FLORIDA'S DEPENDENCY BENCHBOOK

BENCHCARD: TERMINATION OF PARENTAL RIGHTS ADJUDICATORY HEARING

Items in **bold font** are required by Florida Statutes.

Note: TPR Hearings are closed proceedings and, as appropriate, exclude persons who are not parties, participants, persons entitled to notice of advisory, or lawyers involved in the case. § 39.809(4).

Introductory remarks.

- Explain purpose of the hearing. State the number of days the child has been in care and the number of placements to date.
- Swear in the parties, participants, and relatives. (*See Parties and Participants, Section 8*)

Representation and appointment of counsel.

- **If parents do not have counsel, advise parents of right to legal counsel. The offer of counsel must be renewed at every hearing. §§ 39.013(9).**
- **Ascertain whether the right to counsel is understood. § 39.013(9)(a).**
- If counsel is waived it must be on the record. Rule 8.320(b)(2**). Determine if waiver is made knowingly, intelligently, and voluntarily. § 39.013(9)(a).**
- If parents request counsel and claim to be indigent, have parents fill out affidavit for indigency. **If indigent per affidavit and the parents request it, appoint counsel for parents. § 39.013(9)(a).**
- **If parents request a continuance to consult with counsel, if the child is in shelter care, the court must follow the requirements of § 39.402(14) in determining whether to grant the continuance.** (*See Continuances, Section 8*)
- If parents are ineligible for the appointment of counsel or knowingly, intelligently, and voluntarily waive appointed counsel, ask if the parents want to proceed pro se or hire a private attorney. Explain "pro se" if necessary.
- Follow the circuit plan (developed by the chief judge) so that orders appointing counsel are entered on an expedited basis.

Parties and notices.

- **Have all parties identify themselves for the record with full name and permanent address. § 39.0131. See also §§ 39.402(8)(g) & 39.506(4).** Advise parties that the court will use the address for notice purposes until notified otherwise in writing. (Note: Do not openly identify the address when one or more of the parents is party to an injunction for protection against domestic violence.)

- **Confirm that the following persons were served with the petition for termination of parental rights; notice of the date, time, and place of the advisory hearing; and a summons with the required statutory language that specifically notified them that a petition has been filed:**
    - **Parents of the child;**
    - **Legal custodians of the child (if the parents who would be entitled to notice are dead or unknown);**
    - **A living relative of the child;**
    - **Physical custodian of the child;**
    - **Grandparent entitled by law to priority for adoption under § 63.0425;**
    - **Any prospective parent who has been identified under § 39.503 or § 39.803;**
    - **The GAL or GAL program representative.** (*See Service, Section 8*)
- **If the parent's location is not known, require a thorough description of DCF's efforts to locate and advise any absent parent of the hearing and confirm that a diligent search is in progress, if not yet completed. Verify that the diligent search complies with requirements of § 39.803(6).**
- Verify that relatives who requested notice actually received notice to attend the hearing.
- Conduct a paternity inquiry if still in dispute. If a parent has not legally established paternity, DNA testing should be ordered after proper inquiry, applying Privette principles as appropriate. If necessary, examine birth certificate or inquire as to marriage status. (*See Paternity in Dependency Cases, Section 3*)
- **If inquiry and diligent search identify a prospective parent, that person must be given an opportunity to become a party to the proceedings by completing a sworn affidavit of parenthood. § 39.803(8).**
- **Appoint Guardian ad Litem Program to represent the best interests of the child if it has not yet been appointed. § 39.402(8)(c); Rule 8.215.** (*See Guardian ad Litem, Section 4*)
- If the child is eligible for membership in a federally recognized tribe, confirm that the case worker has notified the tribe pursuant to the Indian Child Welfare Act. (*See Indian Child Welfare Act, Section 7*)
- Ask the parents if they are involved in any other past or pending family law, paternity, domestic violence, delinquency, or child support cases other than those previously disclosed. (*See Dependency in the Context of Unified Family Court, Section 2*)
- Ask parents, and others entitled to notice, who else should be involved in the court matter or who else is significant in the child's life.
- Verify timely compliance with all ICPC requirements. (*See Interstate Compact on the Placement of Children, Section 7*)

If parents wish to change their plea.

- Ask parents if they are satisfied with the advice of their attorney. (If no attorney present inquire if parent would like to be represented by an attorney. If indigent, and clerk verifies eligibility, appoint one.)
- Ask parents' counsel if their client is asking the court to accept a plea of consent.
- Ask parents if they understand that by entering a consent they are giving up their right:
  - To a trial;
  - To compel the attendance of witnesses;
  - To cross examine all witnesses; and
  - To require DCF to prove the allegations in the petition by clear and convincing evidence.
- Ask parents if anyone promised them anything or threatened them in any way to get them to enter this plea.
- Inquire if the parents are currently under the influence of any alcohol, medication, or drugs. (If YES, then what type, when, and how much last taken.)
- Inform the parents that they have 30 days from the entry of the termination of parental rights judgment to file an appeal, and if they cannot afford an attorney, one will be appointed to represent them.
- Announce: The court hereby finds that the plea of consent or admit is being knowingly, intelligently, and voluntarily made and that the parents have had the benefit of legal advice regarding the surrender of their parental rights.
- Ask if there is anything that the parents or their counsel would like to say before the court concludes the hearing.
- Accept the plea and continue with the balance of the hearing as scheduled.
- Note that some judges do a similar inquiry concerning a surrender by a parent.
- Set a manifest best interests hearing for: (Date_____, Time_____, in Courtroom _____). *(See Manifest Best Interests Colloquy, Section 9)*

TPR adjudicatory/disposition hearing.

- Proceed through regular course of the trial. (Ex: Each side calling witnesses to testify, etc.)
- Determine whether TPR is the least restrictive means of protecting the child.

