IN THE SUPREME COURT OF THE STATE OF FLORIDA

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES
Petitioner/Appellant.

vs.

ROSHONDA KEYS GAINES
Respondent/Appellee,
_____/

Supreme Court No. 93,275
DCA 5th District No. 97-1532
Circuit Court No. JU 93-1605

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RESPONDENT'S ANSWER BRIEF

AVA F. TUNSTALL, Esq.
Fla. Bar No. 379001
PAULINE W. MCINTYRE, Esq.
Fla. Bar No. 354511
McIntyre & Tunstall, P.A.
540 E. Horatio Ave. Suite 101
Maitland, FL 32751
407-599-9171

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STATEMENT OF THE CASE

DCFS filed a shelter petition in March 1993 seeking shelter for two minor children W.K. and T.K. based on allegations of neglect. (R. 1) This was followed by a Petition for Dependency (R. 6) upon which the two children were adjudicated dependant. DCFS filed a dependency shelter petition for a third child, L.K. in early 1996 when there was no responsible adult to take him after Mrs. Gaines was taken into custody. (R. 286). DCFS filed a petition for termination of the mother's parental rights as to all three boys (R.348) and the matter proceeded to a Termination of Parental Rights hearing.

The trial court entered an order terminating the mother's parental rights as to all three children. (R. 430). On appeal, the 5th DCA affirmed as to the two older children. As to the youngest child, L.K., the DCA reversed the termination and also vacated the adjudication of dependency.

STATEMENT OF FACTS

The Department is appealing the 5th DCA ruling reversing termination of parental rights as to L.K. and vacating adjudication of dependency as to him.

At the time of the initial shelter petition in 1993, Mrs. Gaines, then a single parent, was living with her two infant children and her mother. The petition alleged negligence for failure to provide supervision when W.K. and T.K. were found outside, unsupervised and in diapers at 8 a.m. (R. 1) Subsequently the two were adjudicated dependent. (R. 13)

The mother gave birth to third son, L.K., in October 1994. A home study completed in the summer of 1995 found the mother's home adequate (R. 213) and by December 1995 the mother had sufficiently complied with the case plan to allow weekend visitation with her two oldest children. On one of those visits, the mother and her husband used excess corporal punishment on L.K.'s older siblings. This resulted in charges of child abuse of W.K. and T.K. against both adults.

DCFS filed a petition for termination of the mother's parental rights as to all three boys. (R. 348). The petition alleged that all three children had been abused and neglected by the parents' failure to undertake adequate parental care, contact, concern, supervision and support. (R. 348) DCFS conceded in closing trial arguments that Mrs. Gaines had been handling L.K. appropriately (T. April 16 Vol II

p. 42) but L.K. was taken into custody only because his mother and stepfather were arrested. (Mrs. Gaines gave birth to a daughter, baby girl Gaines, in July 1996. The infant was nine months old at the time of the termination trial. DCFS never made her the subject of any judicial proceedings.)

SUMMARY OF ARGUMENT

Voluntary abusive conduct by parents against older children may be considered by the juvenile courts as a basis for finding unabused children at risk of abuse for purposes of termination of parental rights if there is clear and convincing evidence the behavior of the parents was beyond their control, likely to continue and placed the children at risk.

Existing case law is clear from several Florida appellate courts and this court that it is appropriate to terminate the parental rights of children that have not been abused or neglected where other individuals in the parent's care have been abused or neglected; however, they consistently require proof of potential harm to the unabused children. Padgett v. Dept. of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991); Denson v. Dept. of Health and Rehabilitative Services, 661 So. 2d. 934 (Fla. 5th DCA 1995); In the Interest of J.A.C., 634 So.2d 1087 (Fla. 2nd DCA 1993); In the Interest of Baby Boy A, 544 So.2d 1136 (Fla. 4th DCA 1989). The question before this court now is the parameters of the nexus necessary between prior abuse and prospective abuse to warrant termination of parental rights.

Courts which have addressed this issue have used various language in examining the link. The Fifth DCA in the case below said there must be a showing that the behavior of the parent was beyond the parent's control, likely to continue and placed the child at risk. Gaines v. Dept. Of Children & Fam., 711 So.2d 190,193 (Fla. 5th DCA 1998). This language does not impose any additional

requirement to those laid down in Padgett. Indeed, if there was no need to show that the behavior is beyond the parent's control, likely to continue and places the child at risk, DFCS could point to any single incident of abuse or neglect and terminate parental rights for all children of an accused parent, including those after-born or those not even in the parent's care.

DCFS bases its entire argument on the allegedly improper inclusion of the phrase "beyond the parent's control" in a nexus analysis. The DCFS takes the phrase "beyond the parent's control" and speciously claims this language conflicts with Padgett saying if child abuse is voluntary it is "not beyond the parent's control" and thus children who suffer from persistent and voluntary abuse by their parents can not be protected from prospective abuse. (DCFS Initial Brief p. 4) Such an interpretation of Gaines does not comport with logic or reason. This argument takes the phrase out of context, not only of the sentence from which it is quoted but also of the entire tenor and tone of the opinion.

