

# 2015 ADOPTION AND CHILD WELFARE CASE LAW UPDATE

## **Fla. Statute Chapter 751**

***Seilkop v. Barker*, 148 So. 3d 865 (Fla. 1st DCA 2015).**

Background - At Mother's request, the child was placed in Chapter 751 custody of relatives. Mother's petition to terminate custody was denied at trial court based upon factual finding she was not a fit parent.

Holding - The Chapter 751 analysis of whether a parent is fit requires the court to consider whether a child has been abused, abandoned or neglect occurs when a child is deprived of necessary food, clothing, shelter or medical treatment or the child is permitted to live in an environment that causes the child's physical, mental or emotional health to be significantly impaired. Factual findings that are purely speculative and poor parental judgment where the actions did not result in harm or the deprivation of food, clothing or shelter or medical care are not neglect.

## **Ineffective Assistance of Counsel**

***J.B. v. Fla. Dept. of Children and Families*, 170 So. 3d 780 (July 9, 2015).**

Florida Supreme Court examined a claim of ineffective assistance of counsel for a parent whose rights were terminated under Fla. Stat. Chp. 39.

In summary, there is a strong presumption that appointed attorney for indigent parent has provided reasonable, professional assistance. The parent claiming ineffective assistance of counsel has the burden of proof to overcome that assumption. The parent must identify specific errors of commission or omission that under the totality of the circumstances evidence a deficiency in the exercise of reasonable, professional judgment in the case; and the parent must establish that, cumulatively, the deficient representation so prejudiced the outcome of the termination of parental rights trial that but for the deficiency representation the parent's rights would not have been terminated.

This requires a showing that goes beyond the Strickland requirement that confidence in the outcome is undermined. At the end of TPR hearing, the court must orally inform the parent of (1) the right to appeal the termination of parental rights order and (2) the right to file a pro-se motion in the circuit court alleging ineffective assistance of counsel is the court enters a judgment terminating parental rights. The final judgment must inform the parent of the right to effective assistance of appointed counsel and provide a brief explanation for filing a claim.

## **Directed Consent**

***In re Adoption of K.A.G.*, 152 So. 3d 1271 (5th DCA 2014).**

Background - After father-killed mother, DCF placed the child in custody of the maternal aunt. Father executed written consent for paternal grandmother to adopt. (conditional consent to parental grandmother) Aunt filed a counter petition to adopt in paternal grandmother's 63.087 adoption proceeding. Court granted paternal's grandmother Motion to Strike. Aunt's subsequent motion to intervene was denied. Trial court dismissed paternal grandmother's petition because there was not clear and convincing

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evidence adoption was in best interest. Court relied on considerations such as the child's needs and bonding with caregiver as if it were an intervention.

Holding - Appellate Court found it was error to dismiss paternal grandmother's petition to adopt the child because the trial court failed to determine whether the father's consent was valid. The trial court erred when it required the grandmother to prove by clear and convincing evidence that allowing her to adopt the child served the best interest of the child, as the preponderance of the evidence standard applied. Court has authority to appoint guardian ad litem. Appellate court found that Father's consent was conditional to paternal grandmother and if the trial court found the adoption by the paternal grandmother was not in the best interest of the child, the father's consent to his termination of parental rights is deemed withdrawn.

### **Abandonment**

***A.S. V. Department of Children & Families, J.A., 162 So. 3d 335 (FLA. 4<sup>th</sup> DCA 2015).***

Background - This case involved an infant whose mother was uncertain as to the father, maybe A.S. per the mother. Father told of pregnancy by mother and did not believe mother – no further contact during the pregnancy. Infant born in September 2012 and sheltered shortly after birth. Termination of parental rights filed December 2012 and father listed as “unknown”. Mother not active in child’s life and TPR entered against her. However, mother gave some names as to the father and two men, not A.S., took paternity test. In February 2013, mother testified in open court that A.S., was the father. DCF contacts father in March 2013 via telephone, father ends that call. DCF then mails the father information about paternity test in both April and May seeking to set up paternity test. Father claims letter went to rental property and not to his grandparent's home where he actually lived. Father eventually located and took paternity test in August 2013. A.S. did not learn he was the father until December 2013 at a hearing. Father testified he thought the paternity company would contact him and he did not call. Paternity results filed with Court Oct. 2, 2013. By end of 2013, A.S. paternity established but not offered a case plan. Father missed mediation in January 2014. In March of 2014, father has visitations an hour in length and half in length. Seven visits total, 3 canceled due to DCF case manager on vacation. A.S. did buy food during the visits and a toy. Termination of Parental Rights trial set and the Foster Mother testifies to child having night terrors and dirty diapers after visit. Father refutes these allegations. Trial court enters TPR against A.S. finding that A.S. abandoned and further concluded that termination was the least restrictive means available; as reunification with A.S. would in its opinion, pose a substantial risk of harm to J.A.

Holding – trial court erred in finding that A.S. abandoned his child and that termination of his parental rights was the least restrictive means available. Court reversed and remanded for further proceedings. The court found the trial court considered A.S.

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actions before his paternity was established. The court found that A.S. was prospective parent until late 2013 and could not abandoned his child until his paternity was established and that the trial court was not presented with clear and convincing evidence that A.S. abandoned following the establishment of paternity. They found that TPR was not the least restrictive means because there was no evidence in the record that the father was unable to comply with the case plan or that the child would suffer significant harm if he were reunited.