- **Review petition and determine whether grounds for TPR have been proved by clear and convincing evidence and whether there is clear and convincing evidence that TPR is in the manifest best interests of the child. § 39.809(1).**
- Verify that each family member was provided services to meet his or her particular needs.
- Verify that all services were accessible to the person receiving them.
- **Determine the manifest best interests of the child. § 39.810.**
- **Consider the reasonable preferences and wishes of the child, if appropriate for the child's age. § 39.810(10).**
- **Inquire if parents have relatives who might be considered as a placement for the child. § 39.810(1).**
- **Ask parent(s)/DCF if there are there any siblings in any other homes. If so, order visitation, if appropriate, pursuant to § 39.811(7)(b).**
- Ask if there anything that the parent or their counsel would like to say before the court proceeds to conclude the disposition hearing.
- The court now:
  - Terminates the parental rights of the parent(s);
  - Places the child in the custody of DCF; and
  - **If the court terminates parental rights, order post-TPR visitation if appropriate, including any "goodbye" visits by the parents. § 39.811(7)(b).**
- **If the hearing was on an expedited TPR, set a judicial review hearing. The initial judicial review must be set within 90 days of the disposition hearing but in no event later than 6 months from the date that the child's removal from the home.**
- Inform the parents that they have 30 days from the entry of the termination of parental rights judgment to file an appeal. If they cannot afford an attorney and are eligible, appoint one.
- Inform parents for whom counsel was appointed that they have the right to file a motion in the circuit court alleging that appointed counsel provided constitutionally ineffective assistance, if the court enters a judgment terminating parental rights.
- Inform parents for whom counsel was appointed that they do **not** have the right to appointed counsel to file a motion alleging that trial counsel provided constitutionally ineffective assistance.

<u>Consider dispositional alternatives and ask DCF/CBC to articulate the plan for the child's continued services.</u>

<u>Set the next hearing.</u>

- **If TPR is granted, schedule hearing within 30 days of disposition to amend case plan and identify permanency goal. § 39.811(8).**

- If TPR is not granted, but the child is adjudicated or re-adjudicated dependent, schedule a disposition hearing under § 39.521 or a case plan conference under § 39.6011(1)(a).
- Verify that adoption home studies have been completed. Also verify that the CBC has produced necessary adoption documents. *(See Adoption Hearing Colloquy, Section 9)*

Complete a written order.

TERMINATION OF PARENTAL RIGHTS ADJUDICATORY HEARING SUPPLEMENT

- **TPR generally.**

Are termination of parental rights hearings closed to the public? Yes. § 39.809(4).

Court closure of termination of parental rights hearings is mandatory. Natural Parents of J.B. v. DCF, 780 So. 2d 6 (Fla. 2001) (holding that closure is statutorily mandated, therefore the court need not make particular showing to justify closure). "Because there is no presumption of openness in TPR proceedings, a mandatory closure requirement does not unconstitutionally limit the public's right of access to the proceedings." Id. at 10. Moreover, ". . . the mandatory closure of certain proceedings involving children is not an unconstitutional limitation on First Amendment freedoms." Id. at 11.

May I hold hearings involving more than one child simultaneously? Yes. When the children involved are related to each other or were involved in the same case. § 39.809(4).

- **Initiation of proceedings.**
  - How are proceedings initiated? Proceedings are initiated by filing an original TPR petition in the pending dependency action, if any, by DCF, the guardian ad litem, or any other person who has knowledge of the facts alleged or is informed of them and believes they are true. § 39.802(1); Rule 8.500(a)(1).
  - Must the petition be written? Yes. The TPR petition must be in writing and signed by the petitioner under oath stating the petitioner's good faith in filing the petition. § 39.802(2).

- **Service.**
  - How will subpoenas for witnesses, documents or other tangible objects be issued? At the request of a party or on the court's motion subpoenas will be issued. § 39.801(4).

- All process and orders issued by the court must be served or executed as other process and orders of the circuit court and, in addition, may be served or executed by authorized agents of DCF or the guardian ad litem. § 39.801(5).
- Who may serve subpoenas in Florida? Subpoenas may be served within the state by:
  - Any person over 18 who is not a party to the proceeding,
  - DCF, or
  - The guardian ad litem. § 39.801(6).
- No fee may be paid for service by an agent of DCF or the guardian ad litem. Any sheriff's fees for service must be paid by the county. § 39.801(7).

➢ **Standard of proof.**

- In a hearing on a petition for termination of parental rights, the court shall consider the elements required for termination. Each of these elements must be established by clear and convincing evidence before the petition is granted. § 39.809(1).
- However, if the provisions of ICWA apply, no termination of parental rights may be ordered in the absence of a determination supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f).

➢ **TPR petition.**

A TPR petition must contain facts supporting the following allegations:

- That at least one of the grounds for TPR has been met;
- That the parents were informed of their right to counsel at all hearings they attended;
- That a dispositional order adjudicating the child dependent was entered in any prior dependency proceeding relied upon in offering a parent a case plan;
- That the manifest best interests of the child would be served by the granting of the petition; and
- That the parents of the child will be informed of the availability of private placement of the child with an adoptive entity, as defined in § 63.032. § 39.802(4); Rule 8.500(b).

What must be included in the petition? The petition shall contain:

- Allegations as to the identity and residence of the parents, if known;
- The age, sex, and name of the child;
- A certified copy of the birth certificate of each child named in the petition (unless after a diligent search, petitioner is unable to produce it, in which case the petition shall state the date and place of birth of each child unless these matters cannot be ascertained after diligent search or for good cause); and

- When required by law, a showing that the parents were offered a case plan and have not substantially complied with it. Rule 8.500(b).

