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IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

In the Interest of Z.C.(1) and Z.C.(2), )  
children. )  
\_\_\_\_\_)  
)  
DEPARTMENT OF CHILDREN AND )  
FAMILY SERVICES and GUARDIAN AD )  
LITEM PROGRAM, )  
)  
Appellants, )  
)  
v. )  
)  
K.D. and Z.H., )  
)  
Appellees. )  
\_\_\_\_\_)

Case No. 2D10-3474

Opinion filed May 9, 2012.

Appeal from the Circuit Court for  
Hillsborough County; B. Tracy Sheehan,  
Judge.

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EN BANC

SILBERMAN, Chief Judge.

K.D. and Z.H. are the parents of twin boys, Z.C.(1) and Z.C.(2), who were infants when they were sheltered after Z.C.(1) suffered severe injuries while he was in the parents' care. The Department of Children and Families (DCF) filed an expedited petition to terminate the parental rights to both children based on egregious conduct toward Z.C.(1) under section 39.806(1)(f), Florida Statutes (2009), and aggravated child abuse of Z.C.(1) under section 39.806(1)(g). Although the trial court found that the Department established these statutory grounds by clear and convincing evidence, it declined to terminate parental rights based on its sua sponte consideration of an alternative placement in a permanent guardianship with the maternal grandparents. The trial court entered separate orders denying DCF's petition and placing the children in the permanent guardianship.

We reverse the order terminating parental rights because the trial court misapplied the manifest best interests and least restrictive means tests by basing its decision not to terminate solely on the availability of the alternative placement. We reverse the order placing the children in a permanent guardianship because the trial court was precluded as a matter of law from considering this alternative placement at this stage in the proceedings. This court, sua sponte, has exercised its en banc review of this case because the case addresses recurring issues regarding the termination of parental rights to a child based on the abuse of a sibling. We have determined that

clarification is necessary to maintain uniformity in our decisions. Thus, we take this opportunity to clarify the manifest best interests and least restrictive means tests in such cases in the context of the trial court's erroneous application of those tests. In addition, we address the nexus test derived from Padgett v. Department of Health & Rehabilitative Services, 577 So. 2d 565 (Fla. 1991), in the context of the trial court's proper application of that test.

I. Facts and Procedural Background.

Z.C.(1) and Z.C.(2) are identical twin boys who were born on October 28, 2009. The twins were born healthy and had a normal pediatric checkup on November 5, 2009. They lived alone with the parents, and there is no indication that they had ever been harmed while in the care of relatives.

In mid-November 2009, the Mother attended a family party with the twins. Those attending the party claimed that the children appeared to be fine. At some point after the party, however, the parents claimed that they noticed that Z.C.(1)'s leg was dangling at an odd angle. They took him to the hospital. At the hospital, the doctors diagnosed Z.C.(1) with a recent, severely displaced fracture of the left femur. They also diagnosed a healing skull fracture and a healing rib fracture. The matter was reported to law enforcement.

Law enforcement interviewed the parents about the events of the day; the evidence did not support the parents' version of events after the Mother left the party. The parents initially told law enforcement that the Mother drove straight home. After law enforcement confronted the Mother with evidence that she had gone to Wal-Mart, the Mother changed her story. She claimed she took the twins to Wal-Mart on her way

home from the party. But the interviewing detective had already obtained the Wal-Mart security footage which showed the Mother shopping alone.

The Mother changed her story again and said she picked up the Father and drove to Wal-Mart after the party. She claimed that the Father stayed in the car with the twins while she shopped. When the Mother returned to the car, the Father got out and helped her load the shopping bags into the trunk. The Father corroborated this version of events. But Wal-Mart security footage showed the Mother by herself loading shopping bags into the backseat of a seemingly empty car. Despite this contradictory evidence, the parents adhered to this version of events. They were unable to offer an explanation for Z.C.(1)'s injuries.

DCF believed that the parents were being evasive and uncooperative in an effort to avoid prosecution for felony child abuse. Concluding that no case plan for reunification would be viable under these circumstances, DCF elected not to pursue a dependency proceeding. Instead, it filed an expedited petition for termination of parental rights. DCF alleged egregious conduct toward and aggravated child abuse of Z.C.(1) and maintained that these circumstances warranted termination as to both children.

The trial court found the parents' testimony incredible and accepted medical testimony that Z.C.(1) had been subjected to two or three instances of severe abuse during his seventeen days of life. The trial court concluded that DCF had established that the parents committed egregious conduct toward and aggravated abuse of Z.C.(1). The more difficult question for the trial court was whether these circumstances warranted termination of parental rights to Z.C.(2) who did not appear to

have suffered any abuse similar to the abuse endured by his twin. Ultimately, the evidence convinced the trial court that the parents had a "mutual commitment to lying and covering up the abuse of a child whose sibling can, at any time, be equally susceptible to the kind of aggravated child abuse proven against his twin brother."

The trial court then considered the children's manifest best interests. It made an unusual placement decision, one not advocated by any of the parties. As the trial court explained:

The Court considered the cases noted above, and finds that grounds for TPR and nexus were shown and it is clearly in the best interests of the twins to maintain their joint placement. Nevertheless, the Department failed its burden of proving that termination of parental rights was the "least restrictive" alternative available to these parties. Another option is available that meets half way between termination of rights/adoption and the impossibility of reunification, and that is permanent guardianship.

The court entered an order denying DCF's petition to terminate parental rights and subsequently entered a second order placing the children in a permanent guardianship with the twins' maternal grandparents. In the trial court's view, a guardianship could ensure the children's safety while allowing regular visitation between the children and their parents. DCF and the Guardian ad Litem Program (GAL) challenge these orders on appeal.<sup>1</sup>

## II. The applicable legal framework.

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<sup>1</sup>In case numbers 2D10-3543 and 2D10-3545, the parents also filed notices of appeal from the trial court's orders. Those appeals were subsequently consolidated with the appeal in this case. However, counsel for the parents asserted there were no issues of merit in the parents' appeals and moved to withdraw. This court granted the parents' attorneys' motions to withdraw as counsel for purposes of those appeals. The parents thereafter declined to submit merits briefs in those appeals, and cases 2D10-3543 and 2D10-3545 were dismissed for failure to prosecute.

