FLORIDA'S DEPENDENCY BENCHBOOK - CHILDREN IN COURT

A Model for Practice

Aligning with the principles of family-centered practice, Florida courts are embracing the importance of including children and youth in court and are implementing practices that help them actively participate in dependency proceedings.

Florida Statutes define the child as a party to the dependency case. As a party to the case, children must be notified of all court proceedings (unless excused by the court when the age, capacity, or other condition of the child is such that notice would be meaningless or detrimental to the child). Furthermore, the federal Adoptions and Safe Families Act requires the court to conduct an age-appropriate consultation with the child during a permanency hearing.

Having the child physically present in court gives the judge an opportunity to observe and validate the child's well-being and to ensure that the child's needs are identified and appropriate treatment is provided. Direct observation can validate the Comprehensive Behavioral Assessment to give the judge the best information for making decisions about the child's placement and recommendations for services.

This model serves as suggested guidelines for how to encourage children of all ages to actively participate in their dependency cases. It provides guidance on issues related to including children in all segments of the dependency proceedings so that Florida's children are able to have a voice in the services that are provided and ultimately in the aspects of the case that impact their lives. Allowing children to actively participate in court proceedings is an important aspect of family-centered practice.

The process.

Initial hearing. At the shelter hearing (or the arraignment hearing if there is not a shelter hearing), the court should address the following issues:

- Notice: Section 39.01(52) defines the child as a party to the dependency case. Since the child is a party, the child has a right to attend every hearing and should be notified of all future court proceedings. Rule 8.255(b)(1). Section 39.01(52) further states that "(t)he presence of the child may be excused by order of the court when presence would not be in the child's best interest. Notice to the child may be excused by order of the court when the age, capacity, or other condition of the child is such that notice would be meaningless or detrimental to the child." If the court excuses the child's presence, the court should enter an order that makes a finding that "[t]he child's presence is being excused pursuant to § 39.01(52). The court hereby finds that the child's presence at the _____ hearing is not in the child's best interest for the following reasons: _____." *See also* Rule 8.255(b)(2).
- If a child is not present at a hearing, the court must inquire and determine the reason for the absence of the child. The court must determine whether it is in the best interest of

the child to conduct the hearing without the presence of the child or to continue the hearing to provide the child an opportunity to be present at the hearing. Rule 8.255(b)(3).

- Any party may file a motion to require or excuse the presence of the child. Rule 8.255(b)(4).
- Excusal of attendance should be determined on a hearing by hearing basis.
- Mental health: If the child is admitted to a residential mental health treatment program, § 39.407(6)(e) provides that the child must be involved in the preparation of the treatment plan to the maximum feasible extent consistent with his or her ability to understand and participate. The program director must ensure that a copy of the plan is provided to the child. Id. Rule 8.350(a)(3) also states that when DCF is attempting to place a child in a residential treatment center, the child's wishes should be considered, and Rule 8.350(a)(4) states that the motion for placement must state whether or not the child is in agreement with the placement. Copies of the motion must be served on the child's attorney and all parties and participants.
- Placement: The department must make reasonable efforts to keep siblings together if they are removed and placed in out-of-home care unless such placement is not in the best interest of each child. It is preferred that siblings be kept together in a foster home, if available. Other reasonable efforts shall include short-term placement in a group home with the ability to accommodate siblings groups if such a placement if available. The department must report to the court its efforts to place siblings together unless the court finds that such placement is not in the best interest of a child or sibling. § 39.402(8)(h)6.
- Communication: The court should announce that at all future hearings, the court will be expecting and verifying that the investigator/case worker is in communication with the child on a regular basis. Section 39.4085(14) states that the legislature intends for the case worker to be in contact with the child alone at least once a month, not just with the parents.

<u>Approving the family functioning assessment (FFA)/case plan.</u> When approving the FFA/Case Plan, the court should verify the following things have been completed:

- The family functioning assessment must provide the court with the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference. § 39.521(2)(i).
- A written case plan and a family functioning assessment were filed with the court and provided to the child not less than 72 hours before the disposition or case plan acceptance hearing, as applicable. § 39.521(1)(a). (Section 39.6011(7) states that the case plan must be filed with the court and a copy provided to the child, if appropriate, not less than three business days before the hearing.)
- The child was permitted to participate in the development of the case plan, the case plan addresses the specific needs of the child, and the child had the opportunity to object to any of the provisions of the caseplan. §§ 39.4085(12), 39.6011(1)(a).
- The provisions of the case plan have been explained to the child. § 39.6011(3). The signature of the child may be waived if the child is not of an age or capacity to participate in the case-planning process. Id.

