IN THE SUPREME COURT OF THE STATE OF FLORIDA

93,275

DEPARTMENT OF CHILDREN
AND FAMILIES,
Petitioner,

v.

5th DCA Case No. 97-1532

ROSHONDA KEYS GAINES,
Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

This case originated as a dependency case in the juvenile division of the Circuit Court in Orange County, Florida. The case ultimately led to the filing by the agency of a petition to terminate parental rights with respect to the Mother's three older children. This petition was granted after trial on the merits, and the Mother appealed. The Fifth DCA affirmed as to the two older children. As to the youngest of the three children, the DCA reversed the termination and also vacated the adjudication of dependency of this child. With respect to this child, both the dependency and the termination petitions had been based on the danger of future harm to the child.

The two older boys, born in 1989 and 1991, where taken into agency custody when they were found, in 1993, wandering the streets one morning on a heavily traveled thoroughfare, and were adjudicated dependent. The third child came into state custody in 1996 following a home visit of the older boys. During this visit the older boys were physically abused, resulting in criminal convictions of the Mother and her husband for aggravated child abuse.

Rather late in the dependency process the Mother and her husband had another child, a girl, who was nine months

old at the time of trial. This child was not the subject of any judicial proceedings.

Although the DCA affirmed the termination as to the two older boys, the termination and adjudication of dependency of the youngest boy were reversed. In entering this reversal the DCA held that there must be a showing that the behavior of the parents presenting the threat of future harm was beyond the parents control. This holding conflicts with the decision of this court in *Padgett v. Department of Health and Rehabilitative Services, 577 So. 2d 565 (Fla. 1991)*, and this petition for review followed.

SUMMARY OF ARGUMENT

The decision of the lower tribunal conflicts with the decision of this court in Padgett in that the lower tribunal has imposed an additional requirement to those laid down in Padgett. The decision below affords children protection from harm which the parents cannot help causing, but denies protection to children who suffer from the persistent and voluntary abuse or neglect of their parents. Padgett explicitly held that the abuse of other children could serve as a basis for the termination of parental rights of a child who had not yet been abused..

ARGUMENT

THIS COURT SHOULD REVIEW AND QUASH IN PART THE DECISION OF THE LOWER TRIBUNAL, WHICH CONFLICTS WITH THE PRIOR DECISION OF THIS COURT IN *PADGETT v. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES*, 577 SO. 2d 565 (FLA. 1991)

This court, in *Padgett v. Department of Health and Rehabilitative Services*, 577 So. 2d 565 (Fla. 1991) considered the issue of whether a termination of parental rights of one child could be based on the prior abuse or neglect of a different child, and concluded that it could.

> "...[w]e hold that the permanent termination of a parent's rights in one child under circumstances involving abuse or neglect may serve as grounds for permanently severing the parent's rights in a different child." *Padgett*, 577 So. 2d @571.

In the normal course of events, one hopes that the parental conduct giving rise to a dependency action is the result of lack of education and training which can be provided, mental or emotional disorder which can be treated, or developmental or physical disability which can be remedied. *Padgett* calls for genuine efforts to provide a remedy for the distressed family.

There remains the possibility that the abuse or neglect by the parent is not the product of these conditions, but

results simply from the persistent voluntary behavior of the parent, unaltered by the long-term efforts of the state to change these behaviors. Children of such parents are just as worthy of the state's care and protection as are children of parents with a more socially acceptable defect.

Except in the Fifth District. In the decision under review, the lower tribunal states:

> "...However, we have held that there must be a showing in the record that the behavior of the parent was beyond the parent's control, likely to continue and placed the child at risk. Slip opinion @ 7.

The requirement that the parent's behavior be beyond their control is contrary to Padgett and without foundation in the statutes. It is also irrational. Willfully abusive or neglectful behaviors call for more severe condemnation than do involuntary actions..

After several years of working on a performance plan, and even substantially complying with that plan, the Mother nevertheless engaged in voluntary conduct resulting in her conviction of aggravated child abuse. At the trial, the evidence of the mental health professional was that there was nothing wrong with her except perhaps a little depression. This was a mother who could succeed, but would not. Over a period of years she proved she would not. The trial judge was clearly and convincingly persuaded. The DCA

even affirmed the termination as to the two boys who had already suffered her abuse.

All requirements of the statue and of *Padgett* were met, except the additional conflicting requirement that the abusive behavior not be her fault. This strange and harmful addition to Florida law, conflicting with *Padgett* and harmful to children, deserves conflict review and reversal by this court.

The lower tribunal also speculated that because there was no judicial proceeding with respect to the Mother's youngest child, a nine-month-old girl, that this somehow undermined the risk to the youngest boy. The trial judge found risk to that boy, and the safety of the infant girl was not before him. There was no occasion for the record in this case to treat risk to that child and the similarities or differences that might exist. In its speculations, the lower tribunal, in view of the trial court's findings, would have done better to protect the girl (by ordering investigation or intervention) rather than abandon the boy.

CONCLLUSION

This court should:

1. Accept conflict jurisdiction, quash that portion of the opinion below which requires an involuntary parental condition as a condition precedent to the termination of parental rights of a child not yet harmed when other children of the family have already been harmed, and

2. Reverse the reversal of the termination of parental rights and adjudication of dependency of the youngest boy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail to Ava Tunstall, Esquire, 540 E. Horatio Ave., Ste. 101, Maitland, Florida 32751 and David McDonald, GAL, 170 W. Washington St., Orlando, Florida 32801 this _____ day of June, 1998.

