
**NATIONAL COUNCIL OF JUVENILE &
FAMILY COURT JUDGES**

70TH ANNUAL CONFERENCE

CASE LAW UPDATE

CASES TO BE DISCUSSED

***PRESENTED BY:
Hon. Stephen M. Rubin
Pima County Juvenile Court
Tucson, Arizona***

DEPENDENCY

(To be reported at: 137 P.3d 397)
143 Idaho 10, 2006 WL 1071577 (Idaho)

TOPICAL HIGHLIGHTS - *liability of agency*
Family Law
April 26, 2006 *→ death of a child*

Child Protection: Department of Health and Welfare and its employee owed to child a duty to competently investigate reported child abuse.

As a matter of first impression in Idaho, the Idaho Supreme Court held that the Idaho Department of Health and Welfare and its employee owed to a child a duty to competently investigate reported child abuse. A special relationship was created once the report of suspected abuse was received.

This decision may not yet be released for publication. *Allowing lawsuit for damages*

Rees v. State, Dept. of Health and Welfare

(To be reported at: 434 F.Supp.2d 570)
2006 WL 1677191 (N.D.Ill.)

TOPICAL HIGHLIGHTS - *Have to prove*
Family Law
June 22, 2006 *Special relationship existed - no*
- deliberate indifference? No

From Rees case

Foster Care: Licensing supervisor could not be held liable for injuries to child caused by foster parent.

- Must show constitutional right violated

Because the accusations of child abuse against a foster parent were determined to be "unfounded," an Illinois Department of Children and Family Services supervisor could not, under the "special relationship" exception, be held liable for substantive due process violation for the harms which the foster parent inflicted on the child after the supervisor lifted of the "hold" on the parent's foster parent license. Additionally, the supervisor could not be held liable under the state-created danger exception.

Jennifer Y. v. Velasquez

(To be reported at: 927 So.2d 1224)

2006 WL 932035 (La.App. 2 Cir.), 40,878 (La.App. 2 Cir. 4/12/06)

Duty here is reasonable care

TOPICAL HIGHLIGHTS
Family Law
April 28, 2006

Foster Care: Department of Social Services (DSS) was not subject to strict or vicarious liability to third party injured by child.

The Department of Social Services (DSS) was not subject to strict or vicarious liability to an employee at a private residential facility for "wayward children" who was injured by a child placed in the facility by the DSS. The employee did not allege any negligent acts on the part of DSS but instead contended DSS's liability arose from its legal relationship with foster children "as persons for whom [DSS is] answerable." In rejecting this strict liability claim, the court ruled that the DSS is not vicariously or strictly liable for the acts of a foster child. The only duty owed by the DSS to an injured third party is the duty of reasonable care for the placement of the child's custody and supervision in another party.

This decision may not yet be released for publication.

Washington v. State ex rel. Dept. of Social Services

--- F.Supp.2d ---

2005 WL 588997 (N.D.Ill.)

TOPICAL HIGHLIGHTS
Family Law
January 03, 2007

*Non-court ordered
"Case Plans"*

Child Protection: Restrictions on families during investigations of abuse or neglect implicated due process protections.

Those Illinois Department of Children and Family Services safety plans, which imposed restrictions upon families during the pendency of investigations into allegations of abuse or neglect, lasting only a few hours or days did not implicate substantive due process rights even when coupled with a threat of protective custody. However, safety plans signed under such a threat did implicate substantive due process rights when they had no stated duration or an indefinite duration.

Dupuy v. Samuels

*Tx has a law that allows
some informal supervision
of safety plans.*

TOPICAL HIGHLIGHTS

Family Law
January 10, 2007

Fa diagnosed

w/bi - Polar

*Many allegations of violence -
State hospital*

Child Protection: Flawed appointment of guardian ad litem (GAL) for father in dependency proceeding was structural error requiring reversal.