- The guardian ad litem included a statement of the wishes of the child in the disposition report to the court and provided the report with the GAL recommendations to the child at least 72 hours before the disposition hearing. § 39.807(2)(b)(1).

Judicial reviews. At judicial reviews, the court may address the following issues:

- The child has a right to be heard by the court, if appropriate, at all review hearings. § 39.4085(19).
- The court may dispense with the child's attendance pursuant to § 39.701(1)(c)(1). If the court excuses the child's presence, the court should enter an order that makes a finding that "[t]he child's presence is being excused pursuant to § 39.01(52). The court hereby finds that the child's presence at the _____ hearing is not in the child's best interest for the following reasons: _____." Excusal of attendance should be determined on a hearing by hearing basis.
- If the child attends the hearing, the child should be given the opportunity to address the court with any information relevant to the child's best interests, particularly as it relates to independent living transition services. The department shall include in its judicial review social study report written verification that the child has a statement encouraging the child to attend all judicial review hearings occurring after the child's 17th birthday. § 39.701(3)(a)(14).
- If a young adult petitions the court at any time before his or her 19th birthday requesting the court's continued jurisdiction, the court may retain jurisdiction for up to a year following the young adult's 18th birthday for the purpose of determining whether appropriate services, that were required to be provided to the young adult before reaching 18 years of age, have been provided. § 39.013(2)(c).

Permanency. At permanency hearings, the court can address the following issues:

- Before the permanency hearing, the department shall advise the child and the individuals with whom the child will be placed about the availability of more permanent and legally secure placements and what type of financial assistance is associated with each placement. § 39.621(4)(b).
- The best interest of the child is the primary consideration in determining the permanency goal for the child. The court must consider the reasonable preference of the child if the court has found the child to be of sufficient intelligence, understanding, and experience to express a preference. § 39.621(6)(a).
- Section 39.621(11) states that the court shall base its decision concerning any motion by a parent for reunification or increased contact with a child on the effect of the decision on the safety, well-being, and physical and emotional health of the child. When considering the motion, the court must consider the preferences of the child, if the child is of sufficient age and understanding to express a preference. § 39.621(11)(d).
- The court may approve Another Planned Permanent Living Arrangement (APPLA) as a permanency placement when a foster child who is 16 years of age or older chooses to remain in foster care and the child's foster parents are willing to care for the child until the child reaches 18 years of age. § 39.6241(1)(d).

- Section 675(5)(c)(iii) of the Federal Social Security Act requires the court to conduct an age-appropriate consultation with the child during a permanency hearing. Adoption and Safe Families Act, 42 U.S.C. § 675(5)(C)(iii)(2008).

Termination of parental rights. At termination of parental rights hearings, the court has authority to address the following issues:

- Manifest best interests of child: When determining the manifest best interests of the child in a termination of parental rights hearing, the court shall consider and evaluate 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. § 39.810.
- Appeals: Any child may appeal to the appropriate district court of appeal within the time and in the manner prescribed by the Florida Rules of Appellate Procedure. § 39.815(1).

Children's right to be involved. Children have various other rights throughout the dependency process.

- Inspection of records: The child may inspect and copy any official record pertaining to the child. § 39.0132(3).
- Organize as a group: Section 39.4085(22) provides that foster children can organize as a group to ensure that they receive the services and living conditions to which they are entitled and to provide support for one another while in the custody of the department.
- Injunction: If an injunction to protect the child has been issued, the department shall deliver a copy of the injunction to the child. § 39.504(5).

> Currently, there is no constitutional or statutory right for a child to have an attorney representing the child's legal interests. A guardian ad litem is appointed to represent the child's best interests and to represent to the court the child's wishes. § 39.820(1); Rule 8.215(c)(1). However, nothing prevents a court from allowing an attorney to represent a child as needed in these proceedings. In some areas in the state, there are programs that provide children with attorneys.

- If necessary, the child may be questioned separately from the parents or caregivers or by in camera examination. Rules 8.255(c), 8.255(d)(2). In certain cases, the child may be called to testify by means of closed-circuit television or by videotaping as provided by law. Rule 8.255(d)(2)(D).

Infants and toddlers. 2014 DCF data show that 54.3% of the children entering the dependency system were 0-5, and 17.8% were under one year of age. Science illustrates that the quality of early relationships impacts brain development and is the life-long foundation for emotional development. Young children and even babies should appear in court.