443-0901

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DEPARTMENT OF CHILDREN
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CASE NO.:5th DCA 97-1532

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APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1998

ROSHONDA KEYS GAINES,

Appellant,

v. CASE NO. 97-1532

DEPARTMENT OF CHILDREN & FAMILIES,

Appellee.

_____/

Opinion filed May 15, 1998

Appeal from the Circuit Court
for Orange County,
Jose Rodriguez, Judge.

Ava Tunstall and Pauline McIntyre
of McIntyre & Tunstall, P.A.,
Maitland, for Appellant

Alita S. Chappell and James A. Sawyer,
District Legal Counsel of Department of
Children & Families, Orlando, for Appellee.

THOMPSON, J.,

Roshonda Keys Gaines appeals an order terminating her parental rights to her boys, T.K., W.K. and L.K.[1] We agree that the trial court properly terminated the

[1]Each child has a different father other than her husband, Antonio Gaines, and none of the fathers appealed the order terminating their parental rights. Antonio Gaines

parental rights as to the older boys, T.K. and W.K. The Department of Children and Families ("DCFS") proved by clear and convincing evidence that Roshonda Gaines had physically abused T.K. and W.K., and had failed to substantially comply with a performance plan entered after the children had been adjudicated dependent. These are sufficient reasons to sever the parent and child relationship Santosky v. Kramer, 455 U.S. 745 (1982); Fredrick v. Department of Health & Rehabilitative Services, 523 So. 2d 1164 (Fla. 5th DCA), rev. denied, 531 So. 2d 1353 (Fla. 1988); Spankie v. Department of Health & Rehabilitative Services, 505 So. 2d 1357 (Fla. 5th DCA), rev. denied, 513 So. 2d 1063 (Fla. 1987); In the Interest of L.T., 464 So. 2d 201 (Fla. 5th DCA 1985). We disagree, however, that the state showed by clear and convincing evidence that the trial court should terminate the parental rights as to the youngest boy, L.K. Further, we, hold there was insufficient evidence even to find that L.K. was dependent.

The trial court declared the two older boys dependent in March of 1993 and placed them into foster care after the police discovered the children at 8:30 a.m. running around in their diapers on a busy street in front of Roshonda Gaines' apartment. The police found her in the apartment intoxicated. Several neighbors told the police that the two children frequently wandered into the street without parental supervision. The

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is the legal father of L.K. but he is not the natural father. He married Roshonda when she was pregnant with L.K. They have one child together, a girl, who has not been adjudicated dependent.

mother agreed to a performance plan for the return of the children. Eventually, DCFS filed the initial termination petition in April of 1994, on the basis that the parents of T.K. and W.K. had abused and neglected the two boys by their failure to substantially comply with the performance agreement/permanent placement plans. Later, DCFS altered the status of the case by changing the goal from termination to reunification. The children had remained in foster care for three years while the mother tried to comply with the performance agreements for return of her children. Because the mother had complied with 90% of the goals of the performance agreement, DCFS allowed the children unsupervised home visits in 1996 to further reunification. After a weekend visit, the mother and her new husband, Antonio Gaines, were arrested and eventually convicted on the charges of aggravated child abuse.

DCFS filed a second petition to terminate parental rights alleging that the parents had physically abused the two older boys during the home visit by beating them with a belt and wooden clothes hanger, causing them to have numerous lesions on their thighs, buttocks and lower extremities. A dependency petition as to L.K. was filed alleging that there were no known relatives or non-relatives to care for him while the parents were in jail. DCFS developed a revised performance plan for the return of the children, including L.K., but gave the mother only one month to comply with the plan. DCFS also amended the second termination petition to add L.K. The petition alleged that allowing him to continue to live in the home environment would result in a danger that his

physical or emotional health would be significantly impaired. Although L.K. had lived with his mother and had never been physically or emotionally abused by her or Antonio Gaines during the time the two older boys were in foster care, he was removed after his brothers' beatings only because DCFS alleged there was no one to care for him.[2] The revised termination petition also alleged that all three boys remained at risk for further abuse and neglect if placed with the parents. The trial court scheduled a termination hearing, adjudicated L.K. dependent and terminated the parental rights as to all three children, stating:

> The court finds that there has been no significant effort by the mother to complete the tasks in her Performance Agreement/Permanent Placement Plan/Case Plan. In fact, the children were re-abused after the Department determined that the mother had substantially complied with the original Plan and reunification efforts in the form of unsupervised visitation weekend visits were in effect; that history coupled with the mother's failure to subsequently comply with the subsequent case plan offered in this case leads to the court's finding that reunification with the mother would place the children [W.K., T.K. and L.K.] at significant risk for abuse.

The termination of parental rights involves a fundamental liberty interest protected by the federal and state constitutions. In the Interest of R., Children, 591 So. 2d 1130 (Fla. 4th DCA 1992). To justify a termination the state must show by clear

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[2]During court proceedings, there was testimony that relatives of L.K. were available to care for the child but that they did not know about his placement in shelter care when his mother was arrested.

and convincing evidence that the parent abused, neglected or abandoned the child or that the child is at substantial risk of future abuse, neglect or abandonment. Id. Subsection 39.464(1), Florida Statutes (1995), provides:

> (1). The Department . . . or any person who has knowledge of the facts alleged or is informed of said facts and believes that they are true, may petition for the termination of parental rights under any of the following circumstances:
>
> * * *
>
> (c) When the parent or parents engage in conduct toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent child relationship threatens the life or well-being of the child irrespective of the provision of services. Provision of services is evidenced by proof that services were provided through a previous plan or offered as a case plan from a child welfare agency.
>
> (d) When the parent or parents engaged in egregious conduct that endangers the life, health, or safety of a child or the child's sibling, or have the opportunity and capability to prevent egregious conduct that threatened the life, health, or safety of the child or the child's sibling and knowingly failed to do so.
>
> * * *
>
> 2. As used in this subsection, the term "egregious abuse" means conduct of the parent or parents that is deplorable, flagrant, or outrageous by a normal standard of conduct. Egregious abuse may include an act or omission that occurred only once but was of such intensity, magnitude or severity as to endanger the life of the child.

