Florida Guardian ad Litem

Legal Briefs Newsletter
October 2016

Florida Supreme Court Opinion

S.M. v. Florida Department of Children and Families,
SC15-2127 (Fla. Sept. 1, 2016)

The existence of an emotional bond between the parent and the child is not a reason to deny TPR if the parent is unwilling or unable to safely assume parental responsibilities

The Florida Supreme Court has issued a new opinion on the scope of the least restrictive means showing requirements to terminate parental rights. The specific question presented, based on a certified conflict between the Fourth District's opinion in *S.M. v. Florida Department of Children & Families*, 190 So. 3d 125 (Fla. 4th DCA 2015), and the First District's opinion in *C.D. v. Florida Department of Children & Families*, 164 So. 3d 40 (Fla. 1st DCA 2015), was whether, under the least restrictive means prong enunciated in Padgett, the trial court is required to consider a permanent guardianship rather than adoption in order to preserve the parent-child bond and allow the parent to have continued contact with the child, after the grounds for termination of parental rights have been established and the court has determined that reunification with the parent would be harmful to the child. The Court held a trial court is not required to consider a permanent guardianship.

LRM is part of a constitutional due process analysis; emotional bond is considered under the statutory manifest best interests analysis.

In its brief, the Program asked the Supreme Court to adopt the Fourth District's test, and to definitively hold that the least restrictive means test focuses on the amount of due process, if any, that must be afforded a parent before the State may file a Termination of Parental Rights (TPR) petition. The Supreme Court's opinion does both. The Court held "[t]he least restrictive means prong of the termination of parental rights test is tied directly to the due process rights that must be afforded to a parent before his or her parental rights are terminated and is intended to protect the rights of both the parent and the child," and further that "[t]he determination of the least restrictive means must be evaluated in light of the right being terminated: to be a parent to one's child," as the Fourth District held. In reaching this conclusion, the court emphasized "the constitutional right to be a parent without state interference is not unlimited." The least restrictive means test "simply requires that measures short of termination should be utilized if such measures can permit the safe re-establishment of the parent-child bond."

The Court specifically rejected the argument that an existing parent-child bond should be considered as part of the LRM test, stating "In termination of parental rights cases, consideration of the bond between the parent and child and the best permanency

decision for the child is appropriate and relevant in an analysis of the second prong of the termination of parental rights test, which requires the trial court to consider the manifest best interests of the child by evaluation of the relevant factors listed under section 39.810. Accordingly, the Court held "[w]e approve the decision of the Fourth District in *S.M.* and disapprove the decision of the First District in *C.D.* to the extent that it could be read as prohibiting termination of parental rights if there is any emotional bond between the parent and child and there is another permanency option, such as guardianship, that would protect the child from harm."

If reunification is not possible, adoption is the next statutorily required permanency goal.

In most cases, the parent will be given an opportunity to comply with a case plan and be reunified with their child. See § 39.6011, Fla. Stat. (2016). If the parent cannot succeed in complying with a case plan, and safe reunification is not possible, the next statutorily required permanency option is adoption. See § 39.621, Fla. Stat. (2016). Only after the trial court determines that adoption or reunification would not be in the best interests of the child may it consider some other permanency goal. This interpretation is consistent with the Legislature's permanency goals in dependency cases, and the legislative mandate that "time is of the essence" in these proceedings.

Read the Opinion

Second District Court of Appeal

In re. B.W.G., 198 So.3d 1025(Fla. 2nd DCA 2016)

Although this opinion arose from a custody matter and not a dependency matter, the opinion addresses the definition of abandonment under Chapter 63. Mother appealed termination of her parental rights to her two children, asserting that the trial court was incorrect in holding that she abandoned her children. The Second District Court of Appeal (Second DCA) agreed.

Mother and Father entered into a marital settlement agreement that included a "temporary incapacity" clause that permitted one parent to assume sole responsibility for the children in the event the other was unable to care for the children. After Mother attempted to pick up the children when intoxicated, Father invoked the clause and exercised full custody of the children. Mother originally had nightly phone calls with the children and frequent Skype visits. Father could be heard in the background and would punish the children by disallowing contact with Mother. For a period of time, Mother had supervised visits. She sent gifts and cards to the children. Father changed the children's school without informing mother. After Mother called the school and was told the children were withdrawn, Mother placed "panicked and threatening calls" to Father, his wife and his attorney. Father then obtained injunctions against Mother that prevented her from contacting Father, his wife, and as a result, the children.
The trial court found that "Father placed barriers in the Mother's way to keep her from spending quality time with the children" and alienated the children from their mother. The trial court also found that mother made minimal efforts to contact or support the children, should have done more even in light of the barriers, and concluded that she abandoned the children.