The court can get a sense of the child's relationship with the caregiver and parents by observing their interactions:

- Is the child happy or fussy?
- Does the child eagerly go to the parent or to the caregiver?
- Does parent or caregiver try to soothe or meet the child's needs?
- Does the child avoid the parent? If so, why?

The court can observe the child's developmental status:

- Is the child walking, talking, or otherwise on target for his/her age?
- Is the child of general height and weight for his/her age?
- If not, is the child not thriving for a physical or emotional reason?
- Does the child have nightmares?
- Does the child have a healthy appetite?

Independent living. The Florida Statutes outline certain provisions for children who are exiting foster care and transitioning into adulthood. The court has the authority to address the following in independent living cases:

- Section 409.1451(3)(a)(3) was amended by Chapter 2013-21, Laws of Florida to require in part that the goals and objectives for participation in extracurricular, enrichment, and social activities, as well as specific information on the child's progress toward meeting those objectives, be incorporated in the agency's written judicial social study report and be reviewed by the court at each hearing conducted pursuant to § 39.701. However, § 409.1451 itself was substantially reworded by § 8 of Chapter 2013-178, Laws of Florida. See § 409.1451, Note 1.
- The court should verify that DCF is in compliance with § 409.1451(3)(a)(6), as amended by Chapter 2013-21, Laws of Florida, which requires DCF to make a good faith effort to fully explain, prior to execution of any signature, any document, report, form, or other record, whether written or electronic, presented to a child or young adult and to allow the child to ask any questions necessary to fully understand the document. As noted above, § 409.1451 was substantially reworded by § 8 of Chapter 2013-178, Laws of Florida. See § 409.1451, Note 1.

- The court can verify that the department has provided applicable information about the Road to Independence Program. Specifically, the department must advertise the availability of the stipend and must provide notification of the criteria and application procedures for the stipend to children and young adults leaving, or who were formerly in foster care; caregivers; case managers; guidance and family services counselors; and guardians ad litem. § 409.1451(2)(d)(1).
- The court can verify that the young adult is aware of the department's procedure to appeal the department's refusal to provide Road-to-Independence Program services or support, or the termination of such services or support if funds for such services or support are available. § 409.1451(4).

Crossover cases. Some cases involve dependency as well as delinquency or other family law issues.

- For proceedings involving children and families in need of services, Rule 8.625(b) provides that the child shall be present unless the child's presence is waived. Rule 8.625(c) also states that in these type of hearings, the child may be examined by the court outside the presence of other parties under certain circumstances.
- In juvenile delinquency proceedings, the child must be present unless the court finds that the child's mental or physical condition is such that a court appearance is not in the child's best interests. Rule 8.100(a).
- If there is a substantial likelihood that a child under the age of 16 who is a victim or witness will suffer at least moderate emotional or mental harm due to the presence of the defendant, or that such victim or witness is unavailable as defined in 90.804(1). §§ 92.53, 92.54, the trial court may order that the child's testimony may be taken outside of the courtroom and shown by means of closed circuit television or by videotaping.

FAMILY-CENTERED PRACTICE

Children in Court

Engaging Children in the Courtroom Benchcards

The Engaging Children in the Courtroom Benchcards were developed by the American Bar Association, The Bar-Youth Empowerment Project. Each benchcard contains valuable information about childhood behavior and developmental milestones to aid judges in assessing the current needs of the child appearing before them in court. The benchcards also include age appropriate questions so the judge can meaningfully engage the child in the courtroom proceedings. The benchcards are specific to the following age groups:

- Young Children (Ages 0–12 months)
- Toddlers and Preschoolers (Ages 1–5 years)
- School Age Children (Ages 5–11 years)
- Adolescents (Ages 12–15 years)
- Older Youth (Ages 16+)

FAMILY-CENTERED PRACTICE

Children in Court

Taking Testimony from Children

Children may be called as witnesses by any party or the court and may be examined or cross-examined just as any other witness. Rule 8.255(d)(1). However, the child and parents or legal custodians may be examined separately and apart from one another. *See* § 39.507(2); Rule 8.255(c).

Additional protections. Protections can be invoked by the parties (including the guardian ad litem or child's attorney) or by the court to protect the child from trauma due to testimony. These methods to minimize trauma include:

- in camera examination;
- deposition;
- videotaping;
- testimony by closed-circuit television;
- introduction of hearsay evidence; and
- special orders relating to interviews, depositions, examination, and cross-examination. *See* § 90.803(23), 92.53-92.56; Rule 8.255(d), Rule 8.245(i).