> (e) A petition for termination of parental rights may also be filed when a child has been adjudicated dependent, a case plan has been filed with the court, and the child continues to be abused, neglected or abandoned by the parents. In this case the failure of the parents to substantially comply for a period of 12 months after an adjudication of a child as a dependent child constitutes evidence of continuing abuse, neglect or abandonment, unless the failure to substantially comply with the case plan was due either to lack of financial resources of the parents or the failure of the department to make reasonable efforts to reunify the family. Such 12 month period may begin to run only after the entry of a disposition order placing the custody of the child with the department or a person other than the parent and the subsequent filing with the court of a case plan with a goal of reunification with the parent.

(Emphasis added).

After a review of the record, we find no basis to terminate parental rights as to L.K. DCFS presented no evidence that L.K. had been emotionally or physically abused while he lived with Roshonda and Antonio Gaines. Further, DCFS never offered Roshonda Gaines an opportunity to abide by a performance agreement for a period of at least 12 months. See § 39.464(a)(e), Fla. Stat. Thus, the only justifiable ground to sustain termination as to L.K. is through a finding of prospective neglect, abuse or abandonment. The state has not met its burden to show prospective abuse.

In Padgett v. Department of Health & Rehabilitative Services, 577 So. 2d 565 (Fla. 1991), the Florida Supreme Court wrote that it is appropriate for courts to terminate the parental rights of children that have not been abused or neglected where such children have either a sibling or siblings that have been abused or neglected. The

court wrote:

> In sum, to require a child to suffer abuse in those cases where mistreatment is eventually assured is illogical and directly adverse to society's fundamental policy of preserving the welfare of its growth.

Padgett at 50. This court has also upheld termination of parental rights based upon prospective abuse. Atwell v. Department of Health & Rehabilitative Services, 675 So. 2d 1030 (Fla. 5th DCA 1996); Richmond v. Department of Health & Rehabilitative Services, 658 So. 2d 176 (Fla. 5th DCA 1995); Williams v. Department of Health & Rehabilitative Services, 648 So. 2d 841 (Fla. 5th DCA 1995); Palmer v. Department of Health & Rehabilitative Services, 547 So. 2d 981 (Fla. 5th DCA), cause dismissed, 553 So. 2d 1166 (Fla. 1989). However, we have held that there must be a showing in the record that the behavior of the parent was beyond the parent's control, likely to continue and placed the child at risk. Denson v. Department of Health & Rehabilitative Services, 661 So. 2d 934, 936 (Fla. 5th DCA 1995); In the Interest of T.D., 537 So. 2d 173 (Fla. 1st DCA 1989). Examples include a parent who was addicted to drugs, Williams, or who was an untreatable pedophile, Palmer, or who suffered from mental illness, Richmond. None of those factors are present in this case.

DCFS argued that the boys of Roshonda Gaines are at risk because she is an uncontrollable parent and will probably abuse her children because she has abused them in the past. Further, it impliedly argued that she would not protect the boys if they were abused by her new husband, Antonio Gaines. The arguments fail, however, because

Roshonda has never abused L.K. or his half sister, baby girl Gaines. In fact, DCFS has never filed a dependency petition for baby girl Gaines, though the facts that caused a dependency petition in L.K.'s case would be the same in the case of baby girl Gaines. DCFS argued at oral argument that L.K. is at risk because he is a boy, and as he gets older it is likely that Antonio Gaines might abuse him because Gaines is not the natural father. It also argued that Gaines would not abuse baby girl Gaines because she is his daughter. See Tolley v. Department of Health & Rehabilitative Services, 667 So. 2d 480 (Fla. 5th DCA 1996). The arguments are unsupported by any lay testimony presented to the trial court let alone by expert testimony. DCFS cannot have it both ways: it cannot argue that Roshonda Gaines is an uncontrollable parent who will hurt all of her children, yet allow a child to remain in her care without supervision from the DCFS.

We, therefore, affirm the termination as to the T.K. and W.K., but we reverse as to L.K. Based upon this record, we also reverse the finding of his dependency, since the sole basis was prospective abuse. There was no nexus between the prior abuse of L.K.'s brothers and the allegation of prospective abuse against L.K. Eddy v. Department of Health & Rehabilitative Services, 704 So. 2d 734 (Fla. 5th DCA 1998); Tolley, 667 So. 2d at 481; Denson, 661 So. 2d 934 (Fla. 5th DCA 1995).

Finally, it is clear the termination is not the least restrictive means of protecting the child. L.K. was adjudicated dependent and Roshonda Gaines' parental rights were

terminated on the same day. In the petition for dependency and the petition for termination of parental rights, DCFS acknowledges that no voluntary services had been provided to the family to protect L.K. because they were not "appropriate . . . due to the prior adjudication of the siblings, and the mother and legal father's arrests and incarceration." The parents have since been released from jail and are living as a family with Baby Girl Gaines. Assuming for a moment the finding of dependency was valid, pursuant to section 39.41, Florida Statutes, the court at least should have considered providing services to the family or placing L.K. with an adult relative who was willing to care for the child before proceeding with the termination of parental rights.