The California Court of Appeal held that the trial court's error in appointing a guardian ad litem (GAL) for the father in a child dependency proceeding, absent the inquiry as to father's competence and explanation of the purpose of the appointment required as a matter of due process, was a structural error requiring automatic reversal of the order terminating the father's parental rights, regardless of the strength of the evidence against the father. The court noted that there was a split of authority among the appellate courts as to whether this type of error was a structural one requiring automatic reversal, or a trial error subject to a harmless error analysis. The court aligned itself with the other appellate courts that found this error to be a structural one, emphasizing that the erroneous appointment of the GAL deprived father of his status as a party in the case where his basic right to the companionship, care, custody, and management of his child was at stake. The father's attorney was permitted to take direction from the GAL, rather than the father, and the attorney had no obligation to keep the father informed of what was going on in court, or even to solicit his views.

Must have a hearing to appoint GAL

In re James F.

(To be reported at: 904 A.2d 432)
393 Md. 661, 2006 WL 2129458 (Md.)

TOPICAL HIGHLIGHTS

Family Law
August 02, 2006

Child Protection: Exclusion of mother from adjudicatory hearing during child's testimony in CINA case violated mother's due process rights.

The Court of Appeals of Maryland has held that the juvenile court abused its discretion in excluding a mother from the adjudicatory hearing during her child's testimony in a child in need of assistance (CINA) proceeding without conducting any inquiry as to the reasons for the mother's exclusion. The exclusion of the mother from the adjudicatory hearing during her child's testimony violated the mother's due process rights. The Court emphasized that the mother was excluded based merely on the county department of health and human services' allegation that she would unduly influence her child's testimony, which resulted in unfairness and prejudice to the mother. Moreover, although the child's testimony was recorded, there was no indication that her recorded testimony was provided to the mother when she conferred with her attorney, which was inconsistent with the practice in custody cases of providing to the excluded party a recorded copy of a child's interview that occurs out of the presence of a party.

This decision may not yet be released for publication.

In re Maria P.

*Must have a
hearing to hear evidence
about why to exclude
Mom from hearing*

(To be reported at: 41 Cal.Rptr.3d 909)
138 Cal.App.4th 1121, 2006 WL 1071979 (Cal.App. 1 Dist.), 06 Cal. Daily Op.
Serv. 3396, 2006 Daily Journal D.A.R. 4911

TOPICAL HIGHLIGHTS

Family Law

April 26, 2006

Child Protection: "Evidence sanction" barring father's further testimony in a child dependency proceeding violated his due process rights.

The California Court of Appeal held that the juvenile court's imposition of a purported "evidence sanction" barring the father's further testimony during the jurisdictional phase of a child dependency proceeding violated his right to procedural due process. The father, who was characterized by the appellate court as "not the most attractive standard bearer for the right to be heard," had failed to appear at three of the hearings in the dispositional phase of the proceeding, he was more than two hours late to a fourth meeting, and the juvenile court failed to credit his explanations of his "cavalier disregard" for his obligation to appear. Nevertheless, the reviewing court observed that the juvenile court's response to the father's misconduct was limited by its obligation to protect the important procedural rights involved. The court further held that the constitutional error was not harmless beyond a reasonable doubt, and thus demanded reversal of the juvenile court's dispositional order declaring the child dependent and removing her from the physical custody of her father.

In re Vanessa M.

Can't make this finding/adjudication
by default.

State must put on case in Fa's
absence.

(To be reported at: 144 P.3d 137)
140 N.M. 578, 2006 WL 3000782 (N.M.App.), 2006-NMCA-133

TOPICAL HIGHLIGHTS
Family Law
October 24, 2006

*Matter of 1st
impression*

Child Protection: Parents in adjudication of child abuse and neglect have statutory right to effective assistance of counsel.

In a matter of first impression, the Court of Appeals of New Mexico has held that parents in a child abuse and neglect proceeding have a statutory right to the effective assistance of counsel. As a result of this holding, the Court of Appeals, in the case at bar, applied a presumption that the mother's counsel rendered ineffective assistance and deemed the mother's untimely filed notice of appeal of adjudication of her child as abused and neglected as timely filed, which enabled the Court to accept jurisdiction over her appeal. The presumption applied because the mother had a statutory right to the effective assistance of counsel at this stage of the proceedings, and the adjudication had a serious impact on her fundamental interest in the child.

State ex rel. Children, Youth and Families Dept. v. Amanda M.