Limiting frequency. The court may regulate the number of times a child (or person with mental retardation) is subject to testimony. This may be done through such methods as:

- limiting interviews;
- prohibiting depositions;
- requiring submission of questions prior to examination;
- setting place and conditions for interviewing or conducting any other proceeding; and
- permitting or prohibiting attendance of any person at a proceeding. *See* § 92.55(3); Rule 8.245(i)(4).

Considerations. In ruling on a motion to protect a child under age 16 in this manner, the court shall consider:

- age of the child;
- nature of offense or act;
- relationship of child to parties in the case (or defendant in criminal action);
- degree of emotional trauma for the child that will result as a consequence of a party's (defendant's) presence; and
- any other fact that the court deems relevant. *See* § 92.55(2)(a).

In camera examination. In camera testimony requires a motion and hearing to request that a child who is either under age 16 or mentally retarded be examined by the court outside of the

presence of other parties. The request may be filed by any party or on the court's own motion. § 92.55(1); Rule 8.255(d)(2).

- Specific written findings of fact must be made on the record by the court regarding the reasons for authorization of an in camera examination. Rule 8.255(d)(2)(C).
- Considerations for this include, but are not limited to:
  - child's age;
  - nature of the allegation;
  - relationship between child and alleged abuser;
  - likelihood of the child suffering emotional or mental harm from testimony in open court;
  - likelihood that child's testimony will be more truthful if given outside the presence of other parties;
  - adverse effects of cross-examination on the child; and
  - manifest best interest of the child.
    See § 92.55(2)-(3); Rule 8.255(d)(2)(C).

Videotaped testimony. Videotaped testimony is permissible for witnesses or victims under the age of 16 or who are mentally retarded. § 92.53; Rule 8.255(d)(2)(D).

- To warrant videotaped testimony, the court must find a "substantial likelihood that a victim or witness...would suffer at least moderate emotional or mental harm" if required to testify in open court in the presence of the alleged perpetrator. § 92.53(1).
- Findings must be made on the record by the court. § 92.53(7); Rule 8.255(d)(2)(C).
- However, failure to make specific findings of fact on the record, as required by § 92.53, does not constitute fundamental error. Feller v. State, 637 So. 2d 911 (Fla. 1994).
- If a witness is unavailable as defined in § 90.804(1) and § 92.53(1), the court may also permit videotaping of testimony. Typically, videotaping of testimony will occur prior to the hearing, but may also occur at any other time after the court grants the motion, provided reasonable notice has been provided to each party. § 92.53(6).
- Particularly if there are pending criminal proceedings related to a dependency case, strict adherence to the procedures below is recommended:
  - Judge or special master must preside at videotaping unless the child is represented by counsel or guardian ad litem; there is stipulation from representative of child, as well as each party, that the presence of a judge or special master can be waived; and the court finds at a hearing on motion for videotaping that the presence of judge or special master is unnecessary to protect the witness.
- Unless waived, the defendant/alleged perpetrator must be allowed to be present; however, they may be required to view the testimony through a two-way mirror or another method allowing them to hear and see the child but ensuring that the child cannot see or hear them. To that end, communication between the alleged perpetrator and attorney can be established through "any appropriate private method."
- Any party, or the court on its own motion, may request the aid of an interpreter to assist in formulating methods of questioning or interpreting the answers of a child. § 92.53(5).

Closed-circuit television testimony. Reasons for use of closed-circuit television are similar to those for videotaped testimony. § 92.54(1); Rule 8.255(d)(2)(C)(iv). Specific findings must be made on the record, including findings of fact as to the basis of the ruling. § 92.54(5).

- The only individuals who may be in the room during the taking of the closed-circuit television testimony are:
  - judge;
  - attorney for the state;
  - "defendant" (parent or legal custodian);
  - "defendant's" attorney;
  - operators of closed-circuit television equipment;
  - interpreter; and
  - one other person who "in the opinion of the court, contributed to the well-being of the child... and who will not be a witness in the case." § 92.54(3).

> Parties must choose either testimony by videotape or testimony by closed-circuit television, as videotape testimony is inadmissible in a proceeding in which the witness has testified by the use of closed-circuit television. §92.53(6).

Introduction of hearsay evidence. Regardless of the child's availability to testify, statements of child victims are permissible as evidence within strict guidelines. § 90.803(23).

