IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY, FLORIDA

IN RE: THE INTEREST OF:

CASE NO: 07-00742DPAWS

HELEN POTTS,
SPN: 00522305
A Child.

_____/

ORDER GRANTING MOTION TO DETERMINE UNCONSTITUTIONALITY OF FLORIDA STATUTE SECTION 39.0139

The father in this case was the subject a Child Abuse Hotline Report alleging that he sexually abused both his stepson and his biological daughter. The father has not had any visitation or contact with his daughter in over eight months due to Florida Statute 39.0139.

The father asks this court to find Florida Statute 39.0139(3)(a)(1) unconstitutional as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution.[1]

In *Troxel v. Granville*, 530 U.S. 57, 65 (2000), the United States Supreme Court explained:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain

[1] This court has considered the father's claim that Florida Statute section 39.0139 is void as a bill of attainder, but finds this argument to be without merit.

fundamental rights and liberty interests." see also *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

As the Florida Supreme Court explained in *Natural Parents of J.B. v. Florida Dept. of Children and Family Services*. 780 So.2d 6, 8 (Fla. 2001): "[s]tatutes are presumed to be valid and not unconstitutional. Courts are required to concede every presumption in favor of the validity of a statute. One who challenges the constitutionality of a statute has the burden of demonstrating its invalidity. Only a clear and demonstrated usurpation of power will authorize judicial interference with legislative action. It is therefore the duty of an appellate court to uphold the validity of a statute in all cases where that result can be lawfully reached."

It is a fundamental rule of construction that a statute be construed in such a way so as to effectuate legislative intent and that all doubts as to the validity of a statute should be resolved in favor of its constitutionality. *City of St. Petersburg v. Siebold*, 48 So.2d 291 (Fla.1950), *State ex rel. Shevin v. Metz Construction Co., Inc.*, 285 So.2d 598 (Fla.1973), *Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation District*, 274 So.2d 522 (Fla.1973), *Tornillo v. Miami Herald Publishing Co.*, 287 So.2d 78 (Fla.1973). Fla. 1974). "A determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." *Florida Dept. of Revenue v. City of Gainesville* 918 So.2d 250, 256 (Fla.2005). As well, it is the court's duty when construing a statute to ascertain legislative intention and to effectuate it. *Ervin v. Peninsular Tel. Co.*, 53 So.2d 647, 652 (Fla.1951).

The relevant sections of the statute provides as follows:

(3) Presumption of detriment.—

(a) A rebuttable presumption of detriment to a child is created when a parent or caregiver:

1. Has been the subject of a report to the child abuse hotline alleging sexual abuse of any child as defined in s. 39.01; . . .

(4) Hearings.—A person who meets any of the criteria set forth in paragraph (3)(a) may visit or have other contact with a child only after a hearing and an order by the court that allows the visitation or other contact. At such a hearing:

(a) The court must appoint an attorney ad litem or a guardian ad litem for the child if one has not already been appointed. Any attorney ad litem or guardian ad litem appointed shall have special training in the dynamics of child sexual abuse.

(b) The court may receive and rely upon any relevant and material evidence submitted, including written and oral reports, to the extent of its probative value in its effort to determine the action to be taken with regard to the child, even if these reports and evidence may not be competent in an adjudicatory hearing.

(c) If the court finds the person proves by clear and convincing evidence that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by such visitation or other contact, the presumption in subsection (3) is rebutted and the court may allow visitation or other contact. The court shall enter a written order specifying any conditions it finds necessary to protect the child.

(d) If the court finds the person did not rebut the presumption established in subsection (3), the court shall enter a written order prohibiting or restricting visitation or other contact with the child. ...

In this case, the intent of the legislature is to keep children safe when in the temporary or permanent custody of the Department of Children and Family Services or its contractors. The title of the act reads: 'Keeping Children Safe Act' and it is contained within Chapter 39 of the Florida Statutes.

