 39.806(1)(e)(1) provides that a twelve-month period for compliance with a case plan begins to run only after the child's placement into 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[.]"



### Read the Opinion

#### Third District Court of Appeal

#### *Termination of Parental Rights – Egregious Abuse*

**C.T. v. State, Dept. of Children & Families, 2009 WL 4281302 (Fla. 3d DCA)**

The mother appealed the trial court's order terminating her parental rights to her five children. The termination was based on egregious abuse of two of her children and the remaining three were based on egregious abuse of a child's sibling. §39.806(1)(f), Fla. Stat. (2008). The trial court based its decision on *T.P. v. DCF, 935 So.2d 621 (Fla. 3d DCA 2006)*, and stated "It appears that pursuant to the Third District Court of Appeal's ruling, the egregious abuse directed at one sibling is sufficient, without more, to support the termination of parental rights to another sibling. If this is the case, the Court seems to require the trial judge to terminate rights to the other children even in the absence of proof of prospective abuse of the other children. It is on that basis alone, that this court terminates the parent's rights to the three children ..." the Third District Court of Appeal (Third DCA) held that "while the trial court erred in saying that termination was automatic upon establishing egregious abuse of a sibling, the error was harmless."

The trial court considered the three issues that must be considered before termination of parental rights: that grounds exist, that it is in the manifest best interest of the child and that it is the least restrictive means of protecting the child from harms. The trial court considered grounds, manifest best interest and least restrictive means in its judgment.

The Third DCA upheld the trial court's order terminating the mother's parental rights.



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## Fourth District Court of Appeal *Termination of Parental Rights*

**J.G. v. Department of Children and Families, 2009 WL 3837143 (Fla. 4th DCA)**

The parents appealed the trial court's order terminating their parental rights. The parents argued that their procedural due process rights were violated and raised other issues regarding the sufficiency of the evidence against them. The Fourth District Court of Appeal (Fourth DCA) affirmed the trial court's order terminating parental rights.

"There is a multi-step process inherent in the statutory scheme for termination of parental rights. First, the trial court must find by clear and convincing evidence that one of the grounds set forth in § 39.806, Fla. Stat. (2007), has been established. *Rathburn v. Dep't of Children & Families, 826 So.2d 521, 523 (Fla. 4th DCA 2002)*. Second, the trial court shall consider the manifest best interests of the child by evaluation of all relevant factors, including those set out in section 39.810. *Id.* In addition, the Department must establish that termination of parental rights is the least restrictive means of protecting the child from harm. *In re G.C., 6 So.3d 643, 648 (Fla. 2d DCA 2009)*. While a trial court's decision to terminate parental rights must be based upon clear and convincing evidence, our review is limited to whether competent substantial evidence supports the trial court's judgment. See *T.C. v. Dep't of Children & Families, 961 So.2d 1060, 1061-62 (Fla. 4th DCA 2007)*."

The Fourth DCA agreed with the trial court's findings that the parents "1) failed to substantially comply with their case plans; (2) demonstrated a pattern of substance abuse, criminal activity, and inappropriate decisions pertaining to the child, which would continue irrespective of the provision of services; and (3) engaged in episodic abandonment..." and allowed their children to languish in the foster care system for years.

The parent's failed to preserve their due process argument for appeal so the issue was not considered by the Fourth DCA.

The Fourth DCA affirmed the trial court's order terminating parental rights.



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### *Admission of Hearsay Evidence*

**T.O. v. Department of Children and Families, 2009 WL 3837159 (Fla. 4th DCA)**

The parent's appealed the trial court's order terminating their parental rights to their four children. They argued that the trial court improperly admitted the child's hearsay evidence and that the Department of Children and Families (the department) did not prove a nexus between the father's sexual abuse of one child and any future risk of harm to the remaining children. The department based the original dependency petition on domestic violence (the father put a gun to the mother's head and threatened an older son), the parents have domestic violence and criminal histories, and the father remained in the home. Later, one of the children began exhibiting signs of sexual abuse and began making statements that her father had sexually abused her. When the department filed their termination of parental rights petition they based the petition on domestic violence and the sexual abuse of one of the daughters by the father.

#### **Admission of Child Victim Hearsay Evidence**

The parents argue that the child's *in camera* testimony regarding sexual abuse by her father is inadmissible as she did not testify to the subject-matter of her hearsay statements at trial. In order to admit child victim hearsay § 90.803(23) requires that the trial court:

- 1) conduct a hearing and make a preliminary determination that the statements come from a trustworthy source and are reliable
- 2) the child must either testify at trial or be declared unavailable as a witness, and
- 3) if the child is unavailable, the hearsay statements are admissible only if the trial court determines that there is other corroborating evidence of the abuse or neglect.

