

FILED

SID J. WHITE

JUL 13 1998

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FLA. DEPT. OF CHILDREN AND FAMILIES,
Petitioner,

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

CASE NO. 93,275 (DCA No. 97-1532)

ROSHONDA KEYS GAINES,,
Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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Padgett v. Dept. of H.R.S., 577 So.2d 565 (Fla. 1991) 3, 4, 5, 6, 7.

STATEMENT OF THE CASE AND THE FACTS

The respondent concurs with the facts presented by the petitioner except for recitation of the holding. The Fifth District Court of Appeal found the state did not show by clear and convincing evidence that the trial court should have terminated the parental rights of the third boy because the state had not met its burden to show prospective abuse. In entering the reversal, the DCA said 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. The DCA ruling is not in conflict with Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991).

SUMMARY OF ARGUMENT

While this court has authority as the highest court of the state to resolve legal conflicts created by the district courts of appeal, said opinions must “expressly and directly” conflict with a decision of another DCA or of this court on the same question of law. In the case at bar, conflict with Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991) was neither expressed nor implied. In contrast to conflicting with it, the decision below acknowledged Padgett and followed this Court’s ruling therein. DCF disingenuously looks to dicta in an attempt to create a conflict where none exists. In short, the DCA properly reversed the trial court because “the state failed to meet its burden of showing prospective abuse” as required by Padgett. (Slip opinion p. 6) Without any express and direct conflict, there is no resolution needed by the Florida Supreme Court and jurisdiction should not attach.

ARGUMENT

The crux of any argument on conflict jurisdiction is whether the decision of a district court of appeal expressly and directly conflicts with that of another district court or this Court. The DCF alleges conflict between the case at bar and Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991). The Department is wrong. There is no express and direct conflict between the district court's opinion below in Gaines v. DCF and this Court's opinion in Padgett. It is not enough to contend, as does the DCF, that a labyrinthine interpretation of a lower court opinion might create a conflict. A district court of appeal decision is reviewable only if the conflict can be demonstrated from the opinion itself. That is not the case here. As the opinion in question clearly stated, the Fifth DCA consistently has recognized, upheld and properly applied the holding in Padgett (Slip opinion p. 7) and it did so here, too.

In Padgett, this Court found that a prior termination of a parent's rights in one child can support the severing of the parent's rights in another child "under conditions explained" in the case. (Padgett at 565). Even a cursory look at the "conditions" in Padgett show there is perfect alignment between this Court's holding therein and the district court opinion in Gaines.

The abuse in Padgett was repeated and extreme; the mother had a mental illness (chronic schizophrenia) and neither parent was capable of learning appropriate behavior. Expert testimony found the mother had a long-standing personality problem that was not treatable and there was a very high risk of future abuse. (Padgett at 567). Consistent with the holding in Padgett, the Fifth District Court recapitulated the logic behind the holding by saying in Gaines 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 p.7) The DCF contends such language conflicts with Padgett. The DCF is incorrect. The language is entirely consistent. Indeed, if there need be *no* showing that the behavior of the parent was beyond the parent's control, likely to continue and placed the child at risk, then any single incident of abuse or neglect automatically would necessitate termination of parental rights for all children of an accused parent, including those after-born.

The DCF 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. (DCF Jurisdiction Brief p. 4, 6) Such an interpretation of Gaines does not comport with logic or reason.

Additionally, the Fifth District Court below had an alternative basis for remanding the case as to L.K: termination was not the least restrictive means of protecting him. (Slip opinion p. 8.) Moreover, the district court said, even a finding of dependency could not be supported since pursuant to F.S. § 39.41 the trial court 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 a termination of parental rights. [The Department acknowledged no voluntary services had been provided to the family to protect L.K. (Slip Opinion p. 9)] Again, the sound decision by the Fifth District Court does not conflict with any other district court opinion or one from this Court. Ergo, there is no grounds for this Court to invoke discretionary jurisdiction.

CONCLUSION

The case at bar does not expressly and directly conflict with Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991). Rather, the lower tribunal agreed with the Padgett holding and decided the lower case consistently therewith. Since no conflict exists and since there is no other valid basis for jurisdiction, this Court should decline to review the case.

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 this 10th day of July 1998.



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