The first issue in every case considering the constitutionality of a statute or ordinance is which standard applies. *State v. J.P.*, 907 So.2d 1101, 1120 (Fla. 2004) (Cantero, J., dissenting). When a fundamental right is implicated, the court must apply a

strict scrutiny test. *Florida Department of Children and Family v. F.L.*, 880 So. 2d 602 (Fla. 2004). When no fundamental right is implicated, a rational basis test should be utilized. *Heller v. Doe by Doe*, 509 U.S. 312 (1993).; J.P. at 1129. (Cantero, J., dissenting). "Natural parents have a fundamental liberty interest in the care, custody, and management of their children." *Interest of C.W.W.*, 788 So.2d 1020, 1023 (Fla. 2d DCA 2001) (citing *Santosky v. Kramer*, 455 U.S. 745, 754 (1982)). This Court has not been able to find any authority to support the State's contention that somehow that interest is diminished once a proceeding under Chapter 39 is instituted. Thus, because the statute impinges on a fundamental liberty interest, this court must analyze the statute's constitutionality under a strict scrutiny standard. *Florida Department of Children and Family v. F.L.*, 880 So. 2d 602 (Fla. 2004). Under the strict scrutiny test, the statute must serve a compelling state interest through the least intrusive means possible. *Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla.1996).

The father does not dispute that the statute serves a compelling state interest, to protect children from continuing acts of sexual abuse and exploitation committed by a parent or caregiver. As argued by the father, this state interest is well established in section 39.0139(3)(a)(2), in that this subsection prevents a parent or caregiver's contact with the minor child after pleas and adjudications for certain crimes committed against children. Similarly, section 39.0139(3)(a)(3), prevents a parent or caregiver's contact with the minor child if a parent or caregiver has been legally deemed a sexual predator.

However, the father argues, and this court agrees, that it is the second prong of the statute that fails to pass the strict scrutiny test. The second prong of the strict scrutiny test is that the state use the least intrusive means possible to achieve its compelling interest.

The statute at interest creates a rebuttable presumption of detriment to a child when a parent 'has been the subject of a report to the child abuse hotline alleging sexual abuse of any child...." Although section 39.0139(4) allows for an evidentiary hearing for those parents or caregivers who fall within the statute, they are deprived of visitation with the child until such hearing is held. More troubling to this court, however, is the fact that unlike other statutes depriving a person of fundamental liberty interests on an emergency basis, this statute does not provide for notice or a time frame in which the hearing must be held.

In reviewing Chapter 39, this court recognizes that 39.0139(3)(a)(1) does not provide the same due process protections as other proceedings in the statute. For example, at shelter hearings, arraignments, dependency adjudications, and termination of parental rights proceedings, the parent is entitled to notice and an opportunity to be heard within a specific time period. Additionally, at these hearings, the rules of evidence apply. Undoubtedly, these protections are afforded due to the fact that the state is attempting to restrict or eliminate the fundamental right to parent. Here, not only is the parent not noticed of a hearing prior to the interference with his or her rights, there is no time certain for the hearing. Moreover, assuming there is a hearing at some future point, any and all evidence is admissible even if not competent in an adjudicatory hearing.

There is no question that the right to parent is a fundamental right.[2] *Troxel. Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Washington v. Glucksberg*, 521 U.S. 702 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ [t] ... to direct the education and upbringing of one's children" (citations omitted)). Thus, there is no question that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Troxel.* As previously stated, there is no authority for the proposition that a parent loses the fundamental interest in their children, once they reach dependency court. And Chapter 39 supports this interpretation, except for 39.0139(3)(a)(1).

The burden has always been on the state to prove allegations against a parent, and to demonstrate that interference with those rights is the least restrictive means of protecting the child from serious harm. See § 39.809(1), Fla. Stat. (2006); *Padgett v. Dep't of Health & Rehabilitative Servs.*, 577 So.2d 565, 571 (Fla.1991). "Least restrictive means" analysis embodies due-process concerns. Before depriving someone of a fundamental right, such as the right to parent, the State must demonstrate a compelling interest and further such an interest through the least intrusive and restrictive means. See

[2] Similarly, throughout the Florida Statutes, when a fundamental interest is at risk, even in an emergency situation, parties are afforded due process . See F.S. 751, Petition for temporary custody (petition must be verified and reasonable notice and opportunity to be heard must be provided); F.S. 741 (after filing of sworn petition, respondent entitled to notice and opportunity to be heard; court shall set a hearing no later than 15 days); F.S. 394 (upon filing of petition, the court shall hold a hearing within five working days). Even under Florida Statute 61.13, a parent is entitled to shared parental responsibility unless the parent has been convicted of a felony of the third degree or higher involving domestic violence, or meets the criteria of 39.806(1)(d) (the parent is incarcerated), which all create a rebuttable presumption of detriment to the child. Here, there need not be a conviction, a simple anonymous report is sufficient.