"Beyond the parent's control", does not refer to whether the conduct is voluntary or involuntary— indeed all physical actions i.e. taking drugs, drinking alcohol, administering spankings, are voluntary physical acts. Rather, the phrase refers to whether the parent can control future impulses to repeat the harmful behavior. If not, then the behavior is likely to continue and when it places a child at

risk, parental rights can be terminated even as to a child not yet harmed.

ARGUMENT

Voluntary abusive conduct by parents against older children may be considered by the juvenile courts as a basis for finding unabused children at risk of abuse for purposes of termination of parental rights if there is clear and convincing evidence the behavior of the parents was beyond their control, likely to continue and placed the children at risk.

All appellate courts which have addressed the question of prospective abuse recognize that abuse of others in the parent's care consistently can support termination of parental rights even as to children not yet harmed; however, they consistently require proof of potential harm to the unabused children. Padgett v. Dept. of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991)(mothers chronic schizophrenia made her incapable of recognizing the needs and desires and ability of her young child and incapable of learning.); S.Q. v. Dept. of Health and Rehabilitative Services, 687 So.2d So.2d 319 (Fla 1st DCA 1997)(Evidence regarding mothers mental health failed to support termination because testimony indicated that with proper guidance and counseling, it was extemely likely the mother would be able to maintain a normal, functional relation with her son even though she had abused her daughter.); Denson v. Dept. of Health and Rehabilitative Services, 661 So. 2d. 934 (Fla. 5th DCA 1995)(Sexual abuse of a half-sibling alone is not sufficient to terminate parental rights without some reasonable basis in the evidence the unharmed child likewise is at risk.); In the Interest of J.A.C., 634

So.2d 1087 (Fla. 2nd DCA 1993)(Prospective abuse and neglect would result from reuniting unharmed children with the father who had confessed to killing their mother.); In the Interest of Baby Boy A, 544 So.2d 1136 (Fla 4th DCA 1989)(Termination of parental rights upheld where father was in jail for aggravated child abuse on another child, on parole for manslaughter in New York and wanted there for a violation of probation, had no viable plan for care of the child and offered little or no supervision or child care for other unharmed child when he had an opportunity.); In the Interest of W.D.N., 443 So.2d 493 (2 DCA 1984)(Termination of parental rights upheld where mother's propensities for abuse were shown to be beyond reasonable hope of modification and posed threat to unharmed child.).

Indeed, courts contemplate termination even where there has not been evidence of any prior abuse to anyone if there is a risk to an as yet unharmed child. In the Interest of C.N.G., 531 So.2d 345 (Fla 5th DCA 1988)(A mother's below average mental and emotional capacity are not sufficient alone to terminate parental rights absent clear and convincing evidence that a parent who is able to do otherwise has abused, neglected or abandoned a child.); In the Interest of J.L.P., 416 So.2d 1250 (Fla 4th DCA 1982)(Even without evidence of past abuse, the mother's mental health and level of incompetence assured inadequate parenting skills and mistreatment of child so as to support termination.).

Similarly, dependency determinations have been supported on evidence of prospective abuse if there is evidence of risk of future harm. In the Interest of M.T.T., 613 So.2d 575 (Fla 1st DCA 1993)(Finding of dependency of 4-year-old child upheld where younger sibling died from drug overdose at the hands of the parents.); In the Interest of J.Z., 636 So.2d 726 (Fla 2nd DCA 1993)(Dependency upheld where father, who never abandoned or neglected child, admitted he could not provide for the child's special needs.); Brown v. Dept. of Health and Rehabilitative Services, 582 So.2d 113 (Fla 3rd DCA 1991)(Medical testimony and mother's admission of continuing substance abuse problem supported finding of dependency of infant who was in danger of prospective neglect.) Paquin v. Dept. of Health and Rehabilitative Services, 561 So. 2d 1286 (Fla. 5th DCA 1990)(Dependency finding as to father reversed where there was no clear and convincing evidence the 2-year-old, who did not live with the father, had ever been abused or witnessed any abuse or might be subject to abuse.); In the Interest of I.T., 532 So.2d 1085 (Fla 3rd DCA 1988) (Dependency finding reversed where parent's psychiatric history, which allegedly showed they might exercise poor judgment under stress, did not support finding that infant was at risk of prospective neglect.).

Every termination case is based on prospective abuse in the sense that it involves an element of speculation as to whether mistreatment will occur if a child is

returned to the home. The question in prospective cases then is the likelihood of future mistreatment. How can such a determination be made? By looking for some nexus between the past behavior and potential future mistreatment. The Fifth DCA articulated the necessary link between past behavior and prospective abuse another way from it's pronouncement in Gaines in the earlier case of Palmer v. Dept. of Health and Rehabilitative Services, 547 So.2d 981 (Fla 5th DCA 1989), cause dismissed 553 So.2d 116 (Fla. 1989) when it said at 984:

> The issue in prospective neglect or abuse cases is whether future behavior, which will adversely affect the child, can be clearly and certainly predicted. If the parent is so afflicted that no reasonable basis exists for improvement then courts may find prospective neglect or abuse.