Judgment terminating parental rights as to T.K. and W.K. AFFIRMED; judgment finding L.K. dependent and terminating parental rights as to L.K. REVERSED, and REMANDED for further proceedings.

DAUKSCH, J., concurs.
PETERSON, J., dissents with opinion.

PETERSON, J., dissenting.

I respectfully dissent. Section 39.464(1), Florida Statutes (1995) allows the trial court to terminate parental rights when a parent engages in conduct that threatens the life, health or safety of a child's sibling. The majority acknowledges that the mother is incapable of parenting two of her older children by terminating parental rights to them, but disagrees with the trial judge that the youngest male child, L.K., because of the mother's propensities, is potentially exposed to the same ill-treatment experienced by his siblings. I agree with the trial judge that L.K. should not be exposed to the dangers of mistreatment, and disagree with the majority that no action is appropriate unless, or until, L.K. also falls victim to similar acts and omissions by his mother. *See Padgett v. Dept. of Health and Rehabilitative Services*, 577 So. 2d 565 (Fla. 1991) (the permanent termination of a parent's rights in one child under circumstances involving abuse or neglect may serve as grounds for permanently severing the parent's rights in a different child).

The dependency of L.K., at the very least, should be affirmed, in order to allow the Department of Children and Families to monitor L.K.'s future treatment by his mother and to require her to enter a performance agreement that would address issues of proper child raising. I do hope that my dissent will not be ignored by the mother and that she will recall it before repeating the conduct that cost her two of her most precious gifts.

PADGETT V. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES
577 So.2d 565, 16 Fla. L. Weekly 229 (Fla. 1991)

Headnotes • Opinion • CasesCitingThisCase

Thomas **PADGETT**, Petitioner,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Respondent.

Mary Hartline **PADGETT**, Petitioner,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Respondent.

Nos. 74357, 74358.

Supreme Court of Florida.

March 28, 1991.

SYNOPSIS

Father appealed from order of the Circuit Court, Lake County, G. Richard Singletary, J., which terminated parental rights. The District Court of Appeal affirmed, 543 So.2d 1317, and certified question of whether termination of parent's rights in one child can support severing of parent's rights in another. The Supreme Court, Shaw, C.J., held that permanent termination of a parent's rights in one child under circumstances involving abuse and neglect may serve as grounds for permanently severing parent's right in a different child.

Decision approved.

Barkett, J., concurred specially and filed an opinion in which Kogan, J., concurred.

HEADNOTES

1. INFANTS ⚖155

211 ----
211VIII Dependent, Neglected, and Delinquent Children
211VIII(B) Subjects and Grounds
211k154 Dependent and Neglected Children; Conflict with Parental Rights
211k155 Termination of parental rights or other permanent action.

Fla. 1991.

Statute permits termination of parental rights based on prior termination of parental

rights in other children; child need not have suffered mistreatment before the courts can act. West's F.S.A. §§ 39.001, 39.002, 39.464.

2. CONSTITUTIONAL LAW ⚖82(10)

92 ----
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(6) Particular Rights, Limitations, and Applications
92k82(10) Marriage, sex, and family; obscenity.
Formerly 211k154
[See headnote text below]

2. INFANTS ⚖154.1

211 ----
211VIII Dependent, Neglected, and Delinquent Children
211VIII(B) Subjects and Grounds
211k154 Dependent and Neglected Children; Conflict with Parental Rights
211k154.1 In general.

Fla. 1991.

Parent's interest in maintaining parental ties is essential, but child's entitlement to environment free of physical and emotional violence at the hands of his or her most trusted caretaker is more so, and state has compelling interest in protecting all citizens, especially a child, against the clear threat of abuse, neglect, and death.

3. INFANTS ⚖178

211 ----
211VIII Dependent, Neglected, and Delinquent Children
211VIII(C) Evidence
211k175 Weight and Sufficiency
211k178 Termination of parental rights.

Fla. 1991.

Before parental rights in child can be permanently and involuntarily severed, state must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child and implicit in that standard is the basic requirement that, under ordinary circumstances, the state showed that the parent abused, neglected, or abandoned the child. West's F.S.A. § 39.464.

4. INFANTS ⚖156

211 ----
211VIII Dependent, Neglected, and Delinquent Children
211VIII(B) Subjects and Grounds
211k156 Deprivation, neglect, or abuse.

Fla. 1991.

Termination of parent's right in one child under circumstances involving abuse or neglect may serve as grounds for permanently severing the parent's rights in a different child without violating parent's constitutional rights. West's F.S.A. § 39.464.

COUNSEL

[*565] Lawrence J. Semento of Lawrence J. Semento, P.A., Mount Dora, for petitioner, Thomas **Padgett**.

Mark A. Nacke of Michael H. Hatfield P.A., Umatilla, for petitioner, Mary Hartline **Padgett**.

Linda K. Harris, Deputy Gen. Counsel, Dept. of Health and Rehabilitative Services, Tallahassee, for respondent.

OPINION

SHAW, Chief Justice.

We have for review ***Padgett*** *v. Department of Health & Rehabilitative Services,* 543 So.2d 1317, 1318 (Fla. 5th DCA 1989), in which the district court certified the following: "[W]e ... certify the question of "prospective" abuse, neglect or abandonment under Chapter 39 to be one of great public importance...." We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. Because we find the term "prospective" abuse, neglect or abandonment to be misleading and inapplicable to the present **[*566]** cases, (FN1) we rephrase the question as follows:

WHETHER PRIOR TERMINATION OF A PARENT'S RIGHTS IN ONE CHILD CAN SUPPORT THE SEVERING OF THE PARENT'S RIGHTS IN ANOTHER CHILD.

