

ORIGINAL

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SID J. WHITE

DEC 2 1998

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEPARTMENT OF CHILDREN
AND FAMILIES,
Petitioner,

CLERK SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

v.

CASE NO. 93,275
5th DCA Case No. 97-1532

ROSHONDA KEYS GAINES,
Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

VOLUNTARY ABUSIVE CONDUCT BY
PARENTS AGAINST OLDER CHILDREN MAY
BE CONSIDERED BY THE JUVENILE
COURTS AS A BASIS FOR FINDING
YOUNGER UNABUSED CHILDREN AT RISK
OF ABUSE FOR PURPOSES OF
DEPENDENCY AND TERMINATION OF
PARENTAL RIGHTS.

In her Answer Brief, Appellee essentially agrees that the abusive conduct of a parent need not be beyond the control of that parent in order to form the factual basis for dependency or termination of parental rights, Answer Brief at 15. A classic example of such a case, Spankie v. Dept. of Health and Rehabilitative Services, 505 So. 2d 1357, (Fla. 5th DCA 1987), rev. den. 513 So. 2d 1063 (Fla., 1987), is cited as an example of a case where the mother was unwilling to make any adjustments in her life. The mother's unwillingness, rather than her inability, was the basis for the decision.

Appellee also cites cases where the character of the parent's conduct is more problematic, for example In the Interest of J.L.P., 416 So. 2d 1250 (Fla. 4th DCA 1982) where the Fourth DCA dealt with a retarded mother, a condition certainly not her fault, and unlikely to change.

The critical language of the opinion below, at page 7 of the slip opinion, is:

"...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 (emphasis added)."

This language is very clear. It is also inconsistent with Padgett. Of the three listed elements to be considered in "prospective" cases, the first stated is that the parental conduct be beyond the parent's control. Appellee argues that this does not preclude the consideration of voluntary conduct. This argument is advanced because there are cases such as Spankie, *supra*, in which voluntary conduct has not been rejected as a basis for decision. This argument does not avoid the conflict, it reinforces it. This is exactly the conflict.

In the present case the parental conduct was voluntary. There was nothing wrong with the mother: no retardation, drug addiction or mental illness to explain her behavior. The problem with her behavior was her behavior itself. After lengthy foster care rehabilitative efforts, she had not changed, and she was a risk to her children.

The trial judge found that the proven behavior proved a risk of harm to the child L.K. This judgement should be reinstated.

CONCLUSION

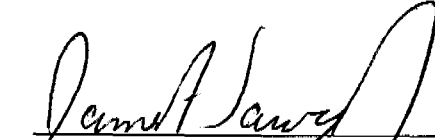
The decision of the lower tribunal should be quashed, and the decision of the trial judge reinstated.

In the alternative, that portion of the decision below vacating the adjudication of dependency of L.K. should be reversed, with directions to reinstate the dependency.

The requirement that the parental conduct serving as a factual basis for termination of parental rights of children be beyond the control of the parents should be repudiated.

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 30 day of November, 1998.



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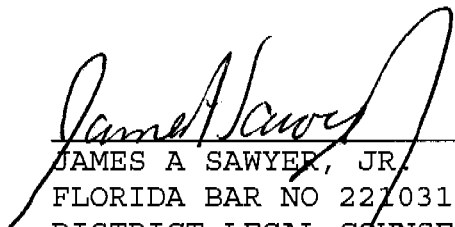
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FONT CERTIFICATION

I hereby certify that the Appellant's Reply Brief filed in this cause has been typed in Courier New 12 point font.

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