TERMINATION OF PARENTAL RIGHTS

(To be reported at: 921 So.2d 787)
2006 WL 435722 (Fla.App. 5 Dist.), 31 Fla. L. Weekly D620

TOPICAL HIGHLIGHTS
Family Law
March 02, 2006

Child Protection: Indigent parents in Florida have right to appointed counsel in privately-initiated proceedings to terminate parental rights.

With respect to an indigent parent's due process right, under the Florida Constitution, to appointment of counsel in proceedings for the permanent termination of parental rights, there is no distinction between state-initiated and privately-initiated termination proceedings.

This decision may not yet be released for publication.

M.E.K. v. R.L.K.

(To be reported at: 205 S.W.3d 778)
361 Ark. 164, 2005 WL 675758 (Ark.)

TOPICAL HIGHLIGHTS
Family Law
July 11, 2006

Child Protection: The Strickland test for ineffectiveness of counsel applies in termination of parental rights cases.

In a matter of first impression, the Supreme Court adopted the Strickland test for ineffectiveness of counsel in termination of parental rights cases. Under Strickland, counsel is ineffective if his performance is deficient and that deficiency prejudices the defendant.

Jones v. Arkansas Dept. of Human Services

2 pages

(To be reported at: 194 S.W.3d 739)
359 Ark. 131, 2004 WL 2249499 (Ark.)

*filed by
trial attorney
do withdraw*

TOPICAL HIGHLIGHTS
Family Law
May 23, 2006

Child Protection: Anders procedures apply in cases of indigent parent appeals from orders terminating parental rights.

In a matter of first impression, the Supreme Court of Arkansas has held that appointed counsel for an indigent parent on a first appeal from an order terminating parental rights may petition the appellate court to withdraw as counsel if, after a conscientious review of the record, counsel can find no issue of arguable merit for appeal. Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal, and the indigent parent must be provided with a copy of the brief and notified of his right to file points for reversal within 30 days.

Does Anders apply?

Yes

Linker-Flores v. Arkansas Dept. of Human Service

(To be reported at: 908 A.2d 1073)
280 Conn. 474, 2006 WL 3069305 (Conn.)

TOPICAL HIGHLIGHTS
Family Law
November 01, 2006

Child Protection: Parents had standing to assert claim that children were denied their constitutional right to conflict free representation.

The Supreme Court of Connecticut has held that the parents in a termination of parental rights proceeding had standing to assert a claim that their children were denied their constitutional right to conflict free representation, because the children were denied the appointment of an attorney to advocate for their express wishes during the proceeding. The Court concluded that the parents' rights were inextricably intertwined with those of the children. Moreover, the ruling at issue involved irrevocable interference with their status as parents, and the legal disposition of the parents' rights in the proceeding necessarily could affect their parental rights.

Court has ^{NO} duty to make sure attorney is conflict free + within rules of professional conduct but parents have standing to raise issue

In re Christina M.

Slip Copy

2006 WL 3459727 (Ky.App.)

TOPICAL HIGHLIGHTS

Family Law

December 08, 2006

Child Protection: Statute providing right of appeal in termination of parental rights cases violated State Constitution.

In a matter of first impression, the Supreme Court of Kentucky has held that the statute providing the right of appeal in termination of parental rights cases was unconstitutional. Specifically, the Court held that the statute, which provided a right of appeal in termination cases only if the trial court granted the termination petition, violated the provision of the State Constitution mandating that all parties in civil and criminal cases have a right to one appeal, to the extent that the statute prohibited the right of appeal from the denial of a termination petition.

This decision may not yet be released for publication.

K.R.L. v. P.A.C.

(To be reported at: 708 N.W.2d 786)
270 Neb. 870, 2006 WL 73585 (Neb.)

TOPICAL HIGHLIGHTS

Family Law

February 03, 2006

Child Protection: Equal protections rights of mother of non-Indian children were not violated in termination of parental rights proceeding.