N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So.2d 612, 625 n. 16 (Fla. .2003); *In re T.W.*, 551 So.2d 1186, 1193 (Fla.1989). .

Florida Statute 39.0139(3)(a)(1), unconstitutionally infringes on the fundamental parental right without due process of law. The statute creates a rebuttable presumption that visitation of a dependent child by a parent or caregiver who has been reported to the child abuse hotline for sexual abuse, is detrimental to the child. The parent is not entitled to notice or entitled to be heard before his or her rights are eliminated. If a hearing is held at some future undetermined time, the onus is on the parent to rebut the presumption by clear and convincing evidence. Any and all evidence is permitted and the rules of evidence simply do not apply. The statute effectively permits any one present in dependency court on any given day, to sit in the back of the courtroom and write up a list of every single parent in every single case and call a tip to the anonymous hotline alleging child abuse. Pursuant to the statute, the court is then required to suspend visitation rights of every single one of those parents in every single case. There is no notice requirement that such an order has been entered. There is no time requirement in which to hold a hearing. If a hearing is held at some point, the parent has no right to learn who it was that called in the complaint, nor does he or she have the benefit of the rules of evidence. Yet, the parent must overcome the presumption of detriment by clear and convincing evidence. There is no other place in Chapter 39 that shifts the burden to the parent.

Similarly, there is no other place in the Florida Statutes that permits interference with a fundamental right based solely on an anonymous tip. For example, it is well established in the criminal arena, that an officer can not even conduct an investigatory

stop without establishing the reliability of the informant's tip. *Jacoby v. State*, 851 So.2d 913, 915 (Fla. 2d DCA 2003) (citing *Travers v. State*, 739 So.2d 1262, 1263 (Fla. 2d DCA 1999)). "[A]n informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report." *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Wallace v. State* 964 So.2d 722, 728 (Fla. 2DCA 2007).

In *Roviaro v. United States*, 353 U.S. 53 (1957), the United States Supreme Court recognized the government's privilege to withhold from disclosure the identity of persons who furnish information to law enforcement officers. However, the government's privilege gives way to a defendant's rights where the disclosure of the informant's identity would be relevant and helpful to the defense and where the disclosure is essential to a fair determination of the case. The Court in *Rovario* went on to explain that the problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. *Id.* at 62. As the Court recognized, the defendant has a right to confront his accuser and a right to prepare a defense. Similarly, Florida law recognizes a limited privilege for the state to withhold the identity of a confidential informant. Specifically, Florida Rule of Criminal Procedure 3.220(g)(2), states that "[d]isclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe the constitutional rights of the defendant."

However, in this case, where the fundamental right to parent is being interfered with, the parent is forced to defend against an anonymous complaint, without knowing who made the complaint, and is therefore, unable to attack the circumstances, bias or motive of the informant. Additionally, the burden is shifted to the parent, who must prove by clear and convincing evidence that visitation would not be detrimental to the child. [3] Compare that to the standard applied to visitation at the shelter hearing, specifically, that visitation rights shall be determined absent a clear and convincing showing that visitation is not in the best interest of the child. Fl. R. Juv. Pro. 8.305(b)(8).

Finally, it is worth noting that according to the statute's text, "[i]f the court finds the person did not rebut the presumption established in subsection (3), the court shall enter a written order prohibiting or restricting visitation or other contact with the child". Thus, regardless of the finding of the court, after any hearing, the statute does not prohibit the court from allowing visitation. This does not save the statute, but merely leaves visitation in the court's discretion regardless of whether the presumption is overcome. That is, the court already has the ability at any time during a dependency action, without this statute, to make decisions as to visitation, including suspension and/or restriction.