Pursuant to Florida Statute § 63.089(3)(e), abandonment occurs when "the parent . . . while being able, makes little to no provision for the child's support or makes little or no effort to communicate with the child, which situation is sufficient to evince an intent to reject parental responsibilities. The Second DCA cites to *M.A.F. v. E.J.S., 917 So. 2d 236, 238 (Fla.5th DCA 2005)*, which held that a finding of abandonment "must be predicated on conduct which manifests a settled purpose to permanently forgo all parental rights."

The Second DCA, citing to several cases that held that termination cannot be based on involuntary abandonment or incarceration, found that there was no evidence that supported a finding that Mother's actions showed a settled purpose to relinquish all parental responsibilities.

Read the Opinion

In re J.W., 2016 WL 5404167 (Fla. 2nd DCA)

J.W. was sheltered days after birth because of Mother's substance abuse, mental health issues and lack of stable income or housing. Mother later pled guilty to armed robbery and a drug charge. She was sentenced to three years in prison. Mother's reunification case plan was due to expire two years prior to her anticipated release date.

The Second DCA discussed only harm to the child arising from continued involvement in the parent-child relationship. Florida Statute § 39.806(1)(c) provides for termination of parental rights "when the parent or parents engaged in conduct towards the child . . . that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life, safety, well-being, or physical, mental or emotional health of the child irrespective of the provision of services." The Second DCA found no evidence that the Department provided Mother any services prior to or during her incarceration. Mother was making progress on some of her case plan goals in prison and there was no evidence presented that she would not be able to complete her goals after release. The Second DCA found, therefore, that the trial court could not rely on Florida Statute § 39.806(1)(c) as a basis for termination.

Florida Statute § 39.806(1)(d)(3) provides for termination based on a parent's incarceration if the Department proves by clear and convincing evidence that continuing the parent-child relationship would be harmful to the child and that termination is in the child's best interest. A number of factors are delineated for the court to consider including: the age of the child, the relationship between the parent and the child, the nature of the parent's provision for the child's needs, the parent's history of criminal behavior, and any other factor the court deems relevant. Id. At § 39.806 (1)(d)(3)(a)-(e). In this case, the trial court made a number of findings as to the impact Mother's incarceration would have on J.W. J.W. was 21 months old and had no relationship with Mother. Mother had not provided for any of the child's needs due to her incarceration. Mother was frequently incarcerated and had a history of charges including armed robbery, possession and delivery of a controlled substance. Finally, Mother would miss the child's "most important developmental years" due to the length of her incarceration.

The Second DCA did find that the trial court's findings met the burden for the termination of Mother's rights under Section 39.806(1)(d)(3). The Second DCA noted the struggle in termination of parental rights cases of incarcerated parents to balance the fundamental liberty interest of parental rights with the permanency rights of children.

Read the Opinion

Third District Court of Appeal

J.C.O. v. Department of Children and Families, 2016 WL 4468112 (Fla. 3rd DCA)

Father appealed an order adjudicating his child dependent, asserting he was not properly served and that the trial court committed reversible error by continuing the hearing after his counsel was removed from the courtroom. The Third District Court of Appeal (Third DCA) agreed and reversed adjudication.
With regard to service, the Department attempted to serve Father by Federal Express in Nicaragua. When Father did not appear telephonically at the dependency hearing, the Department requested an entry of default. The court requested proof of service. As proof, the Department provided a delivery receipt but the name on the receipt differed from Father's name. The Department attempted to present evidence from the Case Manager that Father admitted to being served notice. Meanwhile, Father's counsel was escorted out of the courtroom after improperly interrupting the court to object to testimony. The hearing continued without counsel for Father.

The Third DCA found the testimony regarding service to be inadmissible hearsay. The Case Manager did not directly hear Father admit to receiving service but heard through the Diligent Search Specialist that Father admitted to receiving service. Finally, by continuing the hearing without counsel for Father, the trial court committed reversible error. The Third DCA noted they were not condoning counsel's behavior but acknowledging the importance of the right to counsel in adjudication hearings.

Read the Opinion

Florida Dept. of Children and Families v. M.N., 2016 WL 4536489 (Fla. 3rd DCA)

The Department appealed an order terminating supervision over two children and closing their case. The Third DCA reversed and remanded.

K.C.S. and K.C.N. were sheltered in Miami when the infant tested positive for cocaine at birth, Mother admitted to using cocaine, and Father tested positive for cocaine. The children were adjudicated dependent upon parental consent and the children were placed with a relative in Puerto Rico. Approximately four months later, the parents told the case manager they were moving to Puerto Rico. The case manager provided them referrals for services. The parents had no further contact with the Department and their whereabouts were unknown.