Must an answer or any other pleading be filed? No answer to the petition or any other pleading need be filed. § 39.805. Such matters may be pleaded orally before the court or filed in writing. § 39.805; Rule 8.520(a).

If a written answer is filed, can it be amended? After a written answer has been filed, amendments may be filed only with the permission of the court unless all parties consent. Amendments must be freely permitted in the interest of justice and the welfare of the child. Rule 8.500(d).

- **Voluntary surrenders.**

Consider using written plea form for Admit or Consent. (*See TPR Surrender Colloquy, Section 9)*.

- Parents may consent at any time, in writing or orally, on the record. Rule 8.500(g)(1).
- If the parents consent and execute surrenders and waivers of notice before filing of the petition, this shall be alleged in the petition and copies filed with the court. Rule 8.500(g)(2).
  - A surrender must be executed before 2 witnesses and a notary public or other person authorized to take acknowledgments. § 39.806(1)(a).
  - When a parent has executed a voluntary surrender before the petition is filed, the court must conduct a hearing at which the parent has an opportunity to challenge the prior consent and/or deny the allegations of the petition. *See* L.O. v. DCF, 807 So. 2d 810 (Fla. 4th DCA 2002).

What should I do if the parents appear and enter an oral consent on the record? The court shall determine the basis upon which a factual finding may be made and shall incorporate these findings into the order of disposition. Rule 8.500(g)(3).

Consider including the following questions in an inquiry to determine whether a plea is entered knowingly, intelligently and voluntarily.

- Have you read the petition or had someone read the petition to you?
- Did you have enough time to talk with your attorney?
- Were you promised anything or threatened in any way in order to get you to enter this plea?
- Are you under the influence of any drugs, alcohol, or medication at this time?
- Do you have a mental illness that you are being treated for or have been treated for in the past?
- How far did you go in school?

Based on the answers to these questions, you may need to inquire further to determine whether the parent is able to give a plea that is knowing, intelligent and voluntary, and make detailed findings of fact. *See* In re D.M., 750 So. 2d 128 (Fla. 2nd DCA 2000) & S.F. v. Department of Children and Families, 825 So. 2d 521 (Fla. 5th DCA 2002).

- Adjudicatory hearings for petitions for voluntary termination must be held within 21 days after the filing of the petition. Notice of the use of voluntary termination provisions must be filed with the court at the same time as the filing of the TPR petition. § 39.808(4).

May a surrender and consent be withdrawn after acceptance by DCF? A surrender and consent may be withdrawn after acceptance by DCF only if the court finds the surrender and consent was obtained by fraud or under duress. § 9.806(1)(a)(2).

If a parent fails to appear, determine whether the parent was properly ordered to appear and advised of the consequences for failure to appear, and enter a consent by default as appropriate. *See* § 39.801(3)(d) (stating that if a parent appears for the advisory hearing and the court orders that parent to personally appear at the adjudicatory hearing stating the date, time and location of that hearing, then failure to personally appear shall constitute consent to TPR).

Expedited TPR.

What is an "Expedited TPR"? It is a proceeding wherein a case plan with the goal of reunification is not being offered. § 39.01(26). Expedited TPRs are sometimes referred to as "front-end TPRs" because they are not preceded by a dependency case. Expedited TPRs derive their name not from the length of time needed to process them but from the fact that parental rights are being sought to be terminated even though no case plan has been offered to the parents.

- Reasonable efforts to preserve and reunify families are not required if a court has determined that any of the events described in § 39.806(1)(b)-(d) or (f)-(m) have occurred. § 39.806(2).
- When an expedited TPR petition is filed, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child. § 39.806(4).

➢ **Adjudicatory hearing - generally.**

Determine whether absent parties were properly ordered to appear at adjudicatory hearing and advised of consequences of failure to appear.

➢ **Appoint a guardian ad litem, if one has not yet been appointed.**

> If a guardian ad litem is appointed for the first time at the TPR adjudicatory hearing the court may wish to consider whether to continue the proceeding to allow the guardian ad litem to conduct a meaningful evaluation of the case and develop recommendations. The recommendation of the guardian ad litem is one of the required considerations when determining manifest best interests. § 39.810(11).
>
> The trial court "shall consider and evaluate all relevant factors, including, but not limited to: . . . the recommendations for the child provided by the child's guardian ad litem or legal representative." § 39.810(11). If the court properly considers and evaluates the recommendation, however, "[t]he trial court may reject the recommendations of the guardian ad litem and give weight to expert testimony in consideration of all the evidence. The guardian ad litem and the expert do not render legal judgments that have effect until overruled-that is the function of the trial judge." C.W. v. Department of Children and Families, 814 So. 2d 488, 490 (Fla. 1st DCA 2002).

The court shall ascertain at each stage of the proceedings whether a GAL has been appointed. § 39.807(2)(a).

Shall I appoint a guardian ad litem to represent the best interests of the child in any TPR proceeding? Yes. § 39.807(2)(a). *See* G.S. v. DCF, 838 So. 2d 1221 (Fla. 3rd DCA 2003) (reversing termination of parental rights where trial court failed to inquire whether a guardian ad litem had been appointed, did not attempt to appoint a guardian ad litem, and did not determine whether the child's interests were adequately protected throughout pendency of the proceeding); *compare* In re E.F., 639 So. 2d 639 (Fla. 2nd DCA 1994) (If the court makes a good faith effort to comply with the statute by attempting to appoint a guardian ad litem, it is not fundamental error if none are available and the TPR case proceeds.); S*ee also* L.D. v. DCF, 770 So. 2d 219 (Fla. 3rd DCA 2000).

A guardian ad litem is not required at a voluntary relinquishment of parental rights proceeding. § 39.807(2)(e).

What are the responsibilities of a GAL?

