LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC.
SIGNIFICANT LITIGATION DOCKET
AUGUST 22, 2005

I. Cases resolved this month

Case Name: Brister v. Florida Department of Children & Family Services
Court: Fourth District Court of Appeal
Attorney: Bill Fraser
Legal Aid Unit: Class Action Project

Issue presented: Whether agency must consider eligibility for disability-related Medicaid of person claiming new disabilities since Social Security decision he is appealing.

Summary:

After denial of his claim for Social Security Disability benefits, our client applied for Medicaid, claiming new disabilities have arisen that Social Security has not yet considered. After the Department of Children and Family Services denied Medicaid, an administrative hearing officer ruled that Social Security's finding of no disability is binding on DCF because Mr. Brister applied for Medicaid within a year of that finding and the Social Security decision is on appeal.

We appealed to the District Court of Appeal. In our principal brief, we contended that (1) a federal regulation and DCF's policies required an independent Medicaid disability determination when our client alleged disabilities Social Security had not yet considered, (2) when our client applied for assistance, DCF was required to consider our client's eligibility for all forms of assistance, including disability-related Medicaid, that it administers, and (3) DCF may not consider circumstances of our client's ex-wife in determining his eligibility for disability-related Medicaid.

Current status:

The court reversed the DCF hearing officer, holding the Department obligated to perform an independent Medicaid disability determination when an applicant alleges new disabilities after the Social Security Administration's most recent denial of disability benefits. We continue to represent Mr. Brister administratively on remand from this decision.

Case Name: Department of Children & Family Services v. T.R.
Court: Fourth District Court of Appeal
Attorney: Maxine Williams, Michelle Hankey, William Booth
Legal Aid Unit: Juvenile Advocacy Project

Issue presented: Whether a Florida juvenile court has authority to order provision by the child welfare bureaucracy at state cost of independent living services to a dependent child that will continue beyond the child's eighteenth birthday.

Summary:

After a year and a half in state care, our dependent child client approaching her eighteenth birthday had received no independent living skills training from the Department of Children and Family Services. The juvenile court, concerned that our client was on the verge of leaving state care completely unequipped to live independently, ordered the Department to provide subsidized independent living services to her at state cost and admit her to the Road to Independence Scholarship program. As this order obligates the Department to pay for services beyond our client's eighteenth birthday and potentially until age 23, DCF appealed.

In our response brief, we argued that (1) the Department may not raise failure to exhaust administrative remedies for the first time on appeal; (2) that the administrative remedy putatively available to our client was only available to her after her eighteenth birthday, not when the trial court ruled; (3) that exhausting statutory administrative remedies would have been futile because the Department has not created the necessary procedures; (4) that the juvenile court had power to enforce its own prior orders requiring T.R. be provided independent living services pursuant to a case plan the Department itself wrote; (5) that any statutory ineligibility for independent living services had been created by the Department's neglect that the trial court had power to remedy; and (6) a child does not have to be in licensed foster care to qualify for independent living services.

Current status:

On July 6 the District Court of Appeal reversed per curiam, holding that our client did not qualify for subsidized independent living or the Road to Independence Scholarship Program because she had refused a foster placement that was a requisite to qualifying for those programs. As our client is past her eighteenth birthday, there are no further juvenile court proceedings on which we will be representing her.

Case Name: Global Travel Marketing, Inc. v. Shea
Court: Florida Supreme Court
Attorney: Michelle Hankey, William Booth, Maxine Williams, Barbara Briggs
Legal Aid Unit: Juvenile Advocacy Project

Issue presented: Whether custodial parent in commercial travel contract may waive right of child's estate to sue for wrongful death.

Summary:

An eleven-year-old child was killed by a wild animal on an African safari in the company of his custodial mother, who on his behalf had signed a release of liability protecting the safari operator with an arbitration clause. The child's divorced noncustodial father, as representative of the child's estate, filed suit for wrongful death. The trial court granted defendant's motion to stay the litigation and to compel arbitration, and the father appealed. The Legal Aid Society participated as amicus curiae before the Fourth District Court of Appeal, contending that the custodial mother lacked authority to bind the child. The District Court of Appeal agreed, holding that parents cannot waive their children's litigation rights against commercial travel companies and certifying the issue to the Florida Supreme Court as one of great public importance. Defendant petitioned that Court for review.

