

LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC.
SIGNIFICANT LITIGATION DOCKET
MARCH 22, 2006

I. Cases resolved this month--none

II. New cases

Case Name: J.D. v. Guardian ad Litem Program

Court: Fourth District Court of Appeal

Attorney: William Booth

Legal Aid Unit: Juvenile Advocacy Project

Issue presented: Whether a statutory amendment permitting guardians ad litem to obtain juvenile psychotherapist records without advance notice and opportunity for hearing violates the Florida Constitution.

Summary:

We were appointed attorney ad litem to advance the legal interest of a child sheltered by the Department of Children and Family Services. The guardian ad litem, appointed to represent her best interests, sought access to the report from a court-ordered mental status examination. We moved for an order protecting our client from any disclosures of records of her personal psychotherapist, to which the GAL program has free access under a 2005 statutory amendment. The court denied our motion after an evidentiary hearing.

Current status:

We petitioned the district court of appeal for writ of certiorari declaring the 2005 statutory amendment and provisions in the trial court's order allowing the GAL access to the records of our client's personal psychotherapist unconstitutional. We argue that (1) such access is not the least restrictive means of protecting the child from harm because there is no right to a prior hearing on the need for disclosure and because the court can order mental health evaluations by other providers; (2) due process requires notice and opportunity for meaningful hearing; and (3) appearance of the 2005 amendment governing the GAL program, an executive office, in an act about the state judicial system violated the Florida Constitution's requirement that laws have a single subject.

On our motion, the appellate court has stayed access by the GAL program to the records of our client's personal psychotherapist pending outcome of our petition.

III. Ongoing cases

Case Name: Blum v. Blum

Court: Fourth District Court of Appeal

Attorney: Robin Bresky (private appellate counsel)
Rena Taylor (trial counsel)

Legal Aid Unit: Pro Bono and Elder Law programs

Issue presented: Whether circuit court properly resolved conflicts in the evidence in converting rehabilitative to permanent alimony and raising alimony order to include former wife's health insurance costs.

Summary:

An elderly divorced wife moved the circuit court pro se to modify an award of rehabilitative alimony in the divorce judgment by increasing the payments ordered and converting the award to permanent alimony. The former husband, originally ordered to pay alimony based on income from disability benefits, had returned to work after the initial award. We undertook representation of the former wife during pendency of her motion to modify alimony. After hearing a commissioner of the circuit court granted conversion of the alimony award from rehabilitative to permanent and raised the required monthly payments from \$1200 to \$2053 to enable our client to purchase health insurance. The court of appeal has affirmed per curiam this alimony conversion order.

From the trial court's denial of our motion to hold the former husband in contempt for nonpayment of alimony, we have filed a separate appeal.

Current status:

Briefing is complete on the contempt appeal, and our appellate counsel has also filed a motion for attorney fees. We await the decision of the court.

Case Name: E.T. v. Department of Children & Family Services

Court: Fourth District Court of Appeal

Attorney: Amy Genet
Julie Littky-Rubin (private co-counsel)

Legal Aid Unit: Foster Children's Project

Issue presented: Whether following exhaustion of all appeals from termination of parental rights, parent must receive evidentiary hearing on habeas petition alleging ineffective assistance of counsel.

Summary:

The biological father of a child client of our Foster Children's Program had his parental rights terminated in juvenile court and then unsuccessfully filed an appeal, motion for rehearing, and motion for certification to the Florida Supreme Court, followed by an unsuccessful petition to the District Court of Appeal for certiorari seeking review of the juvenile court's termination of his visitation rights. The biological father then filed in the trial court a petition for writ of habeas corpus alleging ineffective assistance of counsel.

After denial of the habeas petition, the biological father filed a petition for writ of mandamus in the Fourth District Court of Appeal arguing that he had been unlawfully denied an evidentiary hearing on his habeas petition below. The Court of Appeal redesignated the terminated biological father's mandamus petition as an appeal from the denial of habeas relief below. In our principal brief on this appeal, we argue that (1) terminated parents may not base collateral attacks against final adoption of their children on alleged ineffectiveness of their counsel in termination of parental rights proceedings, especially where appellate counsel different from their trial counsel had opportunity to raise the issue on direct appeal, and (2) failure of a terminated parent to seek a stay of adoption proceedings bars a subsequent collateral attack on the adoption under the doctrine of laches.