- To investigate the allegations of the petition and any subsequent matters arising in the case;
- To be present at all court hearings unless excused by the court;
- To represent the best interests of the child until the jurisdiction of the court over the child terminates or until excused by the court; and

- Unless excused by the court, to file a written report, which must include a statement of the wishes of the child and the guardian ad litem's recommendations. § 39.807(2)(b).

What must the GAL report include? The GAL report must:

- Include a statement of the wishes of the child,
- Include the recommendations of the guardian ad litem, and
- Be provided to all parties and the court at least 72 hours before the disposition hearing. § 39.807(2)(b)(1).

➢ **Right to counsel. § 39.807(1)(a).**

If a parent indicates that he or she wishes to have counsel for the first time at the TPR hearing, the court may want to consider continuing the case, if appropriate.

Once counsel has entered an appearance or been appointed by the court, the attorney shall continue to represent the parent throughout the proceedings. § 39.807(1)(b).

If the attorney-client relationship is discontinued, the court must advise the parent of the right to have new counsel retained or appointed for the remainder of the proceedings. § 39.807(1)(b).

If a parent has voluntarily executed a valid written surrender and consented to the entry of a court order terminating parental rights, provisions relating to the appointment of counsel do not apply. § 39.807(1)(d).

➢ **Review petition and consider evidence.**

Is the hearing held before a jury? No. The hearing must be conducted by the judge without a jury, applying the rules of evidence in use in civil cases. § 39.809(3).

- The judge may consider in-court testimony previously given at any properly noticed hearing, without regard to the availability or unavailability of the witness at the time of the actual adjudicatory hearing, if the recorded testimony itself is made available to the judge. Consideration of such testimony does not preclude the witness from being subpoenaed to answer supplemental questions. § 39.809(3).
- A previous adjudication of dependency may be proved by introducing a certified copy of the order of adjudication or disposition. § 39.802(6).
- A certified copy of the order of adjudication or disposition of dependency that contains a finding of fact that the parent was informed of the right to counsel may serve as proof that the parent was so advised. § 39.802(7).

- **Examination of the Parties.**

  The child and the parents may be examined separately and apart from each other. § 39.809(4).

  Grounds for termination of parental rights.

  Any person with knowledge of the facts alleged and who believes such facts are true may petition for TPR under any of the following circumstances:

- When a parent has voluntarily signed a written surrender and consented to an order giving custody to DCF for adoption and DCF is willing to accept custody of the child. § 39.806(1)(a).
- When an abandonment as defined in § 39.01(1) has occurred or when the identity or location of a parent is unknown and cannot be ascertained by diligent search within 60 days. § 39.806(1)(b).
- When a parent engaged in conduct toward the child or other children that demonstrates the continuing involvement of the parent in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child, even with the provision of services. Provision of services may be evidenced by proof that services were provided through a previous plan or offered as a case plan from a child welfare agency. § 39.806(1)(c).
- When a parent is incarcerated in a state or federal correctional institution and one of the following three circumstances exists:
  - The expected period of incarceration will constitute a substantial portion of the period of time before the child will turn 18;
  - The incarcerated parent has been determined by the court to be:
    - A violent career criminal (as defined in § 775.084);
    - A habitual violent felony offender (as defined in § 775.084);
    - A sexual predator (as defined in § 775.21);
    - Convicted of: first degree or second degree murder (in violation of § 782.04) or a sexual battery that constitutes a capital, life, or first degree felony violation of § 794.011; or
    - Convicted of an offense in another jurisdiction which is substantially similar to one of the listed offenses; or

- The court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child and, for this reason, that termination of the parental rights of the incarcerated parent is in the best interests of the child. § 39.806(1)(d).

Important notes about TPR when a parent is incarcerated:

- The Florida Supreme Court has clarified the meaning of "substantial portion" in § 39.806(1)(d)(1). The Court held that "the statutory language 'requires the court to evaluate whether the time for which a parent is expected to be incarcerated in the future constitutes a substantial portion of the time before the child reaches eighteen, not whether the time the parent has been incarcerated is a substantial portion of the child's life to date.'" B.C. v. Department of Children and Families, 887 So. 2d 1046, 1052 (Fla. 2004) *quoting* In re J.D.C., 819 So. 2d 264, 266 (Fla. 2nd DCA 2002).
- Section 39.806(1)(d) was created effective October 1, 1997 and "applies to any person incarcerated after October 1, 1997 who is sentenced to a term of incarceration which would qualify under the provisions of this act, as well as any persons who are sentenced after that date." *See* Ch. 97-226, § 6, Laws of Florida; L.E. v. DCF, 783 So. 2d 346 (Fla. 3rd DCA 2001); In re T.B., 819 So. 2d 270 (Fla. 2nd DCA 2002).
- Additionally, § 39.806(1)(d) formerly required that a parent be incarcerated and that all of the circumstances in (d)1, (d)2 and (d)3 be proved. The statute was amended in 1999 so that only one of the three circumstances has to be proved after establishing the parent's incarceration. *See* Ch. 99-193, § 45, Laws of Florida 1999.
- As used in this section, the term "substantially similar offense" means any offense that is substantially similar in elements and penalties to one of those listed in subparagraph (1)(d), and that is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction. § 39.806(1)(d).