Before the Florida Supreme Court as amicus curiae, we contended that (1) Florida should follow decisions of other state supreme courts precluding parents from binding their children to arbitration clauses; (2) Florida caselaw in comparable contexts precludes parents from relinquishing their children's legal rights; and (3) the Federal Arbitration Act does not preclude resort to state public policy in determining whether a binding arbitration agreement exists.

Current status:

On July 7 the Florida Supreme Court ruled in favor of the travel company. The Court agreed with us that the Federal Arbitration Act did not preclude it from considering Florida public policy in its decision. However, the Court decided that custodial parents have the authority to enter into agreements that personal injury claims of their children will be arbitrated instead of being submitted to the courts. Accordingly, the trial court's order compelling arbitration has been upheld. Because we were only amicus in this case, our role ended with the Florida Supreme Court's ruling.

Case Name: S.I. v. Foster Children's Project
Court: Fourth District Court of Appeal
Attorney: Bill Fraser, William Booth, Michelle Hankey, Maisa Wells
Legal Aid Unit: Foster Children's and Juvenile Advocacy Projects

Issue presented: Whether on petition of a private party filed before creation of a case plan with the goal of reunification a trial to terminate parental rights may occur without any allegation that the parents are out of compliance.

Summary:

We were appointed to represent as attorney ad litem a year-old child in dependency proceedings brought by the Department of Children and Family Services. Parental rights over our client's four siblings were terminated while the mother was pregnant with our client because of acts of strangling, beating, threats of beating, and sexual abuse by the father against a sibling, mostly in the mother's presence. In part because of findings that another child would become the target of these behaviors once the previous victim was removed, we filed a petition to terminate parental rights over our client.

The Department of Children and Family Services then agreed with the parents to a case plan with a goal of reunification. The trial court approved the case plan but denied the parents' motion to dismiss our petition to terminate parental rights and granted our motion to introduce sworn testimony from the earlier termination of parental rights hearing regarding the siblings. From both rulings, the parents appealed. Their initial briefs argued (1) once there is a case plan with a goal of reunification, parental rights can be terminated only for failure to comply with the case plan; and (2) former testimony may be introduced only if the prior declarants are unavailable to testify again.

Current status:

The court of appeal, treating the parents' interlocutory appeals and initial briefs as petitions for certiorari, has dismissed the petitions, finding that the issues raised could effectively be raised on appeal from final judgment in the juvenile court. We are now preparing for trial in the juvenile court.

II. New cases

Case Name: Mikrut v. Pinkerman
Court: Fifteenth Judicial Circuit
Attorney: Shane Weaver
Legal Aid Unit: Elder Law Program

Issue presented: Whether bill of sale of real property by 93-year-old person with dementia prepared by purchasers under which monthly payments would be made without interest at a total discounted price was sufficient to pass title.

Summary:

Defendant Wilkes worked in an insurance business. After our client's cousin, who holds his power of attorney, contacted her about buying homeowner's insurance for his house, we allege that she and Defendant Pinkerton in separate visits to his home in the cousin's absence first induced him to rent the home to them and then secured his signature on a bill of sale. Defendants then recorded the bill of sale and subsequently quitclaimed the property to a third party, Defendant Groves. We allege the purported sale by our client was for an attractive price and involved payment of $800 per month without interest. We allege Defendants Wilkes and Pinkerton were aware of our client's diminished capacity when they induced him to enter into the transactions.

Current status:

We filed suit for actual and punitive damages, rescission, judgment quieting title, and attorney fees, pleading counts for exploitation of a vulnerable adult; rescission for undue influence, inadequacy of consideration, and unconscionability; and for quieting title. Defendants have filed an answer with affirmative defenses.