We answer in the affirmative under conditions explained below. We approve the district court decision.

Two years before W.L.P. was born, five children born to Thomas **Padgett** during a previous marriage were committed to the Department of Health and Rehabilitative Services (HRS) for adoption based in part on the following findings involving four of the children:

5. Dr. Myron A. Harvey, Ph.D., a licensed clinical psychologist, evaluated [the four **Padgett** children] during July, 1981, and he has been involved in psychological therapy with those children up to the present date. Dr. Harvey testified that at the time of his evaluation, each of the four (4) **Padgett** children he examined manifested emotional and behavioral disorders, together with a low level of intelligence functioning.

6. Dr. Harvey further testified that in his opinion, the emotional disorders and low I.Q. of the **Padgett** children were the result of their living in a deprived environment devoid of learning stimuli and emotional contact. He further testified that the **Padgett** children have shown substantial improvements in both intelligence level and behavior since they began living in the structured environment of the Florida Baptist Children's

Home.

....

9. Thomas William **Padgett**, former husband of [the children's natural mother], testified that on approximately four (4) occasions during their marriage, the children's natural mother would leave the marital home and abandon the children with the father. During those absences which lasted several weeks, the mother would not visit with or otherwise contact the children. Thomas William **Padgett** further testified that on several occasions when he returned home from work he found some or all of his children bound at the wrists and tied to the furniture and their mother not being present.

The court concluded that the children were dependent due to the extreme neglect of Thomas as well as his wife. Dr. Harvey later testified in the instant proceeding that two of the children showed signs of sexual abuse.

The year before W.L.P. was born, Mary **Padgett** gave birth to a child that promptly was placed in HRS custody and was permanently committed for adoption on the following grounds:

3. The child has been in the custody of the Department of Health and Rehabilitative Services since June 1, 1984, shortly following her birth. She was taken into custody by the Department on or about that date after the Department was notified by hospital authorities that the mother was "poking" her newborn child and displaying other inappropriate conduct with the child.

4. Dr. Frank Carrera, a psychiatrist in Gainesville, Florida, performed a psychiatric evaluation on the mother on August 30, 1984, which included a detailed review of her prior psychiatric history. [*567] Dr. Carrera testified that the child's mother is a chronic schizophrenic and he traced a history of numerous psychiatric hospitalizations of the mother for schizophrenia over the past several years.

5. Dr. Carrera further testified that the treatment prognosis for the mother was very poor and that, in his opinion, the mother would never be able to effectively parent her child.

On December 12, 1985, two days after W.L.P. was born, HRS filed a petition for detention of W.L.P. based on the fact that Mary **Padgett** 1) had recently given birth to a child who was placed in HRS custody, 2) was receiving mental health care, and 3) had tried to perform an abortion on herself with a pair of scissors to prevent the birth of W.L.P. The trial court entered a dependency detention order on the same day and subsequently placed W.L.P. in the care of the maternal grandmother. On September 27, 1986, the court issued an amended order of dependency, finding both parents unfit and placing the child in foster care. The parents and HRS signed a performance agreement, whereby HRS agreed that W.L.P. would be returned if the parents could demonstrate sufficient parenting ability after undergoing psychotherapy and attending parenting classes.

Dr. Hobey subsequently conducted a final evaluation of the Padgetts; she testified as follows:

Q. Dr. Hobey, based on all of your evaluations, your clinical interviews, your testing procedures and your observations of the parents with the child, were you able to

formulate an opinion as to the Padgetts' fitness or ability to parent this child that you observed them with, [ ]?

A. Yes, I had extremely grave concerns about the Padgetts' capacity to parent their child in any way resembling adequate fashion. I just don't think they're able to do that.

Q. What was the basis for that opinion, can you explain to the Court?

A. Yes, the basis for this is, I think that they are so--they have so few emotional and cognitive resources of their own, that's one thing. They are very much people who are into their own needs and their own wishes, and I think that they are incapable to recognize the needs and the desires and the abilities of a young child.

I think the things they do with their baby reflect their own needs, rather than being sensitive to the baby's needs.

I think that their expectations for children are absolutely unrealistic. They have absolutely no sense at all what kinds of behaviors are appropriate for a child. I think they are not capable of learning what these behaviors might be.

Q. Do your findings translate, in any way, into a risk of abuse or risk that they would be abusive parents of the child?

A. I think the risk is very high that they would be very abusive.

Q. With both Mary **Padgett** and Tom **Padgett**?

A. Yes, both Mary **Padgett** and Tom **Padgett**.

Q. What about either of them individually? Did your findings support that either of them individually could parent this child effectively?

A. No.

Q. Dr. Hobey, if you were attempting to prescribe a treatment program for these parents whereby they could overcome their pathologies and become effective parents, do you think you could do that?

A. I don't think I could do that, no.

Q. Why not?

A. I don't think that the Padgetts are really able to engage with a therapist. I don't think that they're sensitive to the fact that they have real problems. I don't think that they are at all able to look at themselves, toward being insightful. In short, I don't think they are capable of learning what they need to learn. We're not talking about a few simple skills that could be acquired in a parenting class. We're talking about long-standing personality problems, which are not treatable.

