
TRIAL ADVOCACY

Dependency courts preside over a variety of issues relating to children. Although Chapter 39 fully references the statutory criteria for petitions of dependency and termination of parental rights, the protection of children necessitates filing many other types of pleadings consistent with manifest best interest principles. The commitment to motion practice on behalf of children should, at a minimum, address issues such as visitation, custody, medications, residential treatment, permanency, out-of-state placement, child hearsay, psychotropic medication, and the appropriateness of an adoptive placement. Every motion must incorporate a brief statement of facts, an analysis of the applicable law, and an explanation of the relief sought. Fla. R. Juv. P. 8.235(a).

Program attorneys have an ethical and legal duty to thoroughly investigate all court-appointed dependency cases. Upon appointment, a demand for discovery should routinely be filed and served upon all parties except in extremely rare instances. A party may waive the client's right to participate in discovery for the purpose of securing a strategic advantage. The party to whom the demand is directed shall disclose and permit inspecting, copying, testing, or photographing matters material to a child's case. Fla. R. Juv. P. 8.245(b)(1). Generally, the discovery process includes the exchange of witness lists, the disclosure of relevant documents, and the taking of depositions. Fla. R. Juv. P. 8.215(e); 8.245(b). The responding party shall serve a written response within 15 days after service of the demand in normal situations. Fla. R. Juv. P. 8.245(d)(2). Unless required by the court, a party shall not file any of the documents or items requested because their admissibility is still in question. Fla. R. Juv. P. 8.245(d)(4). Work product and confidential communications are not discoverable; however, any claim of privilege must be made expressly to the other party without revealing its contents. Fla. R. Juv. P. 8.245(a)(2); 8.245(2). As for obtaining discovery from a non-party, the issuance of a subpoena directing the production of documents and things is required after serving notice to the other parties. Fla. R. Juv. P. 8.245(e). From the child's perspective, the method used to extract discovery poses a risk to the mental and emotional well-being of the child. To protect the child from undue annoyance or embarrassment, the court is authorized to issue a protective order on the motion of any party for good cause shown. Fla. R. Juv. P. 8.245(f). Additionally, special rules exist to govern the depositions of children under 16 years of age. Fla. R. Juv. P. 8.245(i).

A major objective of motion practice focuses on the protection of children who testify in the courtroom and the preservation of evidence for trial. Prior to a scheduled hearing, the program attorney customarily assumes the responsibility of shielding the child from any anticipated harm by having to testify in court. The court is authorized to examine the child outside the presence of the parties or allow the child to testify via close-circuit television or videotape, if certain conditions are met. Fla. R. Juv. P. 8.255(d). Another pre-trial motion for consideration involves mental and physical examinations for children and parents. When the physical or mental condition of a parent or legal custodian is "in controversy," any person may request the court to order the person submit to a physical or mental examination by a qualified professional. Fla. R. Juv. P. 8.250. Moreover, pursuant to the Florida Evidence Code, statements introduced under the child hearsay rule are inadmissible absent a written pre-trial motion. In contrast, a motion to invoke "the rule" of witness sequestration is made ore tenus at the start of trial, but essential nevertheless, to keep witnesses separated until called to testify. Fla. R. Juv. P. 8.255(e).

In the final preparation for an adjudicatory hearing or trial, a program attorney should make every effort to narrow the issues which are truly in controversy. The general reason is to expedite judicial economy and to reduce the amount of time all parties need to spend in the actual hearing or trial. Practically speaking, this is accomplished through a pre-trial stipulation. A pre-trial stipulation is an agreement between the parties delineating uncontested facts and evidence (e.g. the child's date of birth, the parent's names, the date of removal, etc.). Copies of each exhibit which the parties intend to introduce at trial should be marked and discussed in an attempt to reach an agreement as to their admissibility. This is also the time when final witness lists are disclosed. Under some circumstances, opposing counsel may not be willing to agree to any stipulation. At such time, the program attorney should prepare and submit proposed pre-trial stipulations to the court with copies to all parties.

The commencement of an opening statement is a key opportunity to educate the judge about the theory of your case prior to the introduction of any evidence. Although opening statements are sometimes waived in a non-jury setting in the interest of saving time on straightforward issues, they are extremely beneficial in complicated cases, such as in the sexual abuse or aggravated battery of a child. In fact, most dependency judges willingly accommodate any request to offer opening statements regardless of the complexity of the case. The basic structure of an effective opening statement simply conveys to the judge, in a chronological narrative, what evidence will be presented during the hearing. Discuss first, the most significant facts that are expected to be supported by the evidence, and then explain the issues in a clear and concise manner. One point of caution, however, is that opening statements tainted with argument inevitably invite objections from the opposing counsel and disrupt the flow of the entire presentation.

Direct examination is the stage of the proceeding at which a petitioner calls its witnesses and introduces evidence at trial. Essentially, direct examination elicits factual information from either witnesses or writings for the purpose of supporting the allegations in the petition. The numeric order of your witnesses is especially important in dependency cases. If a child is participating as a witness, conventional wisdom dictates presenting the child as the first witness in an effort to alleviate any anxiety associated with testifying. Otherwise, a chronological arrangement offers the best approach for reasons of clarity and "story telling." As a program attorney, witness preparation is an essential job function. Witnesses need to know what questions will be asked on direct, as well as what questions will likely be posed on cross-examination. Unless the witness is very young, mentally challenged, or hostile, the rules of evidence consider leading questions to be improper. Questions should be open ended and invite the witness to elaborate, rather than answering in the form of yes or no. In theory, every direct examination question should begin with words of who, what, when, where, how, why, explain, or describe. Prior to the completion of direct examination, it is imperative that all of petitioner's exhibits be admitted into evidence. Pursuant to §90.612(1), Florida Statutes, the court has the discretion to deny admission of evidence introduced after the petitioner has concluded its case-in-chief. Postponing evidence until after the completion of one's case-in-chief invariably risks its total exclusion by the trial court.