Case status:

The case was orally argued June 3, 2005, and we are awaiting a decision.

Case Name: Helping Others Pursue Equality v. City of South Bay
Court: Fifteenth Judicial Circuit
Attorneys: Bill Fraser, Shane Weaver
Legal Aid Unit: Elder Law Program

Issue presented: Whether municipality violates statutory requirements when notice of public hearings on utility rate increase is not provided in individual utility bills.

Summary:

Effective November 1, 2004, the City of South Bay increased its water and sewer rates by over fifty percent, making them by far the highest in Palm Beach County. Advance notice of the public hearings on the rate increase was published in the newspaper instead of being included in utility bill inserts. On behalf of eleven mostly elderly ratepayer residents and an organization of

low-income and elderly ratepayer residents, we filed suit seeking declaratory judgment invalidating the rate increase and disgorgement of the added amounts paid by the individual plaintiffs and members of the plaintiff organization. The City has filed an answer with affirmative defenses.

Current status:

Written discovery is in progress.

Case Name: Hernandez v. Medows

Court: U.S. District Court for the Southern District of Florida

Attorney: Miriam Harmatz, Anne Swerlick, Valory Greenfield
(Florida Legal Services)

Bill Fraser (Legal Aid Society)

Jane Perkins, Lourdes Rivera (National Health Law Program)

Legal Aid Unit: Class Action Project

Issue presented: Whether state Medicaid agency provides appropriate notice and hearing rights for recipients when Medicaid refuses to provide prescribed medicine.

Summary:

On behalf of a statewide class Medicaid recipients whose prescriptions for Medicaid-furnished drugs were rejected by state computers, and on behalf of the Florida Transplant Survivors Coalition, we sued under the Due Process Clause and federal Medicaid statutes for an injunction requiring written notice and an opportunity for hearing. Under a settlement approved by the court, the Florida Medicaid program must require its contract pharmacies and health maintenance organizations to provide written notice of the reasons why a drug claim has been rejected and the procedures for resolving any dispute. Aggrieved persons must contact an ombuds office before they can obtain a hearing. In certain circumstances recipients will qualify for an emergency supply of medication, and for Medicaid coverage of branded medication when a generic analog may not be medically viable.

As the result of a broad increase this year in Medicaid drugs subject to prior authorization requirements, many class members did not receive drug denial notices and three-day emergency supplies required by the settlement. Pursuant to a mediated agreement, Defendant sent notices to all Medicaid pharmacies reminding them of their obligations to provide appropriate notices to persons whose prescriptions Medicaid refuses to fill, and to all class members whose refills Medicaid denied in July 2005. Defendant has also agreed on operational steps that will ensure people appealing Medicaid-caused interruptions in their drug therapy will receive

continuing supplies of the prescribed drugs pending results of their appeals.

Current status:

We are completing appropriate documentation confirming the additional agreements reached in settlement of our post-judgment claims. We have also initiated the post-judgment dispute resolution process regarding Defendant's possible failure to extend benefits of the settlement to Medicaid recipients enrolled in health maintenance organizations.

Case Name: Hernandez v. Najmabadi
Court: Fifteenth Judicial Circuit
Attorney: Shane Weaver
Legal Aid Unit: Elder Law Program

Issue presented: Whether mechanic's lien exists and may be foreclosed when auto repair shop secures customer's signature on blank repair order, completed by repair shop later, and fails to provide statutory written estimate of repair costs.

Summary:

We represent an elderly client with limited English proficiency who took his car for repairs and verbally authorized up to three hundred dollars in work. The repair shop secured his signature on a blank repair order and provided no written estimate of costs, then completed the repair order later and presented a bill for \$926. When our client refused to pay the full bill, the repair shop refused to return his car, valued at more than eight thousand dollars. An auto lien service claiming power of attorney then served notice on our client that his care would be sold at public auction April 28.

We filed suit against the owner of the auto repair business, a sole proprietorship, and the auto lien service on April 22, 2005, for replevin, conversion, and violations of the Florida Motor Vehicle Repair Act and the Florida Unfair and Deceptive Trade Practices Act. The court granted our client summary judgment as to liability on our replevin, injunctive, and Florida Motor Vehicle Act claims and ordered Defendant to return our client's car. The court denied summary judgment on our Florida Unfair and Deceptive Trade Practices Act claim, finding that disputes of material fact existed.