There is a recognizable interest in keeping children safe from continuing acts of sexual abuse and exploitation committed by a parent or caregiver. This state interest is well established in F.S. 39.0139(3)(a)(2), in that this subsection prevents a parent or caregiver's contact with the minor child after pleas and adjudications for certain crimes

[3] To meet clear and convincing evidence standard of proof, evidence must be credible, memories of witnesses must be clear and without confusion, and sum total of evidence must be of sufficient weight to convince trier of fact without hesitancy. *J.F. v. Department of Children and Families* 890 So.2d 434 (Fla. 4th DCA 2004)

committed against children, along with 39.0139(3)(a)(3), if a parent or caregiver has been legally deemed a sexual predator. As pointed out by the father, these subsections are constitutional because the persons falling within these subsections have already been provided with due process. Thus, for the reasons stated above, this Court can not say the same for F.S. 39.0139(3)(a)(1).

Having determined Florida Statute 39.0139(3)(a)(1) is unconstitutional the next issue is to decide is "whether the taint of an illegal provision has infected the entire enactment, requiring the whole unit to fail." *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991). Severability depends on the following test, "[w]hen a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provision, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and (4) an act complete in itself remains after the invalid provisions are stricken." *Waldrup v. Dugger*, 562 So. 2d 687, 693 (Fla. 1990) (quoting *Cramp v. Board of Public Instruction*, 137 So. 2d 828, 830 (Fla. 1962).[4]

First, Florida Statute 39.0139(3)(a)(1) can be separated from the remaining valid language without changing the essential meaning of the statute. Second, it is apparent that the purpose of the statute is to keep children safe from continuing acts of sexual abuse and exploitation committed by a parent or caregiver, when in the temporary or permanent custody of the Department of Children and Family Services or its contractors. This

[4] If the four parts of the test are met, severability can occur whether or not the enactment contains a severability clause. *Cramp v. Board of Public Instruction*, 137 So. 2d 828 (Fla. 1962).

purpose can be accomplished independently of subsection (3)(a)(1), since the statute would still apply to those parents or caregivers that have plead or have been adjudicated for certain crimes committed against children, 39.0139(3)(a)(2), and/or those parents or caregivers have been legally deemed a sexual predator, 39.0139(3)(a)(3), both of whom have already been afforded due process at a prior proceeding; unlike a parent who is simply the subject of an anonymous hotline call. Third, in light of the statute's compelling purpose, this court finds that the legislature would have approved the remainder of the statute without (3)(a)(1) had it recognized deficiencies of the section. Finally, it is clear that an act in itself remains after the invalid portion has been removed. The remainder of the statute places a rebuttable presumption only on those parents or caregivers who have been adjudicated of certain sex crimes against children and/or those parents or caregivers labeled a sexual predator. As previously discussed, those parents or caregivers that fall within the statute have already had due process afforded. Therefore, the statute would still serve the compelling state interest of keeping children, in the custody of the state, safe from sexual abuse and exploitation. See *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991).

Accordingly, this Court finds that Florida Statute 39.0139(3)(a)(1) is fundamentally defective and unjust so far as it permits a court to enter an order, denying a parent or caregiver visitation with a child, based on an anonymous telephone call to the sexual abuse hotline until a hearing his held. Although the statute provides for a hearing, it provides no requirement or time frame for the hearing. Moreover, if and when such hearing is actually held, the statute places the burden on the parent or caregiver to overcome the presumption of detriment to the child. As stated above, the rules of

evidence simply do not apply. No where in the laws of this state governing the rights to children, are there procedures for taking away rights with no due process afforded as is the case here. Therefore, this court finds Florida Statute 39.0139(3)(a)(1) unconstitutional on its face. In light of the foregoing holding, the remainder of the statute is otherwise constitutional.

IT IS THEREFORE ORDERED AND ADJUDGED that the Father's Motion to Determine Unconstitutionality of Florida Statute Section 39.0139 is GRANTED.

DONE AND ORDERED in Chambers, at New Port Richey, Pasco County, Florida this _____ day of December, 2007.

CHRIS HELINGER
Circuit Judge

cc:
Kerry A. O'Connor, Esq.
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ORDER SIGNED
BY JUDGE ON 12/21/07