- When determining harm under 39.806(1)(d)3, the court must consider the following factors:
  - The age of the child; § 39.806(1)(d)3.a.
  - The relationship between the child and the parents; § 39.806(1)(d)3.b.
  - the nature of the parent's current and past provision for the child's developmental, cognitive, psychological, and physical needs; § 39.806(1)(d)3.c.
  - the parent's history of criminal behavior, which may include the frequency of incarceration and the unavailability of the parent to the child due to incarceration; § 39.806(1)(d)3.d.
  - any other factor the court deems relevant; 39.806(1)(d)3.e.
- When a child has been adjudicated dependent, a case plan has been filed with the court, and:
  - The child continues to be abused, neglected, or abandoned by the parent or parents. The failure of the parent or parents to substantially comply with the case plan for a period of 12 months after an adjudication of the child as a dependent

child or the child's placement into shelter care, whichever occurs first, constitutes evidence of continuing abuse, neglect, or abandonment unless the failure to substantially comply with the case plan was due to the parent's lack of financial resources or the failure of DCF to make reasonable efforts to reunify the parent and child. The 12-month period begins to run only after the child's placement into shelter care or the entry of a disposition order placing the custody of the child with DCF or a person other than the parent and the court's approval of a case plan having the goal of reunification with the parent, whichever occurs first, OR. § 39.806(1)(e)(1).

  - When the parent or parents have materially breached the case plan. Time is of the essence for permanency of children in the dependency system. In order to prove the parent or parents have materially breached the case plan, the court must find by clear and convincing evidence that the parent or parents are unlikely or unable to substantially comply with the case plan before time to comply with the case plan expires. § 39.806(1)(e)(2).
  - When the child has been in care for any 12 of the last 22 months and the parents have not substantially complied with the case plan so as to permit reunification under § 39.522(2) unless the failure to substantially comply with the case plan was due to the parent's lack of financial resources or to the failure of the department to make reasonable efforts to reunify the parent and child. § 39.806(1)(e)(3).

- When a parent engaged in egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct that threatens the life, safety, or physical, mental, or emotional health of the child or the child's sibling. Proof of a nexus between egregious conduct to a child and the potential harm to the child's sibling is not required. § 39.806(1)(f).

<u>How does Chapter 39 define "sibling"?</u>

"Sibling" means another child who resides with or is cared for by the parent or parents regardless of whether the child is related legally or by consanguinity. § 39.806(1)(f)1.

<u>How does Chapter 39 define "egregious conduct"?</u>

"Egregious conduct" means abuse, abandonment, neglect, or any other conduct that is deplorable, flagrant, or outrageous by a normal standard of conduct. Egregious conduct may include an act or omission that occurred only once but was of such intensity, magnitude, or severity as to endanger the life of the child. § 39.806(1)(f)2.

- When a parent has subjected the child or another child to aggravated child abuse as defined in § 827.03, sexual battery or sexual abuse as defined in § 39.01, or chronic abuse. § 39.806(1)(g).

- When the parent or parents have committed the murder, manslaughter, aiding or abetting the murder, or conspiracy or solicitation to murder the other parent or another child, or a felony battery that resulted in serious bodily injury to the child or to another child. Proof of a nexus between the murder, manslaughter, aiding or abetting the murder, or conspiracy or solicitation to murder the other parent or another child, or a felony battery to a child and the potential harm to a child or another child is not required. § 39.806(1)(h).

> Section 39.806(1)(i) has been held to be constitutional by the Florida Supreme Court. It noted, *inter alia*, that "parental rights may be terminated under section 39.806(1)(i) only if the state proves both a prior involuntary termination of rights to a sibling and a substantial risk of significant harm to the current child. Further, the state must prove that the termination of parental rights is the least restrictive means of protecting the child from harm." Department of Children and Families v. F.L., 880 So. 2d 602, 609-610 (Fla. 2004).

- When the parental rights of the parent to a sibling of the child have been terminated involuntarily. § 39.806(1)(i).
- When the parent or parents have a history of extensive, abusive, and chronic use of alcohol or a controlled substance which renders them incapable of caring for the child, and have refused or failed to complete available treatment for such use during the 3-year period immediately preceding the filing of the petition for the termination of parental rights. § 39.806(1)(j).
- When a test administered at birth that indicated that the child's blood, urine, or meconium contained any amount of alcohol or a controlled substance or metabolites of such substances, the presence of which was not the result of medical treatment administered to the mother or the newborn infant, and the biological mother of the child is the biological mother of at least one other child who was adjudicated dependent after a finding of harm to the child's health or welfare due to exposure to a controlled substance or alcohol as defined in § 39.01(32)(g), after which the biological mother had the opportunity to participate in substance abuse treatment. § 39.806(1)(k).
- When on three or more occasions, the child or another child of the parent or parents has been placed in out-of-home care pursuant to Chapter 39, and the conditions that led to the child's out-of-home placement were caused by the parent or parents. § 39.806(1)(l).
- When the court determines by clear and convincing evidence that the child was conceived as a result of an act of sexual battery made unlawful pursuant to § 794.011, or pursuant to a similar law of another state, territory, possession, or Native America tribe where the offense occurred. It is presumed that termination of parental rights is in the best interest of the child if the child was conceived as a result of the unlawful sexual battery. A petition for termination of parental rights under this paragraph may be filed at any time. The court must accept a guilty plea or conviction of unlawful

sexual battery pursuant to § 794.011 as conclusive proof that the child was conceived by a violation of criminal law. § 39.806(1)(m).

- When the parent is convicted of an offense that requires the parent to register as a sexual predator under § 775.21. § 39.806(1)(n).

➢ **Material Breach of Case Plan.**

What is the standard to prove that a case plan has been materially breached? If DCF has entered into a case plan with a parent with a goal of reunification, and a petition for termination of parental rights based on the same facts as are covered in the case plan is filed prior to the time agreed upon in the case plan for the performance of the case plan, then the petitioner must allege and prove by clear and convincing evidence that the parent has materially breached the provisions of the case plan.§ 39.802(8).

A ground for termination of parental rights exists when a child has been adjudicated dependent, a case plan has been filed with the court, and the parent or parents have materially breached the case plan. Time is of the essence for permanency of children in the dependency system. In order to prove the parent or parents have materially breached the case plan, the court must find by clear and convincing evidence that the parent or parents are unlikely or unable to substantially comply with the case plan before time to comply with the case plan expires. § 39.806(1)(e)(2).