For a better understanding of the principles at issue, we must examine the trial court's actions in the applicable legal framework. Chapter 39 expressly requires DCF to prove the following elements to support a termination of parental rights: (1) that at least one of the grounds set forth in section 39.806 has been met, and (2) that termination would be in the manifest best interests of the children under section 39.810.<sup>2</sup> §§ 39.802(4), 39.809(1).

In order to protect the parents' constitutional right to parent their children without governmental interference, the Florida Supreme Court has held that chapter 39 implicitly requires DCF to prove that termination is the least restrictive means of protecting the children from serious harm. See Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004); Padgett, 577 So. 2d at 571. In the same vein, the supreme court has determined that if the termination is based solely on the abuse of a sibling, DCF must also prove that there is a substantial risk of significant harm to the child resulting from the abuse of the sibling. Id. As will be discussed later, this requirement has been referred to as the "nexus test."

Of the twelve grounds listed in section 39.806, DCF alleged those set forth in subsections (1)(f) and (g). Subsection (1)(f) provides for termination if "[t]he parent or parents engaged in egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct that threatens the life, safety, or physical, mental, or emotional health of the child or the child's sibling." Subsection

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<sup>2</sup>Chapter 39 also requires DCF to prove that the parents of the child were informed of their right to counsel and that the court entered a dispositional order adjudicating the child dependent in any prior dependency proceeding. § 39.802(4)(b). Because DCF filed an expedited petition for termination of parental rights, it was not required to prove that a dispositional order adjudicating the children dependent had been ordered under section 39.802(4)(b). See §§ 39.802(5), 39.806(3).

(1)(g) provides for termination if "[t]he parent or parents have subjected the child or another child to aggravated child abuse as defined in s. 827.03, sexual battery or sexual abuse as defined in s. 39.01, or chronic abuse."

When DCF proceeds with termination under these sections, it may file an expedited petition for termination of parental rights without filing a separate petition for dependency. §§ 39.802(5), 39.806(3). DCF filed such an expedited petition in this case in which it requested that the court adjudicate the children dependent and terminate parental rights. DCF also filed a case plan with a permanency goal of adoption.

If the court finds that DCF met its burden of proving the elements by clear and convincing evidence, it must grant the petition for termination of parental rights and proceed with adoption of a child in its custody. § 39.811(2). If the court finds that DCF has not met its burden of proof, its powers of disposition are limited by section 39.811(1). If grounds for dependency have been established, the court is required to adjudicate the children dependent and enter an order either (1) continuing the children in their out-of-home placement with a case plan, or (2) returning the children to their parents and retaining jurisdiction for six months. § 39.811(1)(a). If grounds for dependency have not been established, the court is required to dismiss the petition. § 39.811(1)(b).

In this case, the trial court determined that DCF proved the statutory grounds for termination in sections 39.806(1)(f) and (g) by clear and convincing evidence. The court also concluded that there was a nexus between the abuse of Z.C.(1) and the substantial risk of significant harm to Z.C.(2). But because it believed that a permanent guardianship was a potential placement option, the court concluded

that DCF failed to prove termination was in the children's manifest best interests or was the least restrictive means of protecting the children. The court therefore declined to terminate parental rights; instead, it adjudicated the children dependent and sua sponte entered an order placing them in a permanent guardianship with the maternal grandparents.

The parties do not dispute that DCF presented sufficient evidence of both egregious conduct and aggravated child abuse of Z.C.(1) under sections 39.806(1)(f) and (g) based on the serious injuries he suffered while in the parents' care. See K.A. v. Dep't of Children & Family Servs., 880 So. 2d 705, 708 (Fla. 2d DCA 2004). And both sections 39.806(1)(f) and (g) provide a valid statutory ground for termination as to both children based on this abuse of Z.C.(1). DCF and GAL challenge the trial court's application of the nexus test, the manifest best interests test, and the least restrictive means test. DCF and GAL also argue that the court erred by sua sponte considering and imposing a permanent guardianship at this stage in the proceedings. We address each of these issues in turn.

III. The trial court properly determined that there was a nexus between the abuse of Z.C.(1) and the substantial risk of significant harm to Z.C.(2).

DCF and GAL argue that the trial court's finding that DCF met its burden of proving the statutory grounds for termination in sections 39.806(1)(f) and (g) ends the inquiry into whether the parents' conduct toward Z.C.(1) was sufficient to support termination of their parental rights to Z.C.(2). However, the supreme court has set forth an additional burden of proof in cases involving termination of parental rights to a child based on abuse of a sibling. See Padgett, 577 So. 2d at 571.



In Padgett, the supreme court addressed the question of whether a prior termination of parental rights based on the abuse and neglect of a sibling could support the subsequent termination of the parent's rights to a child. Id. at 566. The court analyzed (1) whether statutory or other legal authority supported such a practice, and (2) whether the practice was constitutional. Id. at 568-71. In analyzing the first question, the court explained that the statute expressly provided for termination of parental rights based on the abuse or neglect of other children and that this was consistent with its legislative intent. Id. at 569-70.

In analyzing the second question, the Padgett court recognized a parent's "longstanding and fundamental liberty interest" in parenting her children without government interference. Id. at 570. However, the court explained that this right was not absolute but would surrender to the children's right to be free from physical and emotional violence at the hands of their caretaker. To protect the parent's fundamental liberty interest, the court determined that DCF was required to "show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child." Id. at 571. In addition, DCF must establish "that termination of those rights is the least restrictive means of protecting the child from serious harm." Id.

Thus, contrary to DCF and GAL's arguments, the trial court could not terminate the parental rights to Z.C.(2) based on the abuse of Z.C.(1) without first determining that reunification with the parents poses a substantial risk of significant harm to Z.C.(2). The Padgett court did not set forth a test for evaluating this requirement. However, the supreme court provided some guidance in a case

addressing a similar issue regarding the propriety of adjudicating a child dependent based on the abuse of a sibling. See R.F. v. Dep't of Children & Families, 770 So. 2d 1189 (Fla. 2000).

In R.F., the court reviewed a decision to affirm an adjudication of dependency of the child M.F.<sup>3</sup> based solely upon the fact that the father had been convicted of a sex offense against a sibling. Id. at 1191-92. This decision conflicted with the decisions of another district which required additional evidence to establish the likelihood that the parent would similarly abuse the children at issue.