The Supreme Court of Nebraska has held that the statute governing the termination of parental rights of parents of non-Indian children did not violate a mother's right to equal protection by requiring a lesser "clear and convincing" burden of proof than the Nebraska Indian Child Welfare Act (NICWA), which set forth the standard of proof of beyond a reasonable doubt, in a termination of parental rights proceeding. The difference in the standard of proof between parents of non-Indian as distinguished from Indian children was attributable not to racial discrimination, but to the historical sovereignty of Indian tribes. Moreover, the special status of Indians, stemming from the historical relationship between the United States and a sovereign indigenous people, as well as the legislative goal of the NICWA to keep Indian families from disruption, situated the parent of an Indian child differently from the parent of a non-Indian child.

In re Interest of Phoenix L.

*difference is unfair, but
Appeal lost*

Oregon does appellate
Mussel de novo

TOPICAL HIGHLIGHTS
Family Law
January 20, 2006

Child Protection: Termination of parental rights was not supported by clear and convincing evidence of unfitness as of time of hearing.

The Oregon Court of Appeals, in a majority opinion with one justice dissenting, held that the termination of a mother's parental rights was not supported by the requisite clear and convincing evidence that the mother's mental and emotional illness rendered her unfit as of the time of the termination hearing. Although the mother had a long history of substance abuse, she had achieved externally confirmed sobriety for more than a year prior to the hearing. Further, although the treatment providers who assessed the mother during the first six months after the child was removed from her custody supported termination, the mother's most recent treatment providers uniformly agreed that she possessed adequate parenting skills during the year immediately preceding the hearing. Thus, in reversing and remanding the trial court's termination judgment, the majority of the appellate court stated that this mother was like thousands of parents who are "in process," parents who may initially fail to reckon with the potential consequences of their behavior on their children but are seeking to change their behavior to become better parents. However, the dissenting justice stated that the evidence supported the trial court's conclusion that the mother was not a viable safe parenting choice.

In re Engel

TOPICAL HIGHLIGHTS
Family Law
July 12, 2006

Again -> should have
a hearing. Don't just
accept admissions

Child Protection: Statute setting forth ground for termination of parental rights, as applied to mother, was unconstitutional.

The Supreme Court of Wisconsin has held that the statute setting forth ground for termination of parental rights when a child is in continuing need of protection and services, as applied to a mother, violated her right to substantive due process, in a termination of parental rights proceeding. In so holding, the Court pointed out that the trial court had terminated the mother's parental rights based solely on an impossible condition of return, i.e., the mother's status as an incarcerated parent, without considering the mother's actual parenting activities or the condition of her child, in contravention of the statute. The Court stated that, in cases where a parent is incarcerated and the only ground for termination of parental rights is that the child continues to be in need of protection or services solely because of the parent's incarceration, the statute requires that the court-ordered conditions of return are tailored to the particular needs of the parent and child.

TOPICAL HIGHLIGHTS

Family Law
March 01, 2006

Child Protection: Petitioners did not lack standing to bring second suit affecting parent-child relationship after judgment terminating parental rights was reversed.

Petitioners who had actual care, control, and possession of a biological mother's and father's child for at least six months ending not more than 90 days prior to the filing of their second suit affecting the parent-child relationship had standing to bring the second suit after the first judgment that terminated the parents' parental rights was reversed on appeal. As a matter of first impression, the Court of Appeals determined that the petitioners' possession of the child was not in violation of a court order, for the purposes of precluding standing, despite the reversal of the prior judgment, because neither the Court of Appeals in the prior appeal, nor the trial court, had issued an order directing the petitioners to turn the child over to the parents.

This decision may not yet be released for publication.

In re S.S.G.

(To be reported at: 39 Cal.Rptr.3d 365)
136 Cal.App.4th 980, 2006 WL 336175 (Cal.App. 2 Dist.), 06 Cal. Daily Op.
Serv. 1351, 2006 Daily Journal D.A.R. 1919

TOPICAL HIGHLIGHTS
Family Law
February 16, 2006

*Michael Jackson case
Have to make a record
Have to make findings*

Child Custody: Order granting mother's voluntary termination of her parental rights was void, absent best interest inquiry.