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

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

Summary:

Residents of the Seaview Park Club Mobile Home Park in Boynton Beach received notices that the park owner had requested a zoning change. After public hearings the city commission enacted an

ordinance rezoning the mobile home park and changing the city comprehensive plan to permit construction of upscale condominiums on the site. Although the prospective condominium developer had prepared a list of other mobile home parks in the area, there was no evidence presented to the commission at the public hearings on the existence of adequate mobile home parks or suitable other housing where the residents could live. Nonetheless, the residents received notice that their lot rental arrangements will terminate November 15 and they will have to move.

Current status:

We filed suit against the City and the owners of the mobile home park. We contend that by statute the City's failure to make findings after its public hearings that adequate mobile home parks or other suitable housing exist for our clients invalidates the zoning and comprehensive plan changes and precludes eviction based on that change in use. We ask for declaratory and injunctive relief.

III. Ongoing cases

Case Name: Blum v. Blum
Court: Fourth District Court of Appeal
Attorney: Robin Bresky (private appellate counsel)
Rena Taylor (trial counsel)
Legal Aid Unit: Pro Bono and Elder Law programs

Issue presented: Whether circuit court properly resolved conflicts in the evidence in converting rehabilitative to permanent alimony and raising alimony order to include former wife's health insurance costs.

Summary:

An elderly divorced wife moved the circuit court pro se to modify an award of rehabilitative alimony in the divorce judgment by increasing the payments ordered and converting the award to permanent alimony. The former husband, originally ordered to pay alimony based on income from disability benefits, had returned to work after the initial award. We undertook representation of the former wife during pendency of her motion to modify alimony. After hearing a commissioner of the circuit court granted conversion of the alimony award from rehabilitative to permanent and raised the required monthly payments from $1200 to $2053 to enable our client to purchase health insurance.

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

From the trial court's denial of our motion to hold the former husband in contempt for nonpayment of alimony, we have filed a separate appeal.

Current status:

On the alimony conversion appeal the briefs are complete and we are awaiting the court's decision. Due date for our initial brief on the contempt appeal has been extended to August 23, 2005.

Case Name: E.T. v. Department of Children & Family Services
Court: Fourth District Court of Appeal
Attorney: Amy Genet
Julie Littky-Rubin (private co-counsel)
Legal Aid Unit: Foster Children's Project

Issue presented: Whether following exhaustion of all appeals from termination of parental rights, parent must receive evidentiary hearing on habeas petition alleging ineffective assistance of counsel.

Summary:

The biological father of a child client of our Foster Children's Program had his parental rights terminated in juvenile court and then unsuccessfully filed an appeal, motion for rehearing, and motion for certification to the Florida Supreme Court, followed by an unsuccessful petition to the District Court of Appeal for certiorari seeking review of the juvenile court's termination of his visitation rights. The biological father then filed in the trial court a petition for writ of habeas corpus alleging ineffective assistance of counsel.

After denial of the habeas petition, the biological father filed a petition for writ of mandamus in the Fourth District Court of Appeal arguing that he had been unlawfully denied an evidentiary hearing on his habeas petition below. The Court of Appeal redesignated the terminated biological father's mandamus petition as an appeal from the denial of habeas relief below. In our principal brief on this appeal, we argue that (1) terminated parents may not base collateral attacks against final adoption of their children on alleged ineffectiveness of their counsel in termination of parental rights proceedings, especially where appellate counsel different from their trial counsel had opportunity to raise the issue on direct appeal, and (2) failure of a terminated parent to seek a stay of adoption proceedings bars a subsequent collateral attack on the adoption under the doctrine of laches.

Case status:

The case was orally argued June 3, 2005, and we are awaiting a decision.

Case Name: Hernandez v. Medows
Court: U.S. District Court for the Southern District of Florida
Attorney: Miriam Harmatz, Anne Swerlick (Florida Legal Services)
Bill Fraser (Legal Aid Society)
Jane Perkins, Lourdes Rivera (National Health Law Program)
Jim Green (private counsel re attorney fees)
Legal Aid Unit: Class Action Project

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

Summary:

On behalf of Medicaid recipients whose prescriptions for Medicaid-furnished drugs were rejected by state computers, and on behalf of the Florida Transplant Survivors Coalition whose membership includes such persons, we sued under the Due Process Clause and federal Medicaid statutes for an injunction requiring written notice and an opportunity for hearing. The court certified a statewide class of Medicaid recipients and, with cross motions for partial summary judgment pending, the parties entered into a mediated settlement that has been approved by the court.