The R.F. court noted that in Padgett it had held that a court could terminate parental rights based on the abuse or neglect of a sibling. Id. at 1193. And in Padgett the court had not based its ruling on one fact in particular but on "extensive and wide-ranging evidence of abuse and neglect." Id. The R.F. court concluded that the per se rule was inconsistent with Padgett and with the language of the dependency statute requiring "proof that the parent poses a substantial risk of *imminent* abuse or neglect to the child's sibling." R.F., 770 So. 2d at 1194. The court instead required that the trial court should focus on the totality of the circumstances. In cases involving prior sexual acts on a sibling, those circumstances would include "[a]ny similarity between the prior act and the pending case; the temporal proximity of the prior act to the pending case; any treatment received by the parent following the act; and the testimony (if appropriate) of professionals and experts." Id. at 1194 n.13.

This language in R.F. was interpreted by the district courts to require a "nexus" between the abuse of a sibling and the prospect that the same type of abuse

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<sup>3</sup>This case is also cited as In re M.F., 770 So. 2d 1189 (Fla. 2000).

would be suffered by the children who were the subject of the dependency proceedings. See, e.g., C.M. v. Dep't of Children & Families, 844 So. 2d 765, 766 (Fla. 2d DCA 2003); C.W. v. Dep't of Children & Family Servs., 944 So. 2d 1197, 1198-99 (Fla. 3d DCA 2006); J.B., III v. Dep't of Children & Families, 928 So. 2d 392, 395 (Fla. 1st DCA 2006); M.N. v. Dep't of Children & Families, 826 So. 2d 445, 448 (Fla. 5th DCA 2002); O.S. v. Dep't of Children & Families, 821 So. 2d 1145, 1148 (Fla. 4th DCA 2002).

And this court applied the "nexus" language from dependency cases citing R.F. to explain Padgett's requirement of "a substantial risk of significant harm" from the abuse or neglect of a sibling in termination of parental rights cases. See, e.g., K.A., 880 So. 2d at 709; A.D. v. Dep't of Children & Family Servs., 870 So. 2d 235, 238 (Fla. 2d DCA 2004).

In K.A., this court concluded that DCF failed to present sufficient evidence of a substantial risk of significant harm to the parents' older children based on the egregious abuse of their infant son. 880 So. 2d at 709. The infant had been diagnosed with shaken baby syndrome based on fractures to his skull, femur, and ribs that had occurred on three separate occasions. Id. at 707. Although there was no evidence that the parents inflicted the injuries, the infant was almost always in the parents' care. And there was expert medical testimony that the parents should have at least been aware of the injuries. This court concluded that DCF had established grounds for termination of the parental rights to the infant based on egregious conduct and affirmed the portion of the order on appeal terminating parental rights to that child. Id. at 708-09.

However, the two older children in K.A. had not suffered any abuse, and there was testimony that they had been cared for appropriately. Id. at 707-08.

Additionally, the parents had very positive interactions with the older children during visitation. Id. at 708. In fact, the guardian ad litem opposed termination and recommended affording the parents a case plan with a goal of reunification.

In reversing the order terminating the parents' rights to the older children on appeal, this court concluded that DCF failed to establish a "nexus or predictive relationship between the past abuse of the infant and any prospective abuse of the older children." K.A., 880 So. 2d at 709. This court applied R.F.'s totality of the circumstances test as espoused in A.D., 870 So. 2d 235. See K.A., 880 So. 2d at 709.

This court concluded:

The two older children have not been abandoned, abused, or neglected. By all accounts, they have been well cared for and are closely bonded to their parents. The parents do not suffer from any physical or mental illness or condition that would inhibit their proper care of these children in the future. Further, there is no indication these children were aware of the abuse or present when it occurred or that it had any psychological impact upon them. Under these circumstances, the trial court's conclusion that the termination of the parents' rights to the two older children was the least restrictive means of protecting them was not supported by clear and convincing evidence and was clearly erroneous.

Id. at 709-10.

Very shortly after K.A. was decided, the supreme court held that the totality of the circumstances standard as applied in R.F. (cited to as In re M.F.) should be used to evaluate whether DCF met Padgett's requirement of proving "a substantial risk of significant harm" from the abuse or neglect of a sibling in termination proceedings. F.L., 880 So. 2d at 608. The supreme court explained that the totality of

the circumstances analysis should emphasize the facts regarding the prior involuntary termination as follows:

Specifically, if the parent's conduct that led to the involuntary termination involved egregious abuse or neglect of another child, this will tend to indicate a greater risk of harm to the current child. The amount of time that has passed since the prior involuntary termination will also be relevant. A very recent involuntary termination will tend to indicate a greater current risk. Finally, evidence of any change in circumstances since the prior involuntary termination will obviously be significant to a determination of risk to a current child. While a parent's past conduct necessarily has some predictive value as to that parent's likely future conduct, positive life changes can overcome a negative history.

Id. at 610.

DCF argues that the nexus test applied by this court is something different than the totality of the circumstances test the supreme court discussed in F.L. DCF points to the following language this court has repeatedly quoted and applied to determine what evidence would satisfy the nexus test: " 'Generally, this nexus is established when the parent has a mental or emotional condition that will continue, such as mental illness, drug addiction, or pedophilia, and which will make it highly probable that in the future the parent will abuse or neglect another child.' " A.D., 870 So. 2d at 238 (quoting C.M., 844 So. 2d at 766); see also T.L. v. Dep't of Children & Family Servs., 990 So. 2d 1267, 1272 (Fla. 2d DCA 2008); M.C. v. Dep't of Children & Family Servs., 940 So. 2d 571, 575 (Fla. 2d DCA 2006); G.R. v. Dep't of Children & Family Servs., 937 So. 2d 1257, 1262-63 (Fla. 2d DCA 2006); M.C. v. Dep't of Children & Family Servs., 936 So. 2d 764, 766 (Fla. 2d DCA 2006).