The California Court of Appeal held that the trial court acted in excess of its jurisdiction, and contravened the public policy favoring that a child has two parents rather than one, in granting the mother's motion to voluntarily relinquish her parental rights to the two children of her dissolved marriage, and thus the order was void and properly subject to collateral attack by the mother. The mother had relinquished custody of the children and stopped visitation, and then filed a motion to terminate her parental rights. In her declaration in support of the motion, she stated her belief that termination was "in the children's best interests." However, two years after the motion was granted, the mother sought temporary custody of the children because of concerns arising from the high profile criminal prosecution of the celebrity father and press reports that he was associating with an allegedly anti-Semitic group. The appellate court held that the earlier termination proceeding, which the father did not attend, was tantamount to a stipulated agreement between the parents to terminate parental rights, which would be void as attempting to divest the trial court of its jurisdiction over child custody matters. Even assuming there was no stipulation rendering the order void, as the father claimed, the reviewing court further held that the termination order was void on public policy grounds, since no inquiry was made as to whether the termination of the mother's parental rights was in the children's best interests.

In re Marriage of Jackson

ADOPTION

859 N.E.2d 545
112 Ohio St.3d 315, 2007-Ohio-7

TOPICAL HIGHLIGHTS Family Law January 17, 2007

Adoption: Notice of hearing in adoption proceeding need not include specific reference to both consent and best interests portions of hearing.

The Supreme Court of Ohio has held that the publication notice identifying the date and time of the joint hearing on the petitions for adoption of two children by the mother's husband, alleging that the biological father's consent to the adoptions was unnecessary because he had failed to communicate with or support the children for one year, complied with the statute requiring notice of the filing of an adoption petition and of the time and place of the hearing, though the notice did not specifically declare that a best interests hearing would be held. The Court, after analyzing the statute, concluded that it did not require that specific reference be made in the notice to both the consent and the best interests portions of the hearing. The Court went on to conclude that the notice did not violate the father's right to due process, because he had received notice that the court would be taking evidence as to whether his parental rights should be terminated. As such, there was no need for any additional requirement that the father be given notice that the court would consider both the consent and the best interests of the children at the hearing.

In re Adoption of Walters

TOPICAL HIGHLIGHTS

Family Law

May 23, 2006

Adoption: Father was not "parent" within meaning of adoption statute prior to adjudication of complaint to determine parentage.

The biological father of a child was not a "parent" within the meaning of the Florida adoption statute prior to adjudication of his complaint to determine the parentage of the child, since he was not a "man whose consent to the adoption of the child would be required" within the meaning of another section of the adoption statute. The father met none of the requirements to be a person whose consent to the adoption would be required because he was never married to the mother, was not the child's father by adoption, had not filed an affidavit of paternity pursuant to the state birth registration statute, had not yet been established to be the child's father in a court proceeding, and even though he had attempted to file a notarized claim of paternity with the state Putative Father Registry, the claim was untimely because it was filed after the mother executed her consent to adoption and after the adoption agency filed its petition for termination of the father's parental rights pending adoption. However, the father had filed a claim to determine the child's parentage, which, had it been adjudicated prior to the proceeding to terminate his parental rights and authorize the adoption, would have rendered him a person whose consent would be required for the adoption under the statute. Thus, the District Court of Appeal held that the trial court was required to rule on the father's claim to determine parentage prior to ruling on the proceeding to terminate his parental rights.

This decision may not yet be released for publication.

In re Termination of Parental Rights for Proposed Adotpion of Baby A.

---S.W.3d---

364 Ark. 485, 2006 WL 23511 (Ark.)

TOPICAL HIGHLIGHTS

Family Law

October 12, 2006

Adoption: Grandparents were not entitled to notice of adoption or entitled to an opportunity to be heard.

Maternal grandparents were not entitled to notice and an opportunity to be heard at an adoption proceeding for grandchild, even though they had visitation rights. The child's mother had consented to adoption and was not deceased, the grandparents made no claim that they acted in loco parentis by having grandchild live with them, and their visitation rights were cut off by the adoption.

Henry v. Buchanan

(To be reported at: 127 P.3d 638)
2005 WL 3604991 (Okla.Civ.App. Div. 4), 2005 OK CIV APP 112

TOPICAL HIGHLIGHTS
Family Law
January 19, 2006

Adoption: Grandmother had right to intervene in adoption action.