May I sever the parental rights of one parent but not the other? The parental rights of one parent may be severed without severing the parental rights of the other parent only under the following circumstances:

- If the child has only one surviving parent;
- If the identity of a prospective parent has been established as unknown after sworn testimony;
- If the parent whose rights are being terminated became a parent through a single-parent adoption;
- If the protection of the child demands termination of the rights of a single parent; or
- If the parent whose rights are being terminated meets any of the criteria specified in §§ 39.806(1)(d) and (f)-(m). §39.811(6).

An order of TPR, whether based on parental consent or after notice served, permanently deprives the parents of any right to the child. § 39.811(5).

➢ Must I consider the manifest best interests of the child at the adjudicatory hearing? Yes. Determine whether there is clear and convincing evidence that TPR is in manifest best interests of child. § 39.810. This consideration shall not include a comparison between the attributes of the parents and those of any persons providing a present or potential placement for the child. § 39.810. *(See Manifest Best Interests Colloquy, Section 9)*

Section 39.811(6) has been held to apply to orders that originally terminated the rights of both parents but were reversed as to one of the parents on appeal. As a result, termination of the other parent's rights was scrutinized under § 39.811(6) and was subject to reversal if at least one of the criteria did not apply. "[B]ecause we have reversed the termination of the Mother's rights, R.C.'s termination is now subject to the requirements of § 39.811(6). . . . This section creates complexities when an appellate court reviews a judgment terminating the parental rights of both parents and concludes that it must reverse the judgment as to one of the parents. The reversal suddenly subjects the termination of the second parent's rights to special requirements that were not material at the time the trial court made its ruling." J.T. v. Department of Children and Families, 908 So. 2d 568, 573 (Fla. 2nd DCA 2005). *But see* A.G. v. Department of Children and Families, 932 So. 2d 311 (Fla. 2nd DCA 2006)(dismissing appeal as moot when the mother appealed that the court improperly terminated her parental rights without terminating the rights of the prospective fathers but also without addressing § 39.811(6); issue was moot because while the appeal was pending, the fathers' parental rights were terminated).

Because a termination of parental rights order may become subject to the requirements of § 39.811(6) on appeal, the trial court should make any appropriate findings as to the applicability of the criteria set forth in § 39.811(6). The inclusion of such findings may preclude reversal of the entire order terminating parental rights.

What must I consider and evaluate as all relevant factors to determine the manifest best interests of the child? Relevant factors include, but are not limited to, the factors enumerated in §§ 39.810(1)-(11).

- Any suitable permanent custody arrangement with a relative of the child. However, the availability of a non-adoptive placement with a relative may not receive greater consideration than any other factor weighing on the manifest best interests of the child and may not be considered as a factor weighing against termination of parental rights. If a child has been in a stable or pre-adoptive placement for not less than 6 months, the availability of a different placement, including a placement with a relative, may not be considered as a ground to deny the termination of parental rights.
- The ability and disposition of a parent to provide the child with food, clothing, medical care, or other remedial care and other material needs of the child.
- The capacity of a parent to care for the child to the extent that the child's safety; well-being; and physical, mental, and emotional health will not be endangered upon the child's return home.
- The present mental and physical health needs of the child and such future needs to the extent they can be ascertained.
- The love, affection, and other emotional ties between the child and parents, siblings, and other relatives, and the degree of harm to the child that would arise from termination.

- The likelihood of an older child remaining in long-term foster care upon termination because of emotional or behavioral problems or any special needs of the child.
- The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of termination.
- The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- The depth of the relationship existing between the child and the present custodian.
- The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- The recommendations by the child's GAL or legal representative. *See* § 39.810.
- Determine whether TPR is the least restrictive means of protecting the child.

Subsection 39.810(1) provides that the availability of a relative should not receive greater consideration than any other factor. "By the text of [§ 39.810(1)], the possibility of a relative placement is plainly not a reason to delay a decision to terminate parental rights if termination is otherwise in the manifest best interest of the child." K.W. v. DCF, 959 So. 2d 401, 2007 WL 173099, 32 Fla.L.Weekly D1494 (Fla. 1st DCA 2007).

Failure to consider factors relevant to the best interests of a child is reversible error. K.M. v. DCF, 795 So. 2d 1129 (Fla. 5th DCA 2001). *See also* In the Interest of K.M., 788 So. 2d 306 (Fla. 2nd DCA 2001)(reversing a termination of parental rights where the trial court made detailed factual findings in its order but made written findings on only three of the eleven factors in § 39.810).

The Florida Supreme Court has held that "parental rights may be terminated under § 39.806(1)(i) only if the state proves both a prior involuntary termination of rights to a sibling and a substantial risk of significant harm to the current child. Further, the state must prove that the termination of parental rights is the least restrictive means of protecting the child from harm." Department of Children and Families v. F.L., 880 So. 2d 602, 609-610 (Fla. 2004)(emphasis supplied). The Florida Supreme Court did not decide whether other statutory grounds require such findings. Note however that other courts have applied the F.L. holding to other grounds besides § 39.806(1)(i). In D.O. v. S.M., 981 So. 2d 11 (4th DCA 2007), the Fourth District Court of Appeal stated that:

> Because section 39.806(1)(f) similarly permits a court to terminate parental rights to a child based on prospective abuse, we believe the same constitutional analysis applies here. Thus to comport with constitutional requirements, the state must establish that termination is the least restrictive means of protecting the sibling of the abused child from serious harm under section 39.806(1)(f)

D.O., at 19 (citation omitted). That same court had previously held that:

> applying the rationale of our Supreme Court in F.L. to section 39.806(1)(h), we hold that in order for a termination of parental rights to be based solely on the single act of committing manslaughter or a felony assault against another child, the state must also prove that, based on the totality of the circumstances surrounding the petition, the parent currently poses a substantial risk of significant harm to the current child or children and that termination of parental rights is the least restrictive means of protecting the current child or children from harm.