The parents argue that she did not fulfill the second requirement because she refused to discuss the sexual abuse. The Fourth DCA found that she was unavailable under § 90.804(1)(b), which states that a witness is unavailable if he or she "[p]ersists in refusing to testify concerning the subject-matter of the declarant's statement despite an order of the court to do so." Because she was unavailable, her hearsay statements were admissible only if there was corroborating evidence as to the sexual abuse by her father. The Fourth DCA held that there was corroborating evidence - she displayed overly-sexualized behavior for her age, she suffered from post-traumatic stress disorder, she displayed concerning behavior when she saw her father.

The parents also argued that the department failed to show a nexus between the sexual abuse of one child and the potential abuse of the remaining children. The Fourth DCA held that it was unnecessary to make a determination because the trial court properly terminated parental rights under § 39.806(1)(c) – continued threats of domestic violence in the home. The parents had a long-standing domestic violence problems, and two of the children witnessed the domestic violence. As to the other two children, termination of parental rights was primarily a case of prospective abuse. "In prospective abuse cases, the Department must prove a nexus between the act of abuse and any prospective abuse. The issue in these types of cases is whether future behavior, which will adversely affect the child, can be clearly and certainly predicted. Or, stated another way, whether it is likely to happen or expected." *J.F. v. Dep't of Children & Families, 890 So.2d 434, 440 (Fla. 4th DCA 2004).* Expert testimony provided evidence that the father will continue to be a risk to all of the children in the future and that he will not improve. The mother "refused to separate herself and the children from the father. She demonstrated that she cannot provide a safe environment for the children."

The Fourth DCA affirmed the trial court's order terminating parental rights.



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*Substantial Compliance – Trial Court’s Use of Form Order*

**L.M. v. Department of Children and Families, 2009 WL 3271344 (Fla. 4th DCA)**

The mother appealed an order on permanency review denying reunification with her and terminating the Department of Children and Families (the department) protective supervision.

The father wrote a letter to the court expressing concern regarding the primary-caregiver-mothers (his ex-wife) ability to care for the children. The trial court treated the letter as a motion for reunification and placed the children with the father. The trial court found that the father had substantially complied with the case plan but the mother did not. The trial court ordered placement of the children with the father, and permitted only supervised visitation with the mother. The trial court used a form order which listed the mother’s tasks. The trial court used a checkmark next to the option which stated she was not in substantial compliance. The Fourth District Court of Appeal (Fourth DCA) held that “checking a box does not, without more, amount to an adequate determination regarding the existence of substantial compliance.” “Substantial compliance is a term of art which requires more than just a determination that the case plan has not been completed. *B.L. v. Dep’t of Children & Families, 950 So.2d 1264, 1266 (Fla. 5th DCA 2007).*”

The Fourth DCA also held that the trial court failed to consider the six factors that must be taken into account and addressed in the findings of fact of the order on a motion for reunification. § 39.621(10).

The Fourth DCA reversed and remanded the case.



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**Fifth District Court of Appeal**

*Termination of Parental Rights - Consent*

**A.H. v. Department of Children and Families, 2009 WL 4059232 (Fla. 5th DCA)**

The father appealed the trial court’s order terminating his parental rights. The termination was as a result of the father’s default for failure to attend the final hearing. The father was instructed by the court at the advisory hearing that his failure to appear at the adjudicatory hearing would result in termination of his parental rights. However, his attorney later submitted to the trial court an e-mail where the father informed his attorney he would be unable to attend the hearing due to health concerns and financial hardship (he resided in New York). At the status hearing the father appeared telephonically and informed the trial court he would be unable to attend. The trial court responded: “Okay. Well, your attorney will be here.”

When the father did not appear at the termination trial, the trial court entered a consent to termination on behalf of the father and found that he had abandoned his children and the trial court terminated his parental rights.