While this language suggests that certain evidence would satisfy the nexus test in dependency and termination cases, these cases do not *require* this

specific type of evidence to meet the nexus test. In C.M., for example, this court relied on the absence of such evidence to reverse an adjudication of dependency as to a father's biological children based primarily on an incident in which he struck his teenage stepdaughter during an argument. 844 So. 2d at 765-67. However, the court did not reject the application of other circumstances in favor of such scientific evidence. There was simply insufficient evidence of *any* circumstances that established a substantial certainty that the father would similarly abuse his biological children.

In T.L., this court similarly relied on the absence of evidence to reverse an order terminating parental rights to the father's child based on egregious abuse of a sibling. 990 So. 2d at 1272-73. The trial court had concluded that the injuries to the sibling established that the father was " 'a perpetrator who was undeterred, unfeeling, very impulsive, and very likely possessing an explosive temper' and who was 'capable of harming any child under his or her care and control, including his or her very own flesh and blood.' " Id. at 1272. However, this court found that those findings were refuted by DCF's expert psychologist's testimony that the sibling's injuries did not indicate that the father lacked self-control. "In addition, DCF failed to present any evidence at trial that the Father suffered from a mental illness, drug addiction, pedophilia, or some other mental or emotional condition that would make it likely that he would abuse or neglect his son." Id. at 1270.

These cases mention factors that are consistent with the supreme court's suggestion in R.F. that the court consider "any treatment received by the parent following the act; and the testimony (if appropriate) of professionals and experts" as part of the totality of the circumstances. R.F., 770 So. 2d at 1194 n.13. And these cases do

not limit the nexus test to circumstances where " 'the parent has a mental or emotional condition that will continue, such as mental illness, drug addiction, or pedophilia.' " See A.D., 870 So. 2d at 238 (quoting C.M., 844 So. 2d at 766). Instead, these cases merely suggest circumstances that might be considered as part of the totality of the circumstances to satisfy the nexus test. We conclude that this court's use of the term "nexus" is therefore consistent with the totality of the circumstances test described by the supreme court in F.L.

That leaves the question of whether the trial court in this case properly applied the totality of the circumstances test to resolve the nexus issue. The trial court made the following findings regarding the nexus between the abuse of Z.C.(1) and the substantial risk of significant harm to Z.C.(2):

The nexus in this case is the parents' mutual commitment to lying and covering up the abuse of a child whose sibling can, at any time, be equally susceptible to the kind of aggravated child abuse proven against his twin brother, given the fact they are identically situated and aged siblings. After all, while [Z.C.(1)] had the "more noteworthy and persistent cry" there is nothing to say that his presently uninjured twin, [Z.C.(2)], might be the child who takes upon [sic] that mantle in the future. Indeed, these children are aging concurrently, and the challenges of parenting that come with one infant/toddler, when magnified by two, are surely more pronounced.

In addition to the mutual cover up and lies, it is clear that both parents prioritize each others' relationship over the better interests of their infants, and given their demonstrated predilection to do this to [Z.C.(1)], who suffered such egregious injuries, the Court must only conclude that [Z.C.(2)], fortunate enough to be uninjured at present, might nonetheless in future take a seat behind the "prioritized interests" of one or both his parents. And that, in and of itself, is a nexus of behavior that jeopardizes the safety of [Z.C.(2)] and is not in the better interests of [Z.C.(2)].

These findings properly focused on the egregious abuse of Z.C.(1) and the factual circumstances of that abuse. And the court properly considered the applicability of these factual circumstances to Z.C.(2) based on the temporal proximity of the abuse, Z.C.(2)'s status as a twin, and the parents' continued prioritization of each other over the safety and well-being of Z.C.(1). See F.L., 880 So. 2d at 610; R.F., 770 So. 2d at 1194 n.13. Because the evidence supports the trial court's findings, the trial court properly determined that there was a nexus between the abuse of Z.C.(1) and the substantial risk of significant harm to Z.C.(2).

IV. The trial court erred in concluding that DCF failed to prove termination would be in the children's manifest best interests.

Section 39.810 sets forth eleven non-exhaustive factors courts should consider in determining whether termination is in the manifest best interests of the children. One of these factors is "[a]ny suitable permanent custody arrangement with a relative of the child." § 39.810(1). But "the availability of a nonadoptive placement with a relative may not receive greater consideration than any other factor weighing on the manifest best interest of the child and may not be considered as a factor weighing against termination of parental rights." Id.

The trial court's order makes detailed findings regarding each of the eleven manifest best interest factors set forth in section 39.810. The court concluded that the parents have developed bonds with the children but those bonds were no closer than the children's bonds with the maternal grandparents. The court determined that the parents lacked the capacity to care for the children based on the egregious abuse one or both of them inflicted on Z.C.(1) and their failure to protect the infant from that abuse. The court was also seriously concerned with the parents' denial of the abuse



and scheme of lying to protect each other from any legal consequences of that abuse. And the court noted that the guardian recommended termination.

Despite the fact that these factors clearly weighed in favor of a finding that termination was in the children's manifest best interests, the court concluded otherwise.

The court explained its rationale as follows:

The Court therefore considered the provisions of sections 39.810(1)-(11), Florida Statutes ("Manifest Best Interests of the Child") and makes the finding that it is not in the manifest best interests of the children that parental rights be fully terminated; rather, it is both the lesser restrictive alternative and in the better interests of the children that the babies be placed, together, into permanent guardianship with the maternal grandparents and be permitted to maintain regular visitation with both parents.

By basing its decision not to terminate solely on the availability of a permanent guardianship with the maternal grandparents, the trial court violated the express prohibition in section 39.810(1) against giving the availability of a nonadoptive placement greater consideration than any other best interest factor. The court therefore erred in concluding that DCF failed to prove termination would be in the children's manifest best interests. See Guardian ad Litem Program v. T.R., 987 So. 2d 1269, 1271 (Fla. 1st DCA 2008) (" [T]he possibility of a relative placement is plainly not a reason to delay a decision to terminate parental rights if termination is otherwise in the manifest best interest of the child. ") (quoting K.W. v. Dep't of Children & Families, 959 So. 2d 401, 402 (Fla. 1st DCA 2007)).

V. The trial court erred in concluding that DCF failed to prove termination was the least restrictive means of protecting the children.

