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# BASICS FOR EVERY GUARDIAN AD LITEM PROGRAM ATTORNEY

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## CONFIDENTIALITY OF RECORDS AND OPEN HEARINGS

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All records and information required in dependency proceedings are confidential and exempt from public inspection or access. § 39.0132.

Section 39.0132 lists who can access this information without court order:

- the child;
- the child's parents;
- authorized court personnel;
- correctional probation officers;
- law enforcement agents;
- the guardian ad litem; and
- others entitled under chapter 39. See § 39.0132(3).

### **Dependency Court Records are Only Admissible in the Following Civil and Criminal Proceedings:**

- appeal;
- perjury;
- disqualification;
- adoption; and
- those related to placement, parental time, adoption or termination of parental rights for the child or the sibling of a child whose rights have already been terminated. § 39.0132(6).

### **Abuse Hotline Reports and Records are not Open to Public Inspection:**

- Section 39.202 governs the confidentiality of all reports and records held by the department, including reports made to the central abuse hotline regarding a child's abandonment, abuse or neglect. Such reports and records are not open to public inspection.
- Anyone who "knowingly and willfully" discloses confidential information contained in the central abuse hotline or departmental records of child abuse, abandonment, or neglect, is guilty of a 2nd degree misdemeanor. § 39.205(3).

Dependency hearings are open to the public; however the court may close any hearing or exclude someone in particular if the court determines “that the public interest or the welfare of the child is best served by doing so. § 39.507(2).

#### **Termination of Parental Rights Hearings are Closed to the Public. § 39.809(4):**

- See Natural Parents of J.B. v. Florida Department of Children and Family Services, 780 So. 2d 6 (Fla. 2001) (holding that closure is statutorily mandated, therefore the court need not make particular showing to justify closure).

PRACTICE TIP: One of the program attorney’s roles is to keep volunteers operating within the legal parameters of the dependency court. This is especially important with regard to confidentiality of records.

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### JURISDICTION AND VENUE IN DEPENDENCY PROCEEDINGS

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- Jurisdiction attaches either when the department takes a child into custody or when a shelter, dependency or Termination of Parental Rights (TPR) petition is filed, whichever is first. § 39.013(2).
- Jurisdiction may be transferred within a circuit, between circuits, and between states.
- Once TPR has occurred, the court retains jurisdiction over the child until the adoption is finalized. § 39.812(4).
- Indian Child Welfare Act (ICWA) determines the jurisdiction for Indian children, or those eligible for tribal membership. ICWA and its implications are detailed later in the manual.

#### **Subject Matter Jurisdiction**

- Jurisdiction over dependency and TPR proceedings is vested in the circuit court. §§ 39.013(2), 39.801(2).
- The court hearing the dependency matter may also exercise jurisdiction over guardianship proceedings (Chapter 744) and relative custody proceedings (Chapter 751) involving the same child. § 39.013(3).
- The court that conducted the TPR proceedings is granted *continuing jurisdiction* for purposes of adoption (Chapter 63). § 39.813.
  - Dependency issues may arise in other cases such as dissolution, custody, delinquency, and criminal cases. In the absence of local rules, transfer of such issues (custody, visitation, dependency, child support) to the court that hears dependency cases is provided by Rule 8.205(a).
  - The shelter hearing shall be held by the circuit court, or the county court if so designated by the chief judge of the circuit court. §39.402(6)(a). Pursuant to § 39.402(12), all hearings conducted by a judge, other than the juvenile court judge, must be reviewed within 2 working days of the original shelter hearing by the juvenile court judge.

## **Personal Jurisdiction**

- Jurisdiction over the child attaches upon the first of the following taking place:
  - when a child is taken into custody by the department; or
  - when a shelter, dependency, or TPR petition is filed. § 39.013(2).