The Fifth District Court of Appeal held that the trial court abused its discretion when it entered the default. The trial court failed to comply with § 39.801(3)(d), Florida Statutes (2008). “Although the court advised [father] at the initial advisory hearing ... that his failure to appear for trial could result in termination of his rights, at the status hearing almost nine months later, the court failed to give this instruction to [father], even when [father] informed the court that he would not be present. Indeed, the court intimated that [father’s] attorney could appear for him.” Even if the trial court had complied with the statute, “courts should ordinarily refrain from determining a termination of parental rights by default where an absent parent is making reasonable effort to be present at the scheduled hearing and is delayed by forces or circumstances beyond the parent’s control.” *R.P. v. Dep’t of Children & Families, 835 So.2d 1212, 1214 (Fla. 4th DCA 2003).*



## Read the Opinion

### *Internally Inconsistent Orders*

**L.M. v. Department of Children and Families, 2009 WL 3316944 (Fla. 5th DCA)**

The mother appealed the trial court's order reaffirming the adjudication of dependency, acceptance of case plan, and denial of motion for reunification with the mother. The child was removed from the mother's home and placed with the father as there were no allegations of abuse against him. The mother later filed a motion for reunification as she had substantially complied with her case plan and the case plan goal was reunification. The trial court "reaffirmed its adjudication of dependency, acceptance of case plan, and denial of the mother's motion for reunification. In denying the mother's motion for rehearing, the trial court explained that the award of sole custody to the father was made pursuant to § 39.521(3)(b)1., Fla. Stat. (2008). Lastly, the trial court granted DCF's motion to terminate jurisdiction."

The Fifth District Court of Appeal (Fifth DCA) reversed and remanded the case holding that the orders granting custody to the father, and terminating jurisdiction were "internally inconsistent with trial court's simultaneous decision to accept a case plan" which provided for reunification with the mother as its permanency goal.

The Fifth DCA remanded the case for the trial court to determine whether or not it would accept the proposed plan.



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### Florida Supreme Court

On November 12, 2009, the Florida Supreme Court issued an order amending Florida Rules of Judicial Administration, Juvenile Procedure and Appellate Procedure. These amendments are aimed at reducing the length of time of dependency and Termination of Parental Rights (TPR) appeals.

Highlights:

- Rule of Judicial Administration 2.250(a)(2) is amended to require the DCA to render a decision in juvenile dependency and TPR cases within 60 days of oral argument or submission of the case without oral argument.
- Rule of Judicial Administration 2.535(i) is amended to require that transcripts of hearings for appeals of dependency and TPR be given priority.
- Rule of Juvenile Procedure 8.276 is adopted to state that dependency and TPR appeals are governed by Rule of Appellate Procedure 9.146 (to advise parties of appellate filing requirements).
- Rule of Juvenile Procedure 8.525 is amended to require all days of hearing be set forth in dependency and TPR orders.
- Forms 8.983 and .984 are likewise amended, plus a checklist is added for those present and addition of each specific finding the court is require to make under Section 39.810(1) – (11), F.S.
- Parent's indigent status is presumed to continue for purposes of appeal.



## Read the Order

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### Website Resources

## Florida Guardian ad Litem Legal Briefs Newsletter

### Florida Coalition Against Domestic Violence

<http://www.fcadv.org/>

FCADV works towards ending violence through public awareness, policy development, and support for Florida's domestic violence centers. Serving Florida's 41 domestic violence centers, FCADV runs Florida's toll-free domestic violence hotline, maintains a resource library, and develops posters, brochures, safety plans, and other resources.

### Department of Children and Families Office of Domestic Violence Program

<http://www.dcf.state.fl.us/domesticviolence/>

### National Council of Juvenile and Family Court Judges, Family Violence Department

<http://www.ncjfcj.org/content/view/20/94/>

The Family Violence Department (FVD) of the National Council of Juvenile and Family Court Judges (NCJFCJ) has advanced social change in courts and communities across the country by providing cutting-edge training, technical assistance, and policy development on issues of family violence.

### ABA Commission on Domestic Violence

<http://www.abanet.org/domviol/home.html>

### Office of Court Improvement (OCI)

[http://www.flcourts.org/gen\\_public/family/familycourts.shtml](http://www.flcourts.org/gen_public/family/familycourts.shtml)

The OCI is a division of the Office of the State Courts Administrator within the Supreme Court of Florida. The OCI develops and assists with the implementation of court practices and programs which are designed to enhance and improve Florida's family and problem solving courts (delinquency, dependency, domestic relations, domestic violence, child support and drugs courts). Below are a list of just a few of the Domestic Violence resources they have.

[DV Benchbook](#); [Dating Violence Checklist](#); [Repeat Violence Checklist](#); [Sexual Violence Checklist](#); and [DV Checklist](#)

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