The next question is whether trial court misapplied the least restrictive means test as set forth in Padgett to the facts of this case. In Padgett, the court

described the least restrictive means test as "ordinarily" requiring DCF to "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." 577 So. 2d at 571. In In re T.M., the supreme court subsequently explained that Padgett's least restrictive means test does not require a performance agreement in cases of egregious abuse because under those "extraordinary circumstances . . . the termination of parental rights without the use of plans or agreements is the least restrictive means." In re T.M., 641 So. 2d 410, 413 (Fla. 1994). We do not read this language to obviate the application of the least restrictive means test as suggested by the special concurrence. The T.M. court did not decline to apply the least restrictive means test; it determined that the test was met by the circumstances of the case.

Moreover, the supreme court has made clear that it finds the least restrictive means test to be implicit in Florida's statutory scheme based on the court's obligation to apply a constitutional construction to the statutes. See F.L., 880 So. 2d at 609. In F.L., the supreme court reversed the Fourth District's decision declaring section 39.806(1)(i), Florida Statutes (2001),<sup>4</sup> unconstitutional on the basis that it omitted Padgett's requirement that DCF prove that reunification posed a substantial risk of significant harm. 880 So. 2d at 607; F.L. v. Dep't of Children & Families, 849 So. 2d 1114, 1122-23 (Fla. 4th DCA 2003). The Fourth District had relied on the Fifth District's interpretation of the statute to allow a parent to present evidence that the circumstances surrounding the abuse of a sibling cannot serve as a predictor of the parent's conduct

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<sup>4</sup>Section 39.806(1)(i) provides for termination of parental rights "[w]hen the parental rights of the parent to a sibling have been terminated involuntarily." It was enacted after Padgett was decided. See Ch. 98-403, § 88, at 3205, Laws of Fla.

with the current child. F.L., 849 So. 2d at 1123 (quoting A.B. v. Dep't of Children & Families, 816 So. 2d 684, 685 (Fla. 5th DCA 2002)). The Fourth District ruled that this interpretation impermissibly shifted the burden of proof to the parent in contravention of Padgett. Id. at 1124.

The supreme court upheld the constitutionality of the statute based on its construction of the statute as not shifting the burden of proof to the parent. F.L., 880 So. 2d at 609. The court explained that Padgett's constitutional requirements apply to all cases involving the involuntary termination of a parent's rights absent an express determination to the contrary by the legislature. And "to be constitutional under Padgett, *the statute must be interpreted* as requiring [DCF] to also prove that reunification would be a substantial risk to the child and that termination is the least restrictive way to protect the child." Id. (Emphasis added.)

In this case, we conclude that the trial court misapplied the least restrictive means test. As was stated previously, under T.M., the termination of parental rights without the use of plans or agreements is the least restrictive means of protecting a child from serious harm in cases of egregious abuse. 641 So. 2d at 413. Furthermore, "[t]he existence of possible placement with a relative is irrelevant to the least restrictive means test." N.S. v. Dep't of Children & Families, 36 So. 3d 776, 779 (Fla. 3d DCA 2010); see also S.S. v. Dep't of Children & Family Servs., 891 So. 2d 1068, 1070 (Fla. 2d DCA 2004) (holding that the trial court properly rejected the parent's argument that a long-term relative placement was the least restrictive means of protecting the child); R.L. v. Dep't of Children & Families, 955 So. 2d 1240 (Fla. 5th DCA 2007) ("[T]he existence of a long-term relative placement is not the 'dispositive constitutional

consideration' in applying the least-restrictive means test.") (quoting A.J. v. K.A.O., 951 So. 2d 30 (Fla. 5th DCA 2007)). Thus, the trial court erred in concluding that, because a permanent guardianship was a placement option, DCF failed to prove termination was the least restrictive means of protecting the children.

VI. The trial court was precluded as a matter of law from placing the children into a permanent guardianship at this stage in the proceedings.

Even if the trial court had correctly applied the least restrictive means and manifest best interests tests, it was precluded as a matter of law from placing the children into a permanent guardianship at this stage in the proceedings. The court's powers of disposition after an adjudicatory hearing on a petition for termination of parental rights are limited by section 39.811(1). Under section 39.811(1)(a) the trial court would have been permitted to adjudicate the children dependent if grounds for dependency had been established. However, it would have been required to either (1) continue the children in their out-of-home placement with a case plan, or (2) return the children to the parents and retain jurisdiction for six months. See § 39.811(1)(a).

Instead of ordering one of these authorized dispositions, the trial court ordered a disposition that was not requested in the pleadings before it or supported by the evidence presented at the adjudicatory hearing. The case plan filed by DCF contained a permanency goal of adoption, and the parties did not agree to litigate the issue of any alternative permanency placement at the adjudicatory hearing. Thus, the trial court's order placing the children in a permanent guardianship had the effect of modifying the case plan without affording proper notice or the opportunity to be heard. See K.E. v. Dep't of Children & Families, 958 So. 2d 968, 972 (Fla. 5th DCA 2007) (holding that the trial court's order granting the father's motion for sole custody and to

terminate jurisdiction had the effect of erroneously modifying the mother's case plan without proper notice and the opportunity for an evidentiary hearing).

VII. Conclusion.

In conclusion, the trial court erred in denying DCF's petition to terminate parental rights to both children based on the egregious conduct toward and aggravated child abuse of Z.C.(1). The court properly determined that DCF presented clear and convincing evidence of both egregious conduct toward and aggravated child abuse of Z.C.(1) under sections 39.806(1)(f) and (g). Additionally, the court properly determined that there was a nexus between the abuse of Z.C.(1) and the substantial risk of significant harm to Z.C.(2). However, the court misapplied the manifest best interests and least restrictive means tests by basing its decision not to terminate solely on the availability of the alternative placement. And the court erred in sua sponte placing the children into a permanent guardianship at this stage in the proceedings. We therefore reverse both orders on appeal and remand with directions for the trial court to reconsider DCF's termination petition by reapplying the manifest best interest and least restrictive means tests as described above.

Reversed and remanded.

NORTHCUTT, CASANUEVA, DAVIS, VILLANTI, WALLACE, KHOUZAM, and CRENSHAW, JJ., Concur.

ALTENBERND, J., Concur specially with an opinion in which WHATLEY, KELLY, LaROSE, MORRIS, and BLACK, JJ., Concur.

ALTENBERND, Judge, Concurring in part and specially concurring in part.