[*568] Dr. Hobey noted that her conclusions were unrelated to the Padgetts' intelligence levels; (FN2) in her opinion, persons of limited intelligence can be perfectly capable parents.

While the permanent commitment proceeding was pending in the instant cases, two separate incidents took place involving Mary. First, she staged a bizarre "fake rape," in which she abused herself with a hairbrush and then reported to officers that she had been

bound and raped by a neighbor. Second, she sexually abused a four-year-old girl who was in her care. The policeman who responded to the call concerning the child testified that when he arrived at Mary's home, he found the girl lying on the bed on a bloody towel, bleeding from her vaginal area. The pediatrician who examined the child found that her internal genitalia had been lacerated and bruised by the penetration of a blunt object, such as a dull knife or a broomstick, with strong force. Mary pled guilty to aggravated child abuse and was placed on probation for five years. As a condition of her probation, she is prohibited from having contact with minor children unless another adult is present.

Based on evidence of the foregoing, the circuit court in the present proceeding issued a final order on August 16, 1988, permanently committing W.L.P. to HRS for adoption, finding as follows:

[ ] The Court finds that there is a substantial likelihood of future abuse and neglect of the child if [the child] were to be returned to the custody of [the] parents. The Court further finds that there are no less restrictive alternatives available other than the permanent commitment of the child to the Department for subsequent adoption, and that it is in the manifest best interest of the child that [the child] be permanently committed to the Department for subsequent adoption.

The district court affirmed but certified the question of whether prospective abuse, neglect or abandonment can serve as grounds for terminating parental rights.

The Padgetts assert that prospective mistreatment cannot support permanent termination of parental rights because no statute so provides. Mary contends that prospective abuse is based on speculation and is equivalent to jailing someone based on the belief that he "would have" committed a crime. Thomas claims that this is a social issue involving a fundamental liberty interest and must be left to the legislature. Courts, he says, simply cannot predict who will be a "bad" parent. Both Mary and Thomas claim that even if the concept of prospective abuse is valid, the evidence here is insufficient.

[1] Initially, we decline to use the term "prospective" abuse or neglect to characterize the issue presented in the present cases. The mistreatment that was asserted by HRS as grounds for terminating the Padgetts' parental rights was actual, not prospective, and resulted in the permanent termination of their parental rights in other children: Mary was found to have been "poking" and displaying other inappropriate behavior toward a newborn and recently pled guilty to damaging the sexual organs of a four-year-old. Thomas was found to have seriously neglected five children and to have acquiesced in their severe abuse at the hands of his former wife. The real question posed here is whether this prior termination of parental rights in other children can serve as grounds for permanently severing the Padgetts' rights in the present child. To answer this question, we must determine first whether statutory or other authority exists to sustain such a practice, and second whether the practice violates constitutional principles.

General authority supporting the practice of terminating parental rights based on prior abuse or neglect of other children is found in the legislative intent underlying enactment of the Florida Juvenile Justice Act (FN3) (the Act). The legislature has provided that the Act is to be liberally construed to effect its stated purpose of guaranteeing **[*569]** the child a safe and nurturing environment free from the prospect of abuse or neglect:

39.001 Short title, purposes, and intent.--

....

(3) It is the intent of the Legislature that this chapter be liberally interpreted and construed in conformity with its declared purposes.

39.002 Legislative intent.--It is a goal of the Legislature that the children of this state be provided with the following protections:

(1) A permanent and stable home.

(2) A safe and nurturing environment which will preserve a sense of personal dignity and integrity.

(3) Adequate nutrition, shelter, and clothing.

....

(5) Protection from abuse, neglect, and exploitation.

§§ 39.001, .002, Fla.Stat. (1987). The Act expressly authorizes the practice where prior attempts at rehabilitation have failed:

39.464 Elements of procedures for termination.--

....

(2) EXTRAORDINARY PROCEDURES.--

(a) Whenever it appears that the manifest best interests of the child demand it, the state may petition for termination of parental rights without offering a performance agreement or permanent placement plan to the parents....

(b) The state may petition under this subsection only under the following circumstances:

....

2. Severe or continuous abuse or neglect of the child *or other children* by the parent that demonstrates that the parent's conduct threatens the life or well-being of the child regardless of the provision of services as evidenced by having had services provided through a previous performance agreement or permanent placement plan.

§ 39.464, Fla.Stat. (1987) (emphasis added). (FN4) We agree with the fourth district's straightforward conclusion that any other interpretation of legislative intent is untenable: "As the trial court pointedly observed in his final order, placing the boy with his mother will assure mistreatment. The Legislature clearly did not intend to have a child suffer such an experience before a trial court could act." *In re J.L.P.*, 416 So.2d 1250, 1253 (Fla. 4th DCA 1982).

> 39.464 Grounds for termination of parental rights.--The department, the guardian ad litem, or a licensed child-placing agency may petition for the termination of parental rights under any of the following circumstances:
>
> ....
>
> (3) SEVERE OR CONTINUING ABUSE OR NEGLECT.--The parent or parents have engaged in conduct towards the child or towards other children that demonstrates that the continuing involvement of the parent or parents in the

parent-child relationship threatens the life or well-being of the child regardless of the provision of services. Provision of services is evidenced by having had services provided through a previous performance agreement, permanent placement plan, or offer of services in the nature of a case plan from a child welfare agency. A current performance agreement or permanent placement plan need not be offered to the parent or parents, and the petition may be filed at any time before a performance agreement or permanent placement plan has been accepted by the court.

Ch. 90-306, § 16, Laws of Fla.