At a hearing one month after the parents met with the case manager, the trial court indicated it would either transfer the case to Puerto Rico or close the case with custody given to the relative. The Department moved for a rehearing, asserting no mechanism to transfer the case and expressing its intent to seek termination of parental rights and adoption for the children. The trial court ultimately denied the motion for rehearing and closed the case.

The Third District Court of Appeal (Third DCA) found that the trial court originally properly acquired continuing jurisdiction over the children because Florida is the children's "home state" pursuant to UCCJEA § 61.503(7) and citing to B.Y. v. Dep. of Children and Families, 887 So. 2d 1253 (Fla. 2004). A trial court does have the ability to transfer a case when it deems another forum to be more convenient. Section 61.520(2) of the UCCJEA sets forth a number of factors that the trial court shall consider prior to transferring jurisdiction. Because none of these factors were considered, the Third DCA reversed dismissal and remanded for further proceedings. The Third DCA noted that the parties and the trial court could either proceed with the termination proceeding requested by the Department or have conduct a hearing on transferring jurisdiction.

Read the Opinion

Fifth District Court of Appeal

Department of Children and Families v. J.D., 198 So.3d 960 (Fla. 5th DCA 2016)

The Department appealed a trial court's ruling that the court lacked jurisdiction to hear a petition for injunction to prevent Mother's paramour from having any contact with a child the paramour was accused of repeatedly raping. The Fifth District Court of Appeal (Fifth DCA) found the court does have jurisdiction to entertain petitions for protective injunctions to prevent abuse and reversed the order.

It came to the Department's attention that Mother's paramour was repeatedly raping B.M. The Department filed a petition for temporary and permanent injunctive relief to prohibit Mother's paramour from having any contact with B.M. The court granted the temporary injunction. At the permanent injunction hearing, the trial court dismissed the case due to the fact that there was not an open dependency case and therefore the court believe it did not have jurisdiction.

Florida Statute § 39.301(9)(a)6.a. provides that the Department shall "seek issuance of an injunction . . to implement a safety plan for the perpetrator and impose any other conditions to protect the child" when the perpetrator of domestic violence is not the parent or guardian. Although seeking an injunction and initiating a dependency case are both appropriate remedies authorized by law to protect children, the Fifth DCA held that an open dependency case is not required to entertain injunctions.

Read the Opinion

D.R. v. J.R., 2016 WL 5596266 (Fla. 5th DCA)

Mother appealed the trial court's order placing her children with Father, relinquishing jurisdiction and terminating the Department's supervision over the children. Mother asserted that placing the children with their Father was done in violation of the Interstate Compact on the Placement of Children (ICPC). The Fifth District Court of Appeal (Fifth DCA) agreed and reversed the portion of the order terminating the court's jurisdiction. The Fifth DCA declined to order return of the children, instead directing the trial court to determine whether continued placement with Father is in the children's best interest pending completion of the ICPC process.

The children were removed from Mother following reports of domestic disputes between Mother and her paramour. The children were placed into foster care. At the disposition hearing, the Department dismissed the petition against Father and the court adjudicated the children as to Mother. The children were placed with Father and Mother was ordered to receive services. The children, Father and the Department filed for rehearing. Following a non-evidentiary hearing, the court granted the rehearing, placed the children with Father and relinquished jurisdiction over the children immediately following placement with Father.

The Interstate Compact on the Placement of Children governs the placement of children in another state for placement in foster care or preliminary to adoption. Florida Statute § 409.401. The Fifth DCA addressed out of state placements with natural parents in Department of Children and Families v. Benway, 745 So. 2d 437, 439 (Fla. 5th DCA 1999), where the court held the following:

> *Once a court has legal custody of a child, it would be negligent to relinquish that child to an out-of-state parent without some indication that the parent is able to care for the child*

appropriately. The ICPC provides and effective mechanism for gleaning that evidence and for maintaining a watchful eye over the placement.

ICPC does include a regulation for placement with a parent from whom a child was not removed that allows for placement and dismissal of jurisdiction when there is no evidence that the parent is unfit. This regulation was not adopted into law by the State of Florida. The Fifth DCA found there is no Florida law that permits a child to be placed with a noncustodial parent without complying with ICPC.

Read the Opinion

Save the Date

The 2017 Disabilities Training Conference will be held in Orlando on May 4-5, 2017.

Make plans to join child welfare professionals from across the state to share ideas and best practices in representing dependent children with special needs.

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