J.F. v. Department of Children and Families, 890 So. 2d 434, 441 (4th DCA 2004). Note: Section 39.806(1)(h) has been subsequently amended to state the proof of a nexus is not required. However, in Department of Children and Family Services and Guardian ad Litem Program v. S.H. and F.R., 49 So. 3d 846 (2nd DCA 2010), the Second District Court of Appeal disagreed with the Fourth District's application of F.L. to a petition based on § 39.806(1)(h). S.H., 49 So. 3d at 853. The court certified conflict, Id., between its decision and J.F. and held that the trial court erroneously requiring a nexus of harm between the child's murder and prospective harm to other children. S.H. 49 So. 3d at 860.

- Written order of disposition shall briefly state the facts upon which decision was made. § 39.811(5).

If the court finds by clear and convincing evidence that the elements and one of the grounds for termination of parental rights have been established, the court shall enter a final judgment terminating parental rights and proceed with dispositional alternatives. Rule 8.525(i)(1).

The judge shall enter a written order terminating parental rights that includes the findings of fact and conclusions of law.
§ 39.809(5).

What will the appellate court review if termination as to one parent is reversed? If the trial court terminates both parents' rights but the termination as to one parent is reversed, the appellate court will review termination of the other parent's rights to determine whether it can be sustained under § 39.8011(6). Therefore, if appropriate, the court should make conditional findings regarding terminating the parental rights of only one of the parents. See Termination of Parental Rights Adjudicatory Hearing.

If the court finds that grounds for TPR have not been established, but grounds for dependency have been established, the court shall:

- Adjudicate or re-adjudicate the child dependent, and place or continue the child in out-of-home care under a case plan; or
- Return the child to a parent.
  - The court shall retain jurisdiction over a child returned to a parent for 6 months.

- At the end of the 6 months the court shall make a determination as to whether its jurisdiction shall continue or be terminated. *See* § 39.811(1)(a); Rule 8.525(i)(2).

If a child is being adjudicated or re-adjudicated dependent, judges may wish to compare §§ 39.811, 39.521, and 39.621 regarding options for placement in out-of-home care.

If the child has not been adjudicated dependent, and the court finds that the allegations in the petition do not establish grounds for dependency or TPR, it shall dismiss the petition.

- If TPR petition will be granted, consider dispositional alternatives.

If the child is in the custody of DCF and the court finds that the grounds for TPR have been established by clear and convincing evidence, the court shall, by order, place the child in the custody of DCF for the purpose of adoption. § 39.811(2).

- After TPR, the court shall retain jurisdiction over any child and review the status of the child's placement and the progress being made toward permanent adoptive placement. § 39.811(a).
- As part of this continuing jurisdiction, for good cause shown by the GAL for the child, the court may review the appropriateness of the adoptive placement of the child. § 39.811(a).

If the child is in the custody of one parent and the court finds that grounds for termination of parental rights have been established for the other parent by clear and convincing evidence, the court shall enter an order terminating the rights of the parent for whom the grounds have been established and place the child in the custody of the remaining parent, granting that parent sole parental responsibility for the child. § 39.811(3).

<u>What shall I do if the child is neither in the custody of DCF nor in the custody of a parent and the court enters an order terminating parental rights?</u> The court should place the child with DCF or an appropriate legal custodian.

- Chapter 39 does not define “custody” generally, but “legal custody” is defined as: a legal status created by a court order which vests in a custodian of the person or guardian, whether an agency or an individual, the right to have physical custody of the child and the right and duty to protect, nurture, guide, and discipline the child and to provide him or her with food, shelter, education, and ordinary medical, dental, psychiatric, and psychological care. § 39.01(34).
- If the parental rights of both parents have been terminated, or if the parental rights of only one parent have been terminated and the court makes specific findings that placement with the remaining parent is likely to be harmful to the child, the court may order that the child be placed with a legal custodian other than DCF after hearing evidence on the suitability of such placement.

- Suitability of the intended placement includes the fitness and capabilities of the proposed legal custodian to function as the primary caregiver and compatibility of the child with the home.

> If a TPR is granted as to one parent only but there are still findings of fact of abuse, neglect, or abandonment as to the other parent, judges may wish to compare §§ 39.811, 39.521.

- If the court orders that a child be placed with a legal custodian, the court shall appoint such legal custodian as the guardian for the child as provided in § 744.3021 so long as the child has been residing with the legal custodian for at least 6 months. *See* § 39.811(4).

> Section 63.0427 was amended in 2003 authorizing courts to allow post-adoption contact with parents whose rights have been terminated with the consent of adoptive parents. Contact with siblings may be ordered without such consent if it is in the child's best interests. *See* section 7, ch. 2003-58, Laws of Florida.

- If the court terminates parental rights, it may, as appropriate, order that the parents, siblings, or relatives of the parent whose rights are terminated be allowed to maintain some communication or contact with the child pending adoption, if in the best interests of the child. § 39.811(7)(b); Rule 8.525(i)(1).
- If the court orders such continued communication or contact, the nature and frequency of the communication or contact must be set forth in a written order and may be reviewed upon motion of any party or prospective adoptive parent. § 39.811(7)(b).
- If a child is placed for adoption, the nature and frequency of the communication or contact must be reviewed by the court at the time the child is placed for adoption. § 39.811(7)(b).
- The TPR does not affect the rights of grandparents unless the court finds that continued visitation is not in the best interests of the child or that such visitation would interfere with the permanency goals for the child. § 39.811(7)(a).