Case is interesting as the opinion fails to address the rulings by the Florida Supreme Court in the following:

*Doe v. Roe*, 543 So. 2d 741 (Fla. 1989). A mother has the sole rights and authority to place her child for adoption without the father's consent when his conduct prior to acknowledgment of paternity constitutes abandonment as defined in sec. 39.01(1)

*In re: Adoption of EAW*, 658 SO. 2d 961 (Fla. 1995). A court may consider a father's pre-birth conduct when ruling he has abandoned the child.

*Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189 (Fla. 2007). A court has the authority to adjudicate a prospective father's parental rights.

(Acknowledgment of Case Law Update of Florida Adoption Council as prepared by Amy Hickman, Esq. as to additional analysis of **A.S. V. Department of Children & Families, J.A.**)

### **SAME-SEX COUPLES**

#### **Marriage**

***Obergefell, et. Al. v. Hodges*, 135 S. Ct. 2584 (2015).**

The United States Supreme Court ruled that any law prohibits a State from recognizing a legal marriage between same sex partners was unconstitutional.

#### **Time-Sharing**

***Russell v. Pasik*, 2015 Fla. App. LEXIS 15177.**

Same sex couple enters into a relationship in 1998. Form a family unit with children, with Pasik paid for the sperm donation and to have both artificially inseminated. Russell carried two children and Pasik carried two children. All four children have Pasik last name. Relationship ends in 2011. Russell allowed time-sharing for two years after the break up with her carried children. Pasik paid child support and provided health insurance. In 2013, Russell ended time-sharing and litigation ensued. Pasik filed a petition for time-sharing with the children claiming to be de facto or psychological parent and Russell moved to dismiss. Trial court when hearing the motion found the unusual facts as set forth in the petition sufficiently set forth a cause of action and denied

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Russell's motion. A petition for Writ of Certiorari to the Circuit Court for Manatee County followed. The 2<sup>nd</sup> DCA found that the trial court did not conduct an analysis to determine standing. The found because a cause of action does not exist in the absence of standing, the trial court departed from the essential requirements of the law by not dismissing the petition for timesharing. Petition granted; Order quashed.

### **Private Dependency**

***In the Interest of Y.V., 160 So. 3d 576 (Fla. 2015).***

Background: Private dependency petition alleged child was abused and abandoned in Honduras. Child no resides with uncle in FL. The parents consented to an adjudication.

Trial court dismissed dependency petition because events occurred outside Florida and court viewed petition as an attempt to circumvent federal immigration laws.

Holding: Reversed and remanded. No provision in Chapter 39 requires events given rise to dependency to occur in Florida. Absent an express intent, such interpretation is inconsistent with the State's *parens patriae* interest in the welfare of children in its jurisdiction.

Section 39.01(15)(a) and (e) does not require the child to be at imminent risk. Only reason this child is not at risk is because his uncle is caring for him. Disagrees with trial court that the allegations of the petition do not satisfy chapter 39.

***O.I.C.L. v. Dep't of Children & Families, 169 So. 3d 1244 (Fla. 4<sup>th</sup> DCA 2015).***

Background: Private dependency petition alleged Father abandoned 17 y.o. and mother neglect him since he was 12. Child was residing with uncle.

Holding: No abandonment because uncle is a relative caregiver and there were no allegations against him. While statute does not specify the time period when the abuse or neglect must occur, it would be unreasonable to read section 39.01(15)(a) to permit adjudication if a child was ever subjected to abuse, abandonment, or neglect at any point during his minority.

When evaluating private petitions, court should consider.

- Nature, severity, and frequency of the abuse, neglect, or abandonment;
- The time that has elapsed;
- Whether the child is presently at continued risk of harm;
- The availability of a caregiver to supervise; and
- Any other relevant factor.

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### **Due Process with Motion to Re-open Permanent Guardianship**

***A.A. v. Dep't of Children & Families, 147 So. 3d 621 (Fla. 3d DCA 2014).***

Background: In 2012, the trial court entered an order placing the children in a permanent guardianship with their stepfather. A year later, the mother moved to re-open the case and sought reunification with the children. The trial court denied her mother's motion for reunification without conducting an evidentiary hearing. The mother sought certiorari review of the order.

Holding: The trial court violated the mother's right to due process by denying her the opportunity to present evidence and testimony in support of her motion. Section 39.621(9) requires the trial court to hold a hearing and places the burden on the parent to demonstrate "that the safety, well-being, and physical, mental and emotional health of the child is not endangered by the modification." Petition granted.

### **Motion to Re-open**

***H.C. v. Dep't of Children & Families, No. 5D14-1225, 2014 WL 3805524 (Fla. 5<sup>th</sup> DCA Aug. 4, 2014).***

Background: Mother appealed the final order denying her motion to re-open her children's dependency case in order to modify the trial court's previously entered order placing children in permanent guardianship with their paternal grandparents.

Holding: The appellate court affirmed the denial because, contrary to the mother's claim, she had the burden of proving that the safety, well being, and physical, mental and emotional health of the children would not be endangered by reunification; the Department had no burden.

## **REVISED ICWA GUIDELINES**

Revised ICWA guidelines issued February 25, 2015. These reviewed guidelines replace the prior ones issued. In addition, the revised ICWA guidelines radically re-write the former guidelines, including the right of parent to make a confidential placement in a voluntarily proceeding and place a higher duty on the entity or attorney filing the adoption, as they must show "active efforts". Under the prior guidelines, there was a privacy placement option and this is removed under the new guidelines.

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### **New Legislation**

CS/CS/ HB149

Rights of Grandparents and Great Grandparents

(Chapter 2015-134, Laws of Florida)

Authorizes a grandparent of a minor child whose parents are deceased, missing or in a permanent vegetative state to petition the court for visitation with grandchild.

If a minor child is adopted by a stepparent or close relative, the adoptive parent may petition the court to terminate a grandparent visitation order.