## **Other States' Involvement**

- Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Dependency proceedings are included in the UCCJEA's definition of "custody proceeding," and as a result are subject to the UCCJEA. §§ 61.501-61.503.
- Interstate Compact on the Placement of Children (ICPC) involves the placement of children by the sending agency to receiving state, typically under supervision of the child welfare agency in the other state, rather than the transfer of the court's jurisdiction from one state to another. §§ 409.401- 409.405. *See ICPC Chapter.*

## **Transfer of Jurisdiction**

- Jurisdiction over dependency cases can be transferred within a circuit, between circuits, and between states, typically for reasons dealing with venue issues and convenience. Rule 8.205.

## **Retention of Jurisdiction (Extending Jurisdiction)**

- If a child has been adjudicated dependent, the court retains jurisdiction over the child until adoption or the age of 18 unless the court affirmatively relinquishes jurisdiction. §§ 39.013(2), 39.811(9).
- Dependent children may petition the court to retain jurisdiction for one year past their 18th birthday to determine whether appropriate aftercare support and other services have been provided or to meet any federal requirements with respect to the court's ongoing jurisdiction pending issuance of a Special Immigration Juvenile Visa. § 39.013(2).

## **Termination of Parental Rights Cases**

- Following TPR and permanent commitment of a child to the department, the court retains jurisdiction over the child until adoption is finalized, § 39.812(4); during this time, the court may consider continued relative and parental contact, as well as appropriateness of adoptive placement under § 39.811(7). Under § 39.813, the court that granted TPR retains jurisdiction over all matters pertaining to the adoption.

## **Termination of Jurisdiction**

- The court in a dependency proceeding may terminate its jurisdiction under the following circumstances:
  - the court finds that the department has not proved its case and the child is not dependent, and dismisses case § 39.507(4);

- the court adjudicates the child dependent while in custody of one parent, and places the child with the non-custodial parent § 39.521(3)(b)1;
- the court must retain jurisdiction in cases of placement with a fit and willing relative or another planned permanent living arraignment. §§ 39.6221(5), 39.6231(5), 39.6241;
- the child has been returned to parents or legal custodians, residing safely and continuously with the parents for at least 6 months § 39.521(7); or
- termination in such cases is not mandatory, and many courts will choose to terminate supervision while retaining jurisdiction until the child reaches the age of 18. § 39.521(7).

**A Motion May be Filed by any Party to Terminate Department Supervision, Jurisdiction of the Court, or Both, Pursuant to Rule 8.345(b).**

- However, the court cannot terminate its jurisdiction unless child is returned to parents or placed in a home providing child with permanency, and has been there for six months. Rule 8.345(b), 8.415(f)(5).

**Venue**

- The venue in a dependency case is in either the county in which the child and parents reside, or the county where the alleged abandonment, abuse or neglect occurred.
- Venue can also be with an Indian tribe, if the child is Indian, pursuant to ICWA.

PRACTICE TIP: Department policy is that it cannot transfer a case to another circuit without the receiving circuit's permission. Remember that you can still request that the court transfer a case over the department's objection, if a transfer is in the child's best interests, but remember to also address issues of delay in this request (assignment of a courtesy worker, referrals for services, relative caregiver funds and any other task the receiving department district will need to address).

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**DEFINING PARTIES AND PARTICIPANTS**

- Parties to dependency proceedings include the parents, the petitioner, the department, the guardian ad litem and the child. § 39.01(50).
- Participants to dependency proceedings include any person who is not a party but should receive notice of hearings involving the child.
  - Examples of potential participants are foster parents, prospective parents, grandparents, actual custodians of the child or any other person whose participation may be in the best interests of the child. § 39.01(49).
- The safe and timely interstate placement of foster children requires notification of participants.

PRACTICE TIP: The child has the right to be present unless the court finds that appearance is not in the best interests of the child. § 39.01(50), Rule 8.255(b). The child's mental and physical condition and age should be considered in making this determination. Rule 8.255(b).