> It is unclear whether the rights afforded grandparents under § 39.811(7)(a) continue to be valid in light of cases such as Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996) and Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998), holding that court-ordered visitation by grandparents, over the objection of the parents, violates the privacy rights of the parents in the absence of proof of demonstrable harm to the child.

If the court terminates parental rights, it shall, in its order of disposition, provide for a hearing, to be scheduled no later than 30 days after the date of disposition.

- DCF shall provide to the court an amended case plan that identifies the permanency goal for the child.

- Reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to finalize the permanent placement of the child.
- The court shall hold hearings every 6 months to review permanency for the child until adoption or the child turns 18, whichever occurs first. § 39.811(8).

➢ **Records**

How long shall records of cases that include an order that permanently deprives a parent of custody be preserved? Records of cases when the order permanently deprives a parent of custody of a child must be preserved permanently. § 39.814(2).

➢ **Exclusive Jurisdiction**

➢ The court retains exclusive jurisdiction in a child's adoption pursuant to chapter 63 when parental rights are terminated. § 39.813. *(See Adoption Hearing Colloquy, Section 9)*

➢ **Requirements of written order.**

State the facts upon which the decision was made. § 39.811(5).

Include findings regarding indigency and appointment or waiver of counsel. § 39.807(1)(a).

As appropriate, order the parents, siblings, or relative of the parent whose rights are terminated to be allowed to maintain communication with the child. § 39.811(7)(b).

If TPR is granted, set hearing within 30 days of the date of disposition for DCF to provide amended case plan, providing the date, time, and location to the parties. § 39.811(8).

If TPR is proved by clear and convincing evidence, briefly state the findings of fact and conclusions of law constituting grounds for TPR under § 39.806 and manifest best interests under § 39.810. (Include language regarding TPR as the least restrictive alternative.) § 39.811(5).

State that the findings are being made by clear and convincing evidence. § 39.809(1).

What must I include in a TPR order? If TPR is granted under § 39.806(1)(i), the order must find all of the following by clear and convincing evidence:

- The statutory ground has been proven, § 39.806(1)(i);
- The manifest best interests of the child have been considered, § 39.810(1)-(11);
- Reunification of the child with the parent poses a substantial risk of significant harm to the child; and
- Termination of the parent's rights is the least restrictive means of protecting the child from harm. *See* Department of Children and Families v. F.L., 880 So. 2d 602, 609-610 (Fla. 2004)(upholding the constitutionality of § 39.806(1)(i) under these circumstances).

Besides those findings, what else must be included in the TPR order? A written order terminating parental rights must include a brief statement informing the parents of the

right to effective assistance of counsel and a brief explanation of the procedure for filing such a claim. J.B. v. Department of Children and Families, 170 So. 3d 780, 794 (Fla. 2015)(creating interim procedure for bringing claims of ineffective assistance of counsel in termination of parental rights cases).

What if a parent files, states an intent to file, a motion alleging ineffective assistance of counsel? If a parent with court-appointed counsel files or intends to file a motion alleging ineffective assistance of counsel, trial counsel must immediately withdraw. Although an indigent parent is entitled to appointed counsel, with regard to the termination proceeding itself, the parent is not entitled to appointed counsel in any trial court proceedings regarding a motion alleging ineffective assistance of counsel. J.B., 170 So. 3d at 795.

Promptly review the ineffective assistance motion and order compilation of the record regarding the termination of parental rights proceedings on an expedited basis. Conduct proceedings, including an evidentiary hearing if necessary, to determine whether the motion should be granted or denied. Id. at 795.

Are there specific requirements for a motion alleging ineffective assistance of counsel? Yes. The parent, without the assistance of appointed counsel, has twenty (20) days after the TPR judgment issues within which to file a motion alleging a claim of ineffective assistance of counsel. The motion must contain the case name and number, and identify the date the TPR order issued. In the motion, the parent must identify specific acts or omissions in the trial court's representation of the parent during the TPR proceedings that the parent alleges constituted a failure to provide reasonable, professional assistance. The parent must explain how the errors or omissions prejudiced the parent's case in the TPR proceeding to such an extent that the result would have been different absent the deficient performance. Id. at 794.

Isn't that standard different than the criminal IAC standard set forth in Strickland v. Washington? Yes. The standard is different. The Florida Supreme Court explicitly rejected the Strickland standard and instead the parent must establish that, cumulatively, counsel's deficient performance so prejudiced the outcome of the TPR proceeding that but for counsel's deficient representation, the parent's rights would not have been terminated. Id. at 792.

How quickly should I rule on the IAC motion? Conduct proceedings, including an evidentiary hearing if necessary, to determine whether the motion should be granted or denied. Render an order within twenty-five (25) days after the motion alleging ineffective assistance was filed or the motion shall be deemed denied. Id. at 795.

Remember, if a parent files an ineffective assistance of counsel motion, rendition of the order in the TPR proceeding will be tolled for purposes of appeal until the circuit court issues an order on the *pro se* ineffective assistance motion. Id. at 794.

Regarding pleas, should I include the voluntariness of the plea in a TPR order? If the parent admits/consents, include findings regarding the voluntariness of the plea, the parents' right to counsel, and the acts causing the TPR. Rule 8.520(c).

If grounds for TPR are not established by clear and convincing evidence, but grounds for dependency have been established, enter a written order containing findings of fact and conclusions of law, adjudicate/re-adjudicate the child dependent and either: place the child in out-of-home care under a case plan or return the child to the parent and retain jurisdiction. §§ 39.809(4), 39.811(1)(a).

What should I do if I deny TPR? If TPR is denied, enter a written order containing findings of fact and conclusions of law, and dismiss petition. §§ 39.809(4); 39.811(1)(b).

Ensure that the order clearly sets forth each specific date on which the TPR hearing was held.

Ensure that the order clearly sets forth the witnesses that testified.

Cite the specific provision of § 39.0136 when granting continuances.