The court voted to consider this case en banc because recent trial court decisions on appeal in this court reflected differing views of this court's use of the term "nexus" in termination cases involving two or more children. Examining our own cases we concluded that a new, comprehensive opinion was "necessary to maintain uniformity" in our decisions. See Fla. R. App. P. 9.331(a). Although we do not recede from any case today, Chief Judge Silberman's restatement of this court's case law will undoubtedly help both the trial courts and this court to maintain uniformity in decisions. As the judge who first used the word "nexus" in K.A. to describe this test, I believe that the en banc opinion's discussion of this issue is correct.

As we studied the cases involving "nexus," we also came to realize that the trial courts appeared to be applying the concepts of "least restrictive means" and "manifest best interests" differently within their decisions. For example, the trial court in this case while struggling with the proper analysis of "nexus," entered an order reciting that this unusual placement would be a "lesser restrictive alternative" "in the better interests of the children." While attempting to write a better explanation of "least restrictive means," I reached the conclusion that the district courts have misinterpreted the holding in Padgett v. Department of Health and Rehabilitative Services, 577 So. 2d 565 (Fla. 1991). I am inclined to believe that over time even the supreme court itself may have given a role to "least restrictive means" that was not intended by the court when it issued Padgett. Thus, I concur in the court's opinion with the exception of the holding and discussion in section V concerning the application of the "least restrictive means" test.

In brief explanation, I conclude that "least restrictive means" is a test used by the judiciary to determine whether a statute that addresses a fundamental liberty interest is constitutional. It is supposed to be an evaluation of the legislature's enactment; it was never intended to be an evaluation of the parties' conduct or circumstances.

The proper question in Padgett, which perhaps was answered without a full explanation, was whether the relevant statute violated a parent's fundamental liberty interest under the U.S. Constitution when it permitted the termination of the liberty interest; that is, the right to parent. Given that the state has a compelling interest in protecting children from abuse, neglect, and abandonment, the judiciary's limited constitutional evaluation of such a statute addresses the question of whether the statute and the procedures used to implement it are the "least restrictive means" of interfering with the parent's constitutional right while protecting the health and welfare of a child.

When we examine the procedures affecting such a fundamental liberty interest, our analysis is a type of procedural due process review. When we address the substantive provisions of such a statute, our analysis is a type of substantive due process review. In the context of parental rights, it appears to me that the courts have transitioned from a procedural due process review to a more controversial substantive due process review without fully recognizing that the transition has occurred.

I am convinced that the courts have misunderstood what the supreme court intended in Padgett when it required a consideration of the "least restrictive means." In Padgett as it related to standard dependency and termination proceedings, I think the court was trying to explain that, so long as a parent received a meaningful

opportunity, through a performance plan or case plan, to cure the issue or problem that made the parent unfit, the statute passed the least restrictive means test. The case-by-case analysis in that context required the trial court to examine factually whether the parent was given this opportunity. Although there may have been a component of substantive due process in this holding, I believe the court was focusing primarily on whether the parent received procedural due process through the performance plan.

Instead of limiting the trial court's role to this factual examination, the courts have extended Padgett to require a case-by-case substantive due process analysis of the constitutionality of some provisions in Chapter 39 as applied in each and every termination proceeding following a dependency proceeding. I doubt that is what the supreme court envisioned when it decided Padgett.

But this case is not a termination proceeding following a dependency. It is an expedited termination. I see no reason to extend the reach of the "least restrictive means" test, as an as-applied substantive due process analysis, to expedited proceedings. With all due respect to the majority's reading of In re T.M., 641 So. 2d 410 (Fla. 1994), I do not conclude that the court was requiring such a case-by-case substantive due process review of the statute in each and every expedited termination proceeding. I read the holding in In re T.M. simply to approve the constitutionality of a statute authorizing expedited termination in a context like this case. The supreme court decided the legislature was within its authority to declare termination as a proper means of addressing the sort of extreme parenting problems that are the subject of this specific variety of expedited termination proceedings. The holding does not require a case-by-case, as-applied analysis because, as a matter of law, so long as the grounds in the



statute are proven by clear and convincing evidence, the statute is constitutional on its face. In other words, this holding is a facial determination that the statute is constitutional in the context of a substantive due process challenge.

There is little question that Padgett and In re T.M. could have given the district and circuit courts more explicit direction. I cannot argue that the majority's interpretation of these cases is categorically incorrect. But to explain, as the court states today, that the substantive due process "least restrictive means" test is now "implicit" in our statutory scheme is little more than an admission that the judiciary, over time, has inserted an additional requirement of "least restrictive means" into the statute.

It is the job of the judiciary to evaluate a statute affecting a fundamental liberty interest to assure that the statute addresses a compelling state interest and that the legislature has selected a "least restrictive means" to address or remedy the problems that are of compelling state interest. If a specific statute is too broad, invokes a remedy prematurely, or requires a specific remedy that is more restrictive than necessary, normally we should hold the statute unconstitutional and send it back to the legislature for that body to narrow its own statute. If we can fairly construe the statute in a narrow manner, it may be appropriate to use a narrow construction to decide that the statute has withstood a constitutional challenge under strict scrutiny and thereby uphold the statute. But it simply was not the judiciary's job to insert an additional element of "least restrictive means" into a statute.

Because the judiciary has not actually rewritten the statutes and has only inserted a vague concept of least restrictiveness into the mix, trial and appellate judges alike tend to have varying, personalized approaches to this decision-making process,

many of which are not the equivalent of a substantive due process review of the statute as applied. "Least restrictive means" has become "least restrictive way" or "least restrictive method." Without statutes incorporating these concepts, this additional judicial element has become a factor that creeps into our evaluation of the child's manifest best interests and of the "better" placement for a child. If we would only limit "least restrictive means" to its role as a judicial test of the constitutionality of the statute, a test to protect the parent's liberty interest, it would less often become a test restricting our ability to do whatever is in the child's manifest best interests after we have constitutionally terminated the rights of the parents.

The following sections of this special concurrence further explain the reasoning behind the preceding summary. I doubt that they provide a comprehensive analysis, but I hope the reader will find them useful.<sup>5</sup>

I. A Brief Review of Padgett and In re T.M.

In Padgett, the supreme court first described the least restrictive means test as an aspect of termination proceedings.<sup>6</sup> Although the case was both factually and procedurally complex, the narrowest issue in Padgett concerned the termination of parental rights of one child based on the earlier termination of rights to other children.

