# FIRST DISTRICT COURT OF APPEAL
# STATE OF FLORIDA

---

No. 1D20-1002

---

DEPARTMENT OF CHILDREN AND FAMILIES and GUARDIAN AD LITEM PROGRAM,

Appellants,

v.

A.L., Mother, and T.I., Father of C.D.I., D.A.I., and I.A.A.L., Minor Children,

Appellees.

---

On appeal from the Circuit Court for Escambia County.
Jeffrey Burns, Judge.

November 20, 2020

WINOKUR, J.

The Department of Children and Families (DCF) and the Guardian ad Litem Program (GAL) appeal a final order dismissing a petition to terminate parental rights. For the following reasons, we reverse.

DCF petitioned to terminate the mother and father's parental rights to D.I. and I.L. and named three grounds as to each: 1. The mother and father abandoned the children, as stated in sections

39.806(1)(b) and 39.01(1), Florida Statutes; 2. The mother and father engaged in conduct towards the children that demonstrated that continuing the parent-child relationship threatens the children's life, safety, well-being or physical, mental, or emotional health, irrespective of the provision of services, as stated under section 39.806(1)(c), Florida Statutes; and 3. The mother and father failed to substantially comply with their case plans as stated in section 39.806(1)(e), Florida Statutes.

At the hearing, DCF introduced the reunification case plan, the mother's urinalysis results, and her lengthy mental health records demonstrating her inability to maintain sobriety and mental health stability. DCF requested judicial notice of the court file and records detailing the parents' dependency history, domestic violence history, and criminal history over the preceding ten years. They also introduced the testimony of eight witnesses who related the facts of this case and the parents' lack of engagement in or benefit from the services provided over the preceding thirty months. At the close of DCF's evidence, both parents moved for a judgment of dismissal pursuant to Florida Rule of Juvenile Procedure 8.525(h).

The court dismissed the petition. In the written order dismissing the petition the trial court stated:

> The Department has not met it's [sic] burden concerning least restrictive means as to the mother. The case plan at issue is the permanent guardianship case plan filed in April 2019. The items judicially noticed only document incidents of domestic violence which predate the case plan. The Department's attempt to call into question the appropriateness of the permanent guardian amounts to an amendment of the petition to add an additional grounds. The court does not have to address the statutory