Under the settlement, the Florida Medicaid program must require its contract pharmacies and health maintenance organizations to provide written notice of the reasons why a drug claim has been rejected and the procedures for resolving any dispute. Aggrieved persons must contact an ombuds office before they can obtain a hearing. In certain circumstances recipients will qualify for an emergency supply of medication, and for Medicaid coverage of branded medication when a generic analog may not be medically viable.

Plaintiffs have moved for awards of $855,586 in attorney fees, including $200,326.50 for the work of the Legal Aid Society, and $12,761.35 in costs. During an evidentiary hearing July 27, 2004, counsel for Defendant said an award of $600,000 in fees and $7,000 in costs would be reasonable. We therefore moved for an interim award of fees and costs in those amounts.

Current status:

As the result of a broad increase this year in Medicaid drugs subject to prior authorization requirements, many class members did not receive drug denial notices and three-day emergency supplies required by the settlement. Accordingly, we have invoked the dispute resolution procedures required by the settlement and set mediation for October 14. We await the magistrate judge's report and recommendation on our attorney fee motions.

Case Name: Hernandez v. Najmabadi
Court: Fifteenth Judicial Circuit
Attorney: Shane Weaver
Legal Aid Unit: Elder Law Program

Issue presented: Whether mechanic's lien exists and may be foreclosed when auto repair shop secures customer's signature on blank repair order, completed by repair shop later, and fails to provide statutory written estimate of repair costs.

Summary:

We represent an elderly client with limited English proficiency who took his car for repairs and verbally authorized up to three hundred dollars in work. The repair shop secured his signature on a blank repair order and provided no written estimate of costs, then completed the repair order later and presented a bill for $926. When our client refused to pay the full bill, the repair shop refused to return his car, valued at more than eight thousand dollars. An auto lien service claiming power of attorney then served notice on our client that his care would be sold at public auction April 28.

We filed suit against the owner of the auto repair business, a sole proprietorship, and the auto lien service on April 22, 2005, for replevin, conversion, and violations of the Florida Motor Vehicle Repair Act and the Florida Unfair and Deceptive Trade Practices Act. We seek injunctive relief prohibiting auction of the car, return of the car, damages, costs, and attorney fees. On April 27, 2005, the court entered into an agreed order postponing any auction of our client's car until final resolution of our lawsuit. However, on May 19, 2005, the court entered an order denying our client's request for writ of replevin.

Current status:

We deposed the defendant on August 18.

Case Name: Woodard v. Jupiter Christian School
Court: Fourth District Court of Appeal
Attorney: Michelle Hankey, William Booth
Trent Steele (private co-counsel)
Legal Aid Units: Juvenile Advocacy Project

Issue presented: Whether clergyman and private religious school where he is employed may be found liable for clergyman's disclosure of student's confidential disclosure of gay sexual orientation that led to student's expulsion.

Summary:

Represented by private counsel, our child client filed in the Civil Division of the Fifteenth Judicial Circuit a six-count lawsuit following his expulsion from a private religious school based on disclosure by clergy of his confidential revelation that he is gay. Citing the "impact rule," the trial court dismissed our client's negligent infliction count with prejudice because our client had not alleged physical injury as well as emotional damage. The trial court also dismissed three other counts with leave to amend. Our client appealed the dismissal with prejudice, and his private counsel asked us to pursue the appeal.

On December 8, 2004, the court of appeal, upon review of our jurisdictional memorandum, allowed our appeal to proceed. In our principal brief, we argue that the Florida Supreme Court has held emotional damage sufficient for recovery in actions for breach of fiduciary duty involving disclosure of confidential information, regardless of whether the obligation of confidentiality stems from statute or another source.

Current Status:

Oral argument occurred May 24, 2005. We await the court's decision.