577 So. 2d at 568. The supreme court held that the termination of rights as to other

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<sup>5</sup>Although I am inclined to believe that the proper analysis of this substantive due process issue is a matter worthy of review in the supreme court, it is not an issue that is dispositive in this case. Accordingly, it does not appear to be an issue that we can certify as one of great importance. See Pirelli Armstrong Tire Corp. v. Jensen, 777 So. 2d 973 (Fla. 2001).

<sup>6</sup>The opinion reflects that the trial court had determined that there were "no less restrictive alternatives available other than the permanent commitment of the child to the Department for subsequent adoption." Padgett, 577 So. 2d at 568.

children could serve as grounds for the termination to the later-born child. The court addressed the constitutional implications of its holding:

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).

Padgett, 577 So. 2d at 570.

The court then briefly elaborated on the constitutional principles, stating:

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.

Id. at 571 (emphasis added).

The supreme court did not fully explain its reasoning. I would argue that the court was explaining that, in the usual case in which a case plan is offered during a dependency proceeding, the statute is constitutional so long as the parents receive a meaningful opportunity to receive due process through a case plan. In that situation, termination is a proper means to address the compelling state interest of protecting children from abuse if the parents fail at the case plan. The only case-by-case analysis required in that setting is a review to determine factually that the parents received a constitutionally adequate opportunity to fulfill a plan. I recognize that the requirement

for a case plan is at least partially an issue of substantive law and not an issue that is purely procedural, but I am unconvinced that the court actually intended for each trial court to conduct a substantive due process analysis of the statute in each such case.

Padgett does not include any discussion of what might be required for the statute to pass constitutional muster when a termination is sought in an expedited fashion without a prior dependency proceeding. The supreme court later discussed that issue, albeit briefly, in In re T.M., 641 So. 2d 410.

In In re T.M., the supreme court considered a case in which the family had been the subject of a dependency proceeding, but the State commenced a termination proceeding against the incarcerated father without giving him the opportunity to comply with a case plan. Based on Padgett, the father argued that for a termination to pass strict scrutiny, a case plan is essential because such a plan constitutes the least restrictive means of protecting the children in all instances. In re T.M., 641 So. 2d at 413. The supreme court rejected this argument.

[I]n such extraordinary circumstances as are described in section 39.464, paragraphs (3) and (4), the termination of parental rights without the use of plans or agreements is the least restrictive means. Only by the use of such measures will this Court be able to adhere to the " 'overriding principle that it is the ultimate welfare or best interest of the child which must prevail.' " [Padgett, 577 So. 2d] at 570 (quoting 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)).

Id. (emphasis added).

Sections 39.464(3) and (4), Florida Statutes (Supp. 1990), as discussed in In re T.M., were the predecessors to the statutory grounds for termination involved in this case. I conclude that the supreme court rejected the necessity for an as-applied

analysis in cases of such exceptional abuse.<sup>7</sup> The supreme court appears to hold that under such circumstances, only an elimination of parental rights can adequately protect the children; the parent's intentional conduct eliminates the need for heightened, individualized consideration of his other liberty interest. In other words, the statute on its face passes the least restrictive means test. As long as the Department establishes this ground by clear and convincing evidence, there is no need to conduct a further case-by-case least restrictive means analysis as a matter of substantive due process. I recognize that this decision can be read merely to reject a procedural due process attack on the statute authorizing expedited terminations because the statute eliminates the case plan as a procedure, but I read the case to hold that the statute is constitutional when challenged substantively.

## II. Santosky and the Constitutional Law Preceding Padgett

To better understand the Florida Supreme Court's brief discussion of least restrictive means in Padgett and In re T.M., it is helpful to examine the United States Supreme Court's decision in Santosky v. Kramer, 455 U.S. 745 (1982), as well as the case law from which the concept of least restrictive means arose. Like Padgett, Santosky was a termination of parental rights case. It addressed whether by statute or

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<sup>7</sup>I acknowledge that there are other grounds for expedited termination proceedings, see § 39.806(1)(e)-(j). Not all of these grounds have been examined facially to determine whether they are sufficiently narrow to withstand strict scrutiny. It is entirely possible that an as-applied analysis would not be required to satisfy strict scrutiny in cases involving any of those statutory provisions. Indeed, if an as-applied analysis is not required in cases involving egregious conduct or aggravated child abuse, it only follows that such an analysis should not be required in cases involving the murder or manslaughter of another child. See § 39.806(1)(h). However, because this case involves only the statutory grounds of egregious conduct and aggravated child abuse pursuant to sections 39.806(1)(f) and (g), I do not attempt to define every conceivable situation that does not require an as-applied analysis.

judicial rule a state was required to have a higher burden of proof in a parental termination proceeding. A sharply divided court held that clear and convincing evidence is the minimally accepted burden of proof.<sup>8</sup> Santosky, 455 U.S. at 747-48.

The majority and dissenting opinions make clear that the justices believed they were resolving a procedural due process issue. Id. at 753-55, 774-75. It also appears that they were mandating the higher burden of proof only for the fact-finding phase; that is, the termination phase of the hearing and not the dispositional phase. Id. at 748. Although the Court recognized that the parents' interest was a fundamental liberty interest, id. at 753, the Court never discussed the issue in terms of least restrictive means.

Nevertheless, it is well established that courts must review statutes and procedures that impact fundamental rights under a strict scrutiny analysis. See F.L., 880 So. 2d 602, 607 (Fla. 2004); Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 551 (1977) (noting that strict scrutiny standard applies when fundamental interest is involved); see also Santosky, 455 U.S. at 754 (citing Lassiter v. Dep't of Social Servs., 452 U.S. 18 (1981), for the proposition that the nature of the process due in termination of parental rights proceedings rests on the balancing of three factors: the private interests affected, the risk of error resulting from the state's procedure, and the countervailing governmental interest being used in support of the procedure). When a

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<sup>8</sup>Santosky was decided shortly after Lassiter v. Department of Social Services, 452 U.S. 18 (1981), which held that due process did not require the appointment of an attorney to represent indigent parents in such proceedings. The dissenters in Lassiter, having failed to obtain counsel for the parents, were shortly thereafter successful in imposing upon the states a high burden of proof in termination proceedings.

court examines the constitutionality of a statute that restricts a fundamental right, it must determine that the legislature was addressing a compelling state interest and utilized the least restrictive means to address that interest. F.L., 880 So. 2d at 602 (citing Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996)).