## PATERNITY AND DILIGENT SEARCH

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When the identity of a parent is unknown at the time a shelter, dependency or when a TPR petition is filed, the court must conduct the following inquiry of the available parent, relative or custodian present before the court and order notice is given to the prospective parent identified:

- Whether the mother of the child was married at the probable time of conception, a man who co-habitated with the mother at the probable time of conception.
- A man, who claims to be the father, and who made the mother payments or promises of support in connection with the pregnancy or in regard to the child.
- Any man named on the birth certificate or in connection with applying for public assistance.
- Any man who has acknowledged or claimed paternity of the child in a jurisdiction where the mother and/or child have resided since conception. See §§39.503(1) and 39.803(1). See also Form 8.969.

### **Diligent Search and Affidavit of Diligent Search**

If parental location is unknown, and a permanent address designation has not been filed with the court by that person, then a diligent search shall be conducted by the petitioner. Rule 8.225(b)(2).

### **Importance of Conducting Diligent Search or Affidavit of Diligent Search**

- If the court finds that petitioner has conducted a diligent search, failure to serve parents with unknown identity or location shall not affect the validity of an order of adjudication or disposition. Rule 8.225(b)(5)(A).
- Diligent search must include, at a minimum, inquiries of:
  - all relatives of parents or prospective parents known to petitioner;
  - all offices of program areas of DCF likely to have information regarding parents or prospective parent;
  - other state and federal agencies likely to have information regarding parent or prospective parent;
  - appropriate utility and postal providers; and
  - appropriate law enforcement agencies. § 39.503(6).
- If parental location is still unknown after completion of diligent search, then an affidavit of diligent search shall be executed and filed with the court by the person who conducted the search and inquiry. Rule 8.225(b)(3).

Until excused by the court, the petitioner and the department (if required by the court) are under a continuous duty to search for and attempt to serve the parent of unknown location after an affidavit of diligent search has been filed in a dependency or TPR proceeding. Rule 8.225(b)(4).

## Cases

Department. of Health and Rehabilitative Services. v. Privette, 617 So. 2d 305 (Fla. 1993)

- The legal father must be given actual notice if he is available [language implies a diligent search] or constructively if he cannot otherwise be found.
- The court must hear from the father if he chooses to appear either personally or through his counsel.
- The State's interest in establishing paternity does not become "compelling" until it establishes an adequate factual basis and shows the child's best interests will be served by paternity testing.
  - The trial court must determine:
    - That the compliant is factually accurate, brought in good faith, and supported by reliable evidence.
    - That the child's best interests will be better served even if the blood test later proves the child's factual illegitimacy.
    - The moveant/petitioner bears the burden of proving the elements by clear and convincing evidence.

G.F.C. v. S.G. and S.G., 686 So. 2d 1382 (Fla. 5th DCA 1997)

- There is no cause of action under §742 for a man to petition to establish his paternity to a child born to an intact marriage between the mother and another man because §742.011 only provides a cause of action to establish paternity where paternity has not been established by law or otherwise. Paternity is established when a child is born to an intact marriage and the husband and wife recognize the child as theirs; here, the husband is the legal father of the child to the exclusion of all others.
- The court determined "a scientific determination that a man other than legal father is the child's biological father is irrelevant." Id. at 1387. It found that a petition which seeks to transfer the legal father's parental rights to the putative father must assert abuse, abandonment or neglect by the legal father and that the child's manifest best interests will be served by the finding on paternity. The claims must be proven by clear and convincing evidence.

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## CONTINUANCES

### The Program Attorney Shall:

- Advocate for timely hearings to ensure that permanency for the child is reached as quickly as possible; and

- Only request case continuances in extraordinary circumstances and shall make reasonable efforts to expeditiously conclude litigation.

There are specific time limitations that affect when shelter, arraignment, adjudicatory and disposition hearings must be held. *See Timeframe Chart.*

**The Court is Required to:**

- Limit continuances to the amount absolutely necessary to preserve the best interests of the child or the rights of a party. § 39.0136.
- Limit the cumulative days permitted for continuances permitted by ALL parties to 60 days. § 39.0136(3). Time limitations are the right of the child.