Since the concept of prospective abuse first arose in the early-1980's courts have used different phraseology in addressing the likelihood of future abuse:

•The child would be subject to a considerable risk of abuse because of the parent's *inability to think in terms of the child's welfare*. In the Interest of J.L.P., 416 So.2d 1250, 1253 (Fla. 4th DCA 1982).

•The mother's propensities were shown to be *beyond reasonable hope of modification*. In the Interest of W.D.N., 443 So.2d 493, 495 (2 DCA 1984).

•The *problems of the parents were not going to be solved* so as to make it safe for the children to return to the home. In the Interest of J.N., 492 So.2d 1118,

1121 (Fla. 1st DCA 1986).

•The mother is a chronic schizophrenic and *her condition is basically untreatable*. In the Interest of J.J.C., 498 So.2d 604, 605 (Fla. 2nd DCA 1986).

•The mother is *unwilling to make any adjustments in her life*. Spankie v. Dept. of Health and Rehabilitative Services, 505 So.2d 1357, 1359 (Fla. 5th DCA 1987), rev. den. 513 So.2d 1063 (Fla. 1987).

•If the parent is so afflicted that *no reasonable basis exists for improvement* then courts may find prospective neglect or abuse. Palmer v. Dept. of Health and Rehabilitative Services, 547 So. 2d 981, 984 (Fla. 5th DCA 1989).

•An illness beyond the parent's control can support termination of parental rights when accompanied by abuse and the evidence before the court established that *such abuse would continue in the future*. In the Interest of R., 591 So.2d 1130, 1132 (Fla. 4th DCA 1992).

•A parent's past conduct or current mental condition must make the risk of future harm to the child likely and there must be *no reasonable basis to conclude that past behaviors will improve*. Hroncich v. Dept. of Health and Rehabilitative Services, 667 So.2d 804, 808 (Fla. 5th DCA 1996).

Judge Sharp's well-reasoned dissenting opinion in Smith v. Dept. of Health and Rehabilitative Services, 665 So.2d 1153, 1157 (Fla. 5th DCA 1996), outlined a

two-pronged test for sufficiency of prospective abuse to support termination of parental rights or dependency adjudication: First, abuse or neglect of another child must be clearly established. The second element that must be established is the parent's prognosis for improvement or rehabilitation and a high likelihood that condition will result in the abuse of neglect of other children. All cases dealing with prospective abuse addressed the second prong, albeit without articulating it, per se. Likewise the pronouncement in Gaines that there must be a showing that the behavior of the parent was beyond the parent's control, likely to continue and placed the child at risk is merely a recapitulation of the second prong.

The construction urged by DCFS that children who suffer from the persistent and voluntary abuse by their parents are without protection from prospective abuse because the action is voluntary (as opposed to beyond the parents' control) is nonsense. If abuse or neglect by the parent results from persistent voluntary behavior of the parent, only two scenarios could be placed before the trial court. Either the parent is incapable of stopping the voluntary behavior, in which case it is beyond control and justifies termination if it poses a risk to the child. Or the parent can control the persistent behavior but chooses not to in which case it is likely to continue and would likewise form the basis for termination of parental rights if it posed a risk of harm to the child.

In the case below, Mrs. Gaines engaged in one episode of behavior after working on a performance plan resulting in her conviction of aggravated child abuse. She paid the ultimate penalty for her behavior and no longer is the mother of her two oldest children in the eyes of the law. However, there was no nexus between the abuse of L.K.'s brothers and the allegation of prospective abuse against L.K. There was no testimony, by expert or lay witness, that L.K. was at risk because the mother's behavior would continue. There was no evidence the behavior was beyond the parent's control, likely to continue and placed the child at risk. In fact, a personality assessment by Dr. Stephen Jordan, Ph.D. determined the mother had the potential to function as an adequate parent. (R. 302) There was not even sufficient evidence of dependency since the only allegation pertaining to L.K. was that there was no known relatives or non-relatives to care for him while the parents were in jail. Once the parents were released from jail, the petition was amended to allege only that allowing L.K. to live in the home would result in a danger that his physical or emotional health would be significantly impaired. There was no evidence of such impairment.

For the forgoing, the lower court correctly reversed the finding terminating parental rights as to L.K. and finding him dependent.

CONCLUSION

This court should affirm the opinion below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the following has been furnished by U.S. mail to JAMES S. SAWYER, District Legal Counsel Department of Children and Families, 400 W. Robinson Street, Suite S-1106, Orlando, FL 32801 and DAVID McDONALD, GAL, 135 N. Magnolia Ave., Orlando, FL 32801 on November 20, 1998.

Ava F. Tunstall, Esq.
McIntyre & Tunstall, P.A.
540 E. Horatio Ave. Suite 101
Maitland, FL 32751
407-599-9171
Fla. Bar. No. 379001