Following the close of petitioner's evidence, opposing counsel may execute a motion for judgment of dismissal in all cases involving dependency petitions, termination of parental rights petitions, or any other pleadings for relief. Fla. R. Juv. P. 8.330(e); 8.525(h); 8.235(b). If the court is of the opinion that the evidence is insufficient to support the petition, it may enter an order dismissing the petition. *Id.* The failure to timely make such a motion is deemed a waiver of the argument, thus precluding appellate review. To survive a motion for judgment of dismissal, the

petitioner must establish a prima facie case in support of its petition, in light of the applicable standard of review. Therefore, the trial court usually expects to hear oral arguments from both the proponent and challenger before issuing its ruling on the sufficiency of previously admitted evidence.

The Due Process Clause of the Fourteenth Amendment guarantees the right of cross examination in all civil proceedings, including dependency cases. The bulk of cross examination conducted by a guardian ad litem attorney is frequently directed at the child's parents, and commonly features past criminal history, prior bad acts against children, case plan progress, poor decision making, bonding and attachment issues, and the future ability to safely care for children. The recipe for successful cross examinations mandates plenty of preparation, including thorough research into possible bias and conflicting statements, and most importantly, the use of short and clear, leading questions. A tactical advantage of cross examination not only includes the use of leading questions, but encompasses the ability to introduce otherwise non-admissible hearsay to impeach the credibility of witnesses. The line of attack for proper impeachment takes into consideration prior criminal convictions, improper motives or biases, inconsistent statements and bad character evidence through reputation in the community. Consequently, the discovery process is crucial to mounting a meaningful cross examination.

The delivery of a closing argument is quite different than an opening statement. During closing argument, the evidence should be discussed in the most persuasive manner, constantly weaving the best supporting facts into the theory of the case. Similar to jury trials, the trier of fact is usually most attentive at the beginning of your argument. For that reason, the introduction must grab the interest of the court with one or two lines illustrating the entire case from your perspective. For example, "this is a case about willful neglect and not poverty" or "this father has chosen drugs over his children." The middle of the argument basically presents the facts and the law in the light most favorable to your case. Remember to focus on your strongest facts and to merge those details with relevant citations from Chapter 39 and the Florida Rules of Juvenile Procedure, pertinent case law, and federal law as it relates to children. Refer to the appellate practice section of this manual for additional information on preserving the record for appeal. The final part of the closing argument instructs the trial judge what remedy is sought and why the trial judge must accept your conclusion. This is a perfect opportunity to briefly mention the strongest points of your case.

Upon the entry of a ruling, the Florida Rules of Juvenile Procedure describe two methods to obtain post-judgment relief. The first method is to move for rehearing. Fla. R. Juv. P. 8.265. A motion for rehearing is authorized only if based on one or more of the following grounds: (1) the court erred in the decision of any matter of law arising during the hearing; (2) a party did not receive a fair and impartial hearing; (3) any party required to be present at the hearing was not present; (4) there exists new and material evidence, which, if introduced at the hearing would probably have changed the court's decision and could not with reasonable diligence have been discovered before and produced at the hearing; (5) the court is without jurisdiction of the proceeding; and (6) the judgment is contrary to the law and the evidence. Further, a motion for rehearing must be made within 10 days of the entry of the order. Fla. R. Juv. P. 8.265(b)(1). A motion for rehearing shall not toll the time for the taking of the appeal. Fla. R. Juv. P. 8.265(b)(3). Program attorneys considering appeal must be mindful of the prohibition against tolling as it relates to dependent children.

The second method of redress from a trial court's decision is appellate review. Any party affected by an order entered from a dependency court may appeal to the appropriate district court of appeal in the time and manner prescribed by the Florida Rules of Appellate Procedure. §39.815(1). The notice of appeal must be filed within 30 days from the date the order is entered. The time requirements for submitting the initial brief, as well as constructing the record, vary widely depending on whether the appeal is filed under a writ of certiorari, or challenging the entry of a final order or non-final order. As a result, program attorneys are instructed to follow the Program's procedure for notifying the appellate team as soon as any party to the case, including the GAL program attorney, contemplates filing an appeal. The taking of an appeal does not act as a supersedeas in any dependency case unless ordered by the court. §39.815(3). However, placement for adoption is suspended pending the appeal of an order terminating the parental rights. Id.

Effective trial advocacy never begins on the day of the hearing, but originates from the date of appointment. The discovery process is the foundation of a pyramid of legal research and analysis, preservation of evidence, preparation of witnesses, and the organization of facts and ideas. All phases of legal representation for the Program should reflect the loyalty and commitment of serving the best interest of the child. For this reason, program attorneys strive to achieve a workable knowledge of Chapter 39, the Florida Rules of Juvenile Procedure, the Florida Evidence Code, and even federal law relating to dependent children. They zealously urge the dependency court to heavily weigh the rights of children, despite ever increasing trends of parents' counsel to ardently insist the rights of the parents are paramount. And most importantly, the child is given a voice through our program attorneys, especially when competing interests fail to place the child's best interest at the center of the controversy.