- The specific exception applies when:
  - the statement is made by a child victim describing any act of neglect, abuse, or sexual abuse; the offense of child abuse or aggravated child abuse; or any offense involving an unlawful sexual contact, act, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, which is not otherwise admissible, and
  - the child is of a physical, mental, emotional, or developmental age of 11 or less. *See* § 90.803(23)(a).
- The court must make findings regarding the grounds for admission of the statement on the record. § 90.803(23)(c).
- The court must find that the time, content, and circumstances of the statement are sufficiently reliable. § 90.803(23)(a)(1); *See* In the Interest of D.P., 709 So. 2d 633 (Fla. 2nd DCA 1998).
- In making that determination, the court may consider items such as the following:
  - mental and physical age and maturity of the child;
  - nature and duration of the abuse or offense;
  - relationship of child to offender;
  - reliability of assertion;
  - reliability of child victim; and
  - any other factor deemed appropriate by the court. Other factors include, but are not limited to:
    - a consideration of the statement's spontaneity,
    - whether the statement was made at the first available opportunity following the incident,
    - whether the statement was elicited in response to questions posed by adults,

- the mental state of the child,
- whether child used terminology unexpected of one of a similar age,
- the ability of the child to distinguish between reality and fantasy,
- the vagueness of accusations,
- the potential motive or lack thereof to fabricate a statement,
- the possibility of improper influence by participants to a domestic dispute, and
- contradictions within the statement, and the like.

  § 90.803(23)(a)(1); *See also* State v.Townsend, 5 So. 2d 949 (Fla. 1994).

- Further, the child must either:
  - testify, or
  - be found "unavailable" pursuant to § 90.804(1), provided there is other corroborative evidence of the abuse or offense.

  § 90.803(23)(a)(2).
- While corroborative evidence is required under § 90.803(23)(a)(2), exactly how much is unclear. *See* Thomas v. State, 760 So. 2d 1138 (Fla. 5th DCA 2000); In the Interest of C.W., 681 So. 2d 1181 (Fla. 2nd DCA 1996).
- Proper corroborative evidence has been known to include such items as physical evidence of abuse, statements from the defendant, and similar fact evidence from a source other than the child victim.

See also Zmijewski v. B'Nai Torah Congregation of Boca Raton, Inc., 639 So. 2d 1022 (Fla. 4th DCA 1994) (finding that medical opinions that child exhibited signs of sexual abuse were sufficient evidence to corroborate child's hearsay statement); R.U. v. DCF, 777 So. 2d 1153 (Fla. 4th DCA 2001) (stating that child's other out-of-court statements were not other corroborative evidence, but admissions by the defendant could be); Reyner v. State, 745 So. 2d 1071 (Fla. 1st DCA 1999) (allowing statements to the police by the defendant to be used to corroborate child's hearsay statements); Perez v. State, 536 So. 2d 206 (Fla. 1988) (allowing defendant's admission to police to be used as corroborative evidence); Jones v. State, 728 So. 2d 788 (Fla. 1st DCA 1999) (finding that similar fact evidence of defendant's other conduct could be used to corroborate child's hearsay statement regarding occurrence of abuse).

- ❖ On the other hand, a psychologist's opinion that "something did occur" based on observed and reported behaviors was not sufficient to amount to corroborative evidence. *See* Doe v. Broward County School Board, 744 So. 2d 1068, 1071 (Fla. 4th DCA 1999).
- ❖ Also, statements by an alleged perpetrator that merely place him in proximity to the child (as opposed to details within denials that are directly related to the misconduct) have been found insufficient to corroborate child's testimony. *See* Ghelichkhani v. State, 765 So. 2d 185 (Fla. 4th DCA 2000).

- In addition to the requirements for unavailability in § 90.804(1), a determination of unavailability for this exception must include a finding that the child's participation in the hearing would result in a substantial likelihood of severe emotional or mental harm, which is a more rigorous standard than that required for videotaped or closed-circuit television

testimony (which is a substantial likelihood of moderate emotional or mental harm. § 90.803(23)(a)(2)(b).

- A child may be deemed "unavailable" pursuant to the "existing physical or mental illness or infirmity" exception contained in § 90.804(1) due to the "child's age and lack of understanding as to the duty or obligation to tell the truth." State v.Townsend, 635 So. 2d 949 (Fla. 1994).
- While, in a criminal action, there is a requirement for special notice to the defendant no later than 10 days prior to trial that a hearsay statement will be offered as evidence, there is no notice requirement for use of a child victim's out-of-court statement in a dependency proceeding, as long as the other requirements have been met. § 90.803(23)(b).