The grandmother of a minor child had the right to intervene in an adoption action for the limited purpose of establishing that she had court-ordered visitation with the child, and to protect her right to that visitation. The grandmother had been awarded visitation rights in a deprived child case. The child's foster parents and the Department of Human Services (DHS) unilaterally terminated visitation. Because the District Court could not grant grandparental visitation subsequent to a final order of adoption, the grandmother's ability to protect her visitation would be extinguished if she were not allowed to intervene in the foster parents' adoption action.

This decision may not yet be released for publication.

In re Adoption of D.D.B.

2005 WL 3604991

(To be reported at: 133 P.3d 645)
2006 WL 964752 (Alaska)

TOPICAL HIGHLIGHTS
Family Law
April 18, 2006

Adoption: Showing of detriment was required to overcome lack of consent by Office of Children's Services (OCS) to adoption petitions.

The Alaska Supreme Court held, as a matter of first impression, that prospective adoptive parents had to show by clear and convincing evidence that it would be detrimental to the minors to deny the adoptions, in order to establish that the Office of Children's Services (OCS), which had custody of the minors who were children in need of aid (CINA), had unreasonably withheld its consent to the adoptions. OCS's withholding of consent to the adoption petitions was facially reasonable. OCS was precluded by its own rules and regulations from consenting, since the prospective adoptive parents had relinquished their foster care license after OCS received substantiated reports of child abuse occurring in their home. The presumption of deference due OCS and the bar established by its facially reasonable withholding of consent could be overcome only if a high standard of proof was required of the adoptive parents.

This decision may not yet be released for publication.

(To be reported at: 902 A.2d 402)
587 Pa. 650, 2006 WL 1994680 (Pa.)

TOPICAL HIGHLIGHTS

Family Law

July 20, 2006

Adoption: Refusal of agency to consent to children's adoption by aunt and uncle did not deprive them of standing to pursue adoption.

The Supreme Court of Pennsylvania has held that the refusal of a county children and youth agency, which agency had custodial authority over the children, to consent to the children's adoption by their maternal aunt and uncle, did not, by itself, deprive the aunt and uncle of standing to pursue the adoption. The Court concluded that, under the Adoption Act, it was the trial court, not the agency, that was to determine what role a conferred or withheld consent should have upon an adoption proceeding. The Court went on to conclude that the aunt and uncle had standing to pursue adoption, as the termination of the mother's and the father's parental rights to the children did not act to sever the children's relationship with all of their other relatives. Moreover, the aunt and uncle had an interest in the proceeding that surpassed that of the ordinary, unrelated citizen.

In re Adoption of J.E.F.

Ill. App. 5 Dist., 2006
858 N.E. 2d 961
October 31, 2006

Mother executes a final and irrevocable consent to the adoption of her child by her brother. Mother's rights were terminated after trial. The trial court permitted the department of social services to place the child with the foster parents for adoption. The mother appealed. The trial judge was affirmed. The Court of Appeals said that the child was not available for adoption by the relative. The child was in a foster home that had cared for her almost her entire life. The child considered them "mom" and "dad." A parent's residual power to consent to an adoption after the child has been placed in protective custody does not necessarily lead to an adoption as sought by the parents. A judge may approve an adoption only after a finding that it is in the child's best interests.

In Re Taylor D.

187 N.J. 556
(2006)

New Jersey Division of Youth and Family Services v. S.S. –
The Court granted certification, limited solely to whether the Division of Youth & Family Services (DYFS) or the courts have an affirmative duty to ensure that contact between siblings is maintained, even in a post-adoption context, when the siblings are in a separate home. The New Jersey Supreme Court rules that because the child continued to have sibling contact with her adopted siblings, there was no real controversy before the court.

Therefore, the Court vacated the grant of certification as having been improvidently entered. The Court directed the Legislature's attention to the important issues raised concerning the scope of sibling rights in the context of the Child Placement Bill of Rights Act, N.J.S.A. 9:6B-1 TO -6, the Grandparent and Sibling Visitation Statute, N.J.S.A. 9:2-7.1, and the Adoption Act, N.J.S.A. 9:3-37 to -56.

New Jersey Div. of Youth and Family Servs. v. S.S.