The practice also is supported by caselaw and strong public policy concerns. Florida district courts repeatedly have upheld the practice of terminating parental rights based on the prior abuse or neglect of other children. (FN5) The second district has **[*570]** directly addressed the matter and concluded:

[W]e believe a parent's abuse of some of her children may constitute grounds for the permanent commitment of her other children who also live with the parent.... To continue to expose children to abuse by a parent simply because findings of prior abuse by the parent only concerned others of the parent's children would constitute an unacceptable risk to the children where, as here, the mother's propensities in that regard were shown to be beyond reasonable hope of modification.

In re W.D.N., 443 So.2d 493, 495 (Fla. 2d DCA 1984). The fifth district expressed society's fundamental aversion to the idea of requiring that a child suffer actual abuse or neglect before it can be permanently removed from a caretaker who has seriously mistreated others and is unrehabilitated:

The record in this case reflects D.L.P. is a difficult, troubled child, badly in need of therapy, and a safe, stable environment to be able to achieve normal adulthood. To require him to actually suffer sexual abuse before permitting the state to intervene would be absurd and especially cruel to this or any vulnerable child.

Palmer v. Department of Health & Rehabilitative Servs., 547 So.2d 981, 984 (Fla. 5th DCA), *cause dismissed,* 553 So.2d 1166 (Fla.1989). In sum, to require a child to suffer abuse in those cases where mistreatment is virtually assured is illogical and directly averse to society's fundamental policy of preserving the welfare of its youth.

As to whether the practice violates constitutional principles, this Court and others have recognized a longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism. The United States Supreme Court has concluded that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982). This interest is especially implicated in proceedings involving the termination of parental rights:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.... Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for ... protections than do those resisting state intervention into ongoing family affairs.

Id. Florida courts have long recognized this fundamental parental right, as we noted in *State ex rel. Sparks v. Reeves,* 97 So.2d 18, 20 (Fla.1957) (citation omitted): "[W]e nevertheless cannot lose sight of the basic proposition that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring. This is a rule older than the common law itself...."

[2] In fact, "the only limitation on this rule of parental privilege is that as between the parent and the child the ultimate welfare of the child itself must be controlling." *Id.*

While Florida courts have recognized the "God-given right" of parents to the care, custody and companionship of their children, it has been held repeatedly that the right is not absolute but is subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail.

In re Camm, 294 So.2d 318, 320 (Fla.), *cert. denied,* 419 U.S. 866, 95 S.Ct. 121, 42 L.Ed.2d 103 (1974). While the parent's interest in maintaining parental ties is essential, the child's entitlement to an environment free of physical and emotional violence at the hands of his or her most trusted caretaker is more so. The state has a compelling interest in protecting all its citizens--especially its youth--against the clear threat of abuse, neglect and death.

[3] [4] **[*571]** To protect the rights of the parent and child, we conclude that before parental rights in a child can be permanently and involuntarily severed, the state must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child. (FN6) Implicit in this standard is the basic requirement that, under ordinary circumstances, the state must show that the parent abused, neglected or abandoned a child. (FN7) The question before us today is whether this abuse, neglect or abandonment must concern the present child, or whether it can concern some other child. Based on our above analysis, we hold that the permanent termination of a parent's rights in one child under circumstances involving abuse or neglect (FN8) may serve as grounds for permanently severing the parent's rights in a different child.

We note that because parental rights constitute a fundamental liberty interest, the state must establish in each case that termination of those rights is the least restrictive means of protecting the child from serious harm. This means that HRS ordinarily must show that it has made a good faith effort to rehabilitate the parent and reunite the family, such as through a current performance agreement or other such plan for the present child. We additionally point out that factors related to a parent's lack of financial resources cannot support permanent termination of parental rights. *Cf.* ch. 90-306, § 19 at 2448, Laws of Fla. ("This failure to substantially comply is evidence of abuse, abandonment, or neglect, unless the court finds that the failure to comply with the performance agreement is due to the lack of financial resources of the parent...."). As is apparent from the above analysis, a parent's intelligence level ordinarily is irrelevant to this inquiry.

While we are loath to sanction government interference in the sacrosanct parent-child relationship, we are more reluctant still to forsake the welfare of our youth. Florida's children are simply too important. We find that the record in the present cases contains sufficient competent evidence to support the trial court's order permanently terminating parental rights. We approve the district court decision.

It is so ordered.

OVERTON, McDONALD and GRIMES, JJ., concur.

BARKETT, J., concurs specially with an opinion, in which KOGAN, J., concurs.

BARKETT, Justice, specially concurring.

Although I agree with the majority, I write to emphasize that the evidence necessary to terminate parental rights is not simply the bare assertion of an expert that parents lack the "capacity to parent their child." Rather, the decision must be supported by factual evidence of actual physical, emotional, and/or sexual abuse.

Permanent severance of the parent-child relationship is a serious matter that involves constitutionally protected liberty interests. *In re R.W.*, 495 So.2d 133 (Fla.1986) (and cases cited therein); *see also In re D.B.*, 385 So.2d 83 (Fla.1980) (requiring indigent parents to be provided counsel in a permanent termination proceeding). The United States Supreme Court has stated:

The fundamental liberty interest of natural parents in the care, custody, and **[*572]** management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.

Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982). To ensure that the rights of both parent and child are fully protected, the reasons for the permanent termination of parental rights must go far beyond the fact that others may be more capable of caring for the child. (FN9) "A mother's parental rights in and to her child, and the child's corresponding rights in and to its mother, cannot be terminated by the State based solely upon the mother's deficient parental capabilities which result from conditions beyond her control." *In re C.N.G.*, 531 So.2d 345, 347 (Fla. 5th DCA 1988) (Cowart, J., dissenting) (arguing that parental rights cannot be terminated merely because the parents are mentally and emotionally deficient); *see In re T.D.*, 537 So.2d 173 (Fla. 1st DCA 1989) (court refused to permanently commit a child to foster care where HRS failed to provide clear and convincing evidence that the mother's lack of intellectual capacity and parenting skills translated into neglect, abuse, or abandonment).

Clearly, conclusions that parents manifest a low level of intelligence or lack emotional and cognitive resources by themselves would not be enough to terminate parental rights. Those characterizations undoubtedly describe thousands of individuals who are now, and will continue to be, loving parents. Such findings are a far cry from clear and convincing proof of abuse, neglect, or abandonment. *See In re R.W.*, 495 So.2d at 135. As one judge recently observed:

While the best interests and welfare of the child is the sole guide in legal controversies relating to a child's custody, it has no proper place when the issue is the permanent termination of parental rights. The reason should be obvious. It is in the best interest and welfare of every child to have the best possible parents. Whatever criteria are used to measure the desirable characteristics of ideal parents, obviously one-half of all parents are superior to, and better than, the other half. Any rule of law permitting the government to permanently terminate natural parental rights based on the best interests of the child will justify the government in taking all children away from the less adequate half of all parents and giving them to the other, "better," half. Under such a rule of law

the government need merely say: "Look, kid, we will find you some better parents."

C.N.G. 531 So.2d at 347 n. 10 (Cowart, J., dissenting). Thus,

> notwithstanding the natural parent's inadequacy and a judicial belief that it may be in the best interest of the child to be adopted by more adequate parents, under Florida law, proof by clear and convincing evidence that a parent who is able to do otherwise has abused, neglected, or abandoned a child is essential to an involuntary termination of that parent's rights in and to that child.

Id. at 347.

I also stress that because parental rights are recognized as a fundamental liberty interest, the state must prove that termination of those rights is the least restrictive alternative. *See Dunn v. Blumstein,* 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972). To meet this standard, HRS must, in the very least, make reasonable and meaningful efforts to reunite the family. Termination of parental rights should be the remedy of last resort, employed only when other reasonable alternatives have been exhausted.

KOGAN, J., concurs.

FN1. The term "prospective" simply means likely to happen. Although every termination case is prospective in the sense that it involves an element of speculation as to whether mistreatment will occur if the child is returned to the home, courts generally have reserved use of the term to characterize those termination cases where parental rights in a child are severed without evidence of abuse or neglect to that particular child. Parental rights are said to be terminated in such cases based on "prospective," as opposed to "actual," abuse of the child. We reject this analysis and point out that most such "prospective" abuse cases are in fact based on actual, documented mistreatment of other children and are no more speculative in nature than conventional termination cases involving prior abuse or neglect of the present, as opposed to some other child. *See infra* note 5. Such is the case in the present proceedings. To characterize these cases as "prospective," thus implying that they are somehow more speculative than conventional cases, is misleading. We are not presented today with a truly "prospective" abuse case in which the state seeks to terminate parental rights based solely on prospective abuse, i.e., without evidence of actual abuse to any child, and we do not decide this issue.

FN2. Both Mary and Thomas are borderline retarded, with I.Q.s below 70.

FN3. Ch. 39, Fla.Stat. (1987).

FN4. Section 39.464 has since been amended to read:

FN5. *See, e.g., Lett v. Department of Health & Rehabilitative Servs.,* 547 So.2d 328 (Fla. 5th DCA 1989) (prior physical abuse of two siblings); *Palmer v. Department of Health & Rehabilitative Servs.,* 547 So.2d 981 (Fla. 5th DCA) (prior sexual abuse of sibling), *cause dismissed,* 553 So.2d 1166 (Fla.1989); *In re Baby Boy A,* 544 So.2d 1136 (Fla. 4th DCA 1989) (prior physical abuse of sibling); ***Padgett*** *v. Department of Health & Rehabilitative Servs.,* 543 So.2d 1317 (Fla. 5th DCA 1989) (prior physical abuse and neglect of six other children); *In re W.D.N.,* 443 So.2d 493 (Fla. 2d DCA 1984) (prior physical abuse of two siblings); *In re J.L.P.,* 416 So.2d 1250 (Fla. 4th DCA 1982) (past history of alleged child abuse).

FN6. The statutory prerequisites for termination of parental rights are contained in section 39.467(2), Florida Statutes (1987), which provides that under ordinary circumstances before parental rights can be involuntarily terminated the state must show by clear and convincing evidence that the present child was adjudicated dependent, a dependency disposition order was entered, the parent was informed of his or her right to counsel, and the parent failed to substantially comply with the terms of a performance agreement or permanent placement plan. Section 39.467(2) has been amended by section 19, chapter 90-306, Laws of Florida.

FN7. *See In re R.W.*, 495 So.2d 133, 135 (Fla.1986) ("We conclude and hold that, before parental rights can be permanently terminated, the state must show abandonment, abuse, or neglect by clear and convincing evidence.").

FN8. We decline to address the issue of abandonment because it is not presented in the present cases.

FN9. In this case, not only was Mary adjudicated guilty of aggravated child abuse, but as a condition of her probation she is prohibited from having unsupervised contact with minor children. Thomas and Mary live together, and Thomas works during the day. Thus, as a practical matter, returning W.L.P. to Thomas and Mary is not a viable option.