**PRACTICE TIP:** Because continuances delay permanency for the child, it is crucial that the program attorney scrutinize each request for a continuance and only agree when absolutely necessary to preserve the best interests of the child. It is important to keep track of the total number of days elapsed during continuances as there is a 60 day limitation within in any 12 month period.

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## PRESENCE OF THE CHILD

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**Presence in Court**

- The child has the right to be present unless the court finds that the child’s appearance is not in the best interests of the child. § 39.01(50).
- The program attorney shall take steps necessary to ensure the child’s attendance at hearings when appropriate.
- In making this determination, the program attorney shall consider: the age, maturity and child’s wishes; the purpose of the hearing; the advice of those consulted; and the potential risk of trauma to the child if they attend court.

**Testifying**

- If the child has been subpoenaed by another party to testify at hearing, the program attorney and the Program shall determine if testifying is in the child’s best interests.
  - The program attorney and the Program must determine the possible benefits and repercussions of testifying and the necessity of the child’s direct testimony.
  - Consideration should be given to the availability of other evidence or hearsay exceptions that may substitute for direct testimony.
  - If it is determined that it would not be in the child’s best interests to testify, the program attorney should seek an agreement of the parties not to call the child as a witness or utilize other remedies such as an order from the court to limit the scope or circumstances of the testimony.

- If the child is compelled to testify, the program attorney should seek to minimize the consequences by seeking appropriate accommodations as allowed by law such as *in camera* testimony, videotaped testimony or testimony via closed circuit television (all require motion and hearing as well as specific findings of fact).
- The court can limit the number of times a child is subject to testimony. *See § 92.55(3); Rule 8.245(i)(4).*

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## APPOINTMENT OF THE GUARDIAN AD LITEM PROGRAM

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Appointment of a guardian ad litem shall occur at the earliest possible time in any civil or criminal abuse, neglect, or abandonment judicial proceeding.

- See §§ 39.402(8)(c)(1); 39.807(2); 39.822. Rule 8.215; 8.305(b)(7)(A); 8.510(a)(2)(C).
- The Program is required to accept the appointment and shall assign staff or a volunteer within 30 days of the order of appointment or shall file a motion for discharge.
- Once appointed, the Program remains appointed until discharged by the court.

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## DISCOVERY

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### **Demands for Discovery**

- The program attorney shall file a demand for discovery in each case.
- The program attorney must ensure a discovery request is for information that cannot be obtained from another source that may be more timely and responsive.

### **Response to Demand for Discovery**

- A response to a demand for discovery must be filed within 15 days of service of the request. Rule 8.245(d)(2).
- The program attorney shall redact any work product from Program files before the file is reviewed by any other party.

### **Depositions**

Any party may take the deposition upon oral examination of any person who may have information relevant to the allegations in the petition. Rule 8.245(g).

- Depositions may be used at any hearing for the purposes of:
  - Impeachment
  - Testimonial evidence if the deponent is unavailable because:
    - he or she is dead;

- he or she lives farther than 100 miles from the place of hearing or is out of state unless it appears that the absence of the witness was procured by the party offering the deposition;
  - no service (and proof that proper service attempted);
  - he or she is unable to testify because of age, illness, infirmity or imprisonment;
  - it has been shown on application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or
  - the witness is an expert. Rule 8.245(g)(3).
- The court may set conditions for the depositions of a child under the age of 16 after proper notice and an evidentiary hearing where good cause is shown. Rule 8.245(i)(2).
    - “good cause” is shown based on the following considerations:
      - the age of the child;
      - the nature of the allegations;
      - the relationship between the child victim and the alleged abuser;
      - the child has undergone previous interviews that were recorded;
      - the examination would adversely affect the child; or
      - the manifest best interests of the child requires the limitations or restrictions.