

LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC.
SIGNIFICANT LITIGATION DOCKET
NOVEMBER 28, 2005

I. Cases resolved this month

Case Name: Zerilli v. City of Boynton Beach
Court: Fifteenth Judicial Circuit
Attorney: Shane Weaver, Bill Fraser
Legal Aid Unit: Elder Law Program

Issue presented: Whether mobile home park residents may be evicted based on a change to a city's comprehensive plan allowing construction of condominiums without presentation of evidence to the city commission that other adequate rental housing exists.

Summary:

On behalf of five elderly and near-elderly residents of the Seaview Park Club Mobile Home Park in Boynton Beach, we filed suit against the City of Boynton Beach and the owners of Seaview. Our suit seeks to enjoin evictions of the mobile home park and an underlying change to its zoning and future land use designation obtained to permit construction of upscale condominiums on the land. We allege violation of a statute requiring a determination by the City that there are adequate mobile home parks or suitable other housing where the residents could live. Both the City and the park owners moved to dismiss.

Current status:

The court granted Defendant City's motion to dismiss the count against it with leave for us to amend our complaint to clarify that we were challenging the City's change to its future land use plan, not merely the zoning change. After amending the complaint, and with the park owners' motion to dismiss still pending, we entered into a confidential settlement that will enable our clients to relocate while also permitting redevelopment of the mobile home park site. As part of the settlement, we voluntarily dismissed the action.

II. New cases--none

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.

After the circuit judge upheld this decision, the former husband appealed. In our principal brief, we argued that (1) our client's motion to convert rehabilitative to permanent alimony was timely because the trial court reserved jurisdiction to hear such a motion and because she did not have unambiguous notice of the end of the rehabilitative alimony period; (2) the trial court had reserved jurisdiction to include the cost of health insurance in a modified alimony award; (3) the permanent alimony award was within the ability of the husband in consideration of the wife's needs, (4) time limitations on cross examination imposed by the trial court were reasonable, and (5) testimony of a witness who did not appear on the witness list was cumulative and not prejudicial to appellant.

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:

The court of appeal affirmed per curiam the alimony conversion order below. The former husband's brief on our contempt appeal is due December 9.

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: Hernandez v. Medows

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

Attorney: Miriam Harmatz, Anne Swerlick (Florida Legal Services)
Bill Fraser (Legal Aid Society)

Jane Perkins, Lourdes Rivera (National Health Law Program)

Jim Green (private counsel re attorney fees)

Legal Aid Unit: Class Action Project

Issue presented: Extent of state official's liability for attorney fees to prevailing party in settled case requiring notice and hearing for persons whose Medicaid claims for prescription medicine have been rejected.

Summary:

On behalf of 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. The court certified a statewide class of Medicaid recipients and later approved a mediated settlement.

Under the settlement, 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. Plaintiffs have moved for awards of \$855,586 in attorney fees, including \$200,326.50 for the work of the Legal Aid Society, and \$12,761.35 in costs.

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. Accordingly, we have invoked the dispute resolution procedures required by the settlement.

Current status:

At mediation we reached agreement in principle on further relief to implement the original settlement of this case, but we have not been able to reach operational agreement. As a condition to withholding a motion to enforce the original settlement, we have asked Defendant to send immediate 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. A further telephone mediation on the remaining settlement implementation issues is likely.

On October 12 the magistrate judge recommended an award of \$857,007 in attorney fees and \$12,844.89 in costs to the plaintiffs, including \$190,917 in fees for the Legal Aid Society's work on the case. On November 17 the district judge approved this recommendation, and we are now awaiting payment.

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. We seek injunctive relief prohibiting auction of the car, return of the car, damages, costs, and attorney fees. On April 27, 2005, the court entered into an agreed order postponing any auction of our client's car until final resolution of our lawsuit. However, on May 19, 2005, the court entered an order denying our client's request for writ of replevin.

Current status:

Based on the defendant's deposition and plaintiff's affidavit, we moved for summary judgment on four counts of the complaint. In our motion, we argue (1) defendant was statutorily obligated to provide written disclosure of the right to a written estimate before undertaking repairs, (2) in the absence of such notice, the right to an estimate cannot be waived, (3) in the absence of a proper waiver, the right to payment for the repairs is forfeit, (4) the measure of damages in a replevin action is the rental cost of a substitute vehicle, and (5) the measure of damages in an Unfair and Deceptive Trade Practices Act case is the diminished value of the car during its unlawful detainer. We consequently request the return of plaintiff's car, damages, attorney fees, and costs.

Case Name: Mikrut v. Pinkerman
Court: Fifteenth Judicial Circuit
Attorney: Shane Weaver
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:

All parties have served and responded to written requests for discovery.

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. The trial court also dismissed three other counts with leave to amend. Our client appealed the dismissal with prejudice, and his private counsel asked us to pursue the appeal.

Current Status:

On October 12 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. Reserving a decision on its jurisdiction, the Florida Supreme Court asked for briefs on the merits.

In our principal brief, 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. We await the appellees' response brief.