Current status:

Nonjury trial is set for May 15 on the UPDTPA claim, and to establish the amount of damages to be awarded.

Case Name: Mikrut v. Pinkerman
Court: Fifteenth Judicial Circuit
Attorney: Shane Weaver, Ron Ponzoli (private co-counsel)
Legal Aid Unit: Elder Law Program

Issue presented: Whether bill of sale of real property by 93-year-old person with dementia prepared by purchasers under which monthly payments would be made without interest at a total discounted price was sufficient to pass title.

Summary:

Defendant Wilkes worked in an insurance business. After our client's cousin, who holds his power of attorney, contacted her about buying homeowner's insurance for his house, we allege that she and Defendant Pinkerton in separate visits to his home in the cousin's absence first induced him to rent the home to them and then secured his signature on a bill of sale. Defendants then recorded the bill of sale and subsequently quitclaimed the property to a third party, Defendant Groves. We filed suit for actual and punitive damages, rescission, judgment quieting title, and attorney fees, pleading counts for exploitation of a vulnerable adult; rescission for undue influence, inadequacy of consideration, and unconscionability; and for quieting title. We allege Defendants Wilkes and Pinkerton were aware of our client's diminished capacity when they induced him to enter into transactions under extremely favorable terms.

Current status:

We await responses from written discovery requests and have noticed depositions of the defendants.

Case Name: W.A. v. Department of Children and Families
Court: Fourth District Court of Appeal
Attorneys: Bill Fraser, Amy Genet
Legal Aid Unit: Foster Children's Project

Issue presented: Whether termination of parental rights of a mother with fifteen years of unsuccessful drug treatment is unlawful when qualified relatives want custody of the child and the State has not offered a year of reunification services.

Summary:

Our child client B.A. was not yet eight months old when her mother W.A., who has had difficulties with drugs for over twenty years, took B.A. with her to buy crack cocaine and then smoked it in her transitional apartment. When the maternal grandparents declined to assume care over the child and went on a month's vacation instead, the Department of Children and Family Services placed B.A. in a foster home where she is flourishing. A few months before trial of our petition for termination of parental rights, W.A. moved for a change of placement to the grandparents. The court denied this motion without prejudice and terminated W.A.'s parental rights.

In her principal brief on appeal, W.A. argues that termination of her parental rights without a year's additional services and refusal to place the child with the grandparents violated her constitutional right to the least restrictive limitation of her parental rights and her rights under Florida statutes and caselaw.

Current status:

In our appellate brief we argue that (1) there was clear and convincing evidence that no additional services could prevent W.A.'s continuing involvement in the child's life from being harmful; (2) no additional proof is constitutionally necessary to terminate parental rights; (3) the juvenile court's order declining to change the child's placement ten days before the TPR trial began was in the child's best interest; and (4) a temporary change of placement was not properly before the juvenile court at its TPR adjudicatory hearing. We are awaiting W.A.'s reply brief.

Case Name: Woodard v. Jupiter Christian School
Court: Florida Supreme Court
Attorney: Michelle Hankey, William Booth
Legal Aid Unit: Juvenile Advocacy Project

Issue presented: Whether clergyman and private religious school where he is employed may be found liable for clergyman's disclosure of student's confidential disclosure of gay sexual orientation that led to student's expulsion.

Summary:

Represented by private counsel, our child client filed in the Civil Division of the Fifteenth Judicial Circuit a six-count lawsuit following his expulsion from a private religious school based on disclosure by clergy of his confidential revelation that he is gay. Citing the "impact rule," the trial court dismissed our client's negligent infliction count with prejudice because our client had not alleged physical injury as well as emotional damage. A split panel of the court of appeal affirmed dismissal of the negligent infliction count but certified to the Florida Supreme Court as a

question of great public importance the question of whether the impact rule precludes a claim for negligent infliction arising from breach of confidentiality by clergy.

In our principal brief to the Florida Supreme Court, we argue that the impact rule should not apply because the damages to our juvenile client from disclosure of his confidences were foreseeable, the disclosure directly caused his emotional distress, and his damages were demonstrably consequential. We further argue that the individual defendant's status as clergy was adequately alleged in the complaint, that confidentiality attaches to discussions with persons merely perceived as clergy, and that tort liability for violation of confidences does not require existence of a statutory privilege.

Current Status:

Oral argument has been scheduled for May 5.