In the context of termination proceedings, it is rather easy to conclude that the State has a compelling interest in protecting children from severe abuse, neglect, or abandonment by their parents. However, deciding whether the legislature chose the least restrictive means to address this interest can be quite difficult. When a parent's fundamental right is restricted, not by a procedural requirement, but by the substantive grounds for termination, strict scrutiny is a form of substantive due process analysis. See Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001); Smith v. Fisher, 965 So. 2d 205, 208-09 (Fla. 4th DCA 2007); see also In re Parental Rights as to D.R.H., 92 P.3d 1230 (Nev. 2004) (upholding a statute authorizing termination of parental rights by applying strict scrutiny in a substantive due process challenge).

III. The As-Applied Substantive Due Process Review has Resulted in Varying Approaches in the Trial and Appellate Court, Which Other States Seem to Have Avoided

Thus, based on the reasoning of Santosky, Padgett applied a strict scrutiny review to address a due process issue that has been interpreted to be a substantive due process issue, even though Santosky had addressed only a procedural due process issue. It is not necessarily wrong to extend Santosky to substantive due process issues. But the procedural due process issue in Santosky could be fixed by a simple rule change. After the court in Padgett neither expressly approved nor

disapproved the text of the relevant statutes when conducting its strict scrutiny review, the trial courts have been left with a rather awkward case-by-case approach.

This case-by-case approach has varied. Some cases simply hold that, because parental rights constitute a fundamental liberty interest, in order to terminate those rights, DCF must prove not only that a statutory ground for termination has been met but also that termination is the least restrictive means of protecting the child from harm. See, e.g., N.S. v. Dep't of Children & Families, 36 So. 3d 776, 778 (Fla. 3d DCA 2010); C.A.T. v. Dep't of Children & Families, 10 So. 3d 682, 684 (Fla. 5th DCA 2009). Other cases apply the least restrictive means test as a means of testing whether the state made a good faith effort to rehabilitate the parent and to determine the best interests of a child. See, e.g., C.G. v. Dep't of Children & Families, 67 So. 3d 1141, 1143 (Fla. 3d DCA 2011). Such application seems to expand the least restrictive means analysis into the dispositional phase. See C.G., 67 So. 3d at 1143 (citing Padgett, 577 So. 2d at 571); see also M.I. v. Dep't of Children & Families, 45 So. 3d 878, 882 (Fla. 4th DCA 2010) (noting that in determining whether to terminate parental rights, trial courts "must choose the permanency option that is the least restrictive means of protecting a child from serious harm" and that "[t]he best interest of the child is the primary consideration in determining the permanency goal" (citation omitted)). Still other cases have transformed the requirements for termination into a three-step process that seems to subject a child's manifest best interests to a least restrictive means analysis: "To terminate parental rights, the State must establish: (1) the existence of one of the statutory grounds set forth in Chapter 39; (2) that termination is in the best interest of the child; and (3) that termination is the least restrictive means of protecting



the child from harm." R.L. v. Dep't of Children & Families, 63 So. 3d 920, 921-922 (Fla. 5th DCA 2011); see also S.H., 49 So. 3d at 851; T.H. v. Dep't of Children & Families, 56 So. 3d 150, 154 (Fla. 4th DCA 2011). Candidly, I am not certain which description is the most accurate to explain the process that has evolved since Padgett.

In suggesting that the appellate courts should not extend the as-applied least restrictive means test to expedited termination proceedings and that Florida may wish to reexamine the use of this test even in typical termination cases, I believe it is appropriate to consider the law of other states. I would concede that I have not performed a complete state-by-state review of this issue.

A few states appear to conduct a nonstatutory, case-by-case, least restrictive means analysis similar to Florida's approach, at least in cases where there is some likelihood that the parents' behavior can improve.<sup>9</sup> However, several states have held that such a test is not required prior to ordering termination where grounds for termination have been proven and termination is otherwise in the children's best interests.<sup>10</sup> The laws of these states suggest that the legislature might be able to

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<sup>9</sup>See, e.g., In re Justin H., 791 N.W.2d 765, 773 (Neb. Ct. App. 2010); People ex rel. J.I.H., 768 N.W.2d 168, 174 (S.D. 2009); D.M.P. v. State Dep't of Human Resources, 871 So. 2d 77, 84-97 (Ala. Civ. App. 2003); In re Jeffrey R.L., 435 S.E.2d 162, 171 (W. Va. 1993); In re S.D., Jr., 549 P.2d 1190, 1200-01 (Alaska 1976).

<sup>10</sup>See, e.g., In re Dependency of K.M., 162 Wash. App. 1036 (Wash. Ct. App. 2011); In re L.J.W., 252 P.3d 647 (Kan. Ct. App. 2011); Friend v. Ark. Dep't of Human Servs., 344 S.W.3d 670, 678 (Ark. Ct. App. 2009); In re Cody W., 36 Cal. Rptr. 2d 848, 852 (Cal. Ct. App. 1994); In re L.A., III, 574 A.2d 782, 786 (Vt. 1990). We note that the District of Columbia courts have also indicated, in the context of an appeal from an adoption petition, that a least restrictive means analysis is not required to pass constitutional muster. See In re Baby Boy C., 630 A.2d 670, 681-82 (D.C. 1993). Texas courts, meanwhile, appear to be split. Compare In re C.L.S., No. 14-97-00580-CV, 1998 WL 3646, at \*3 (Tex. App. Jan. 8, 1998), with In re S.H.A., 728 S.W.2d 73, 91-92 (Tex. App. 1987).

amend chapter 39 in a manner that would relieve the trial courts of their current obligation to do a substantive due process analysis as-applied in every case.

I appreciate the wisdom of the court's decision today to continue to require the trial courts to use the same general procedures and rules in termination proceedings that have been used for the last generation, but I am convinced that there is no adequate legal basis to justify the current "least restrictive means" case law. If or when we can revisit this law without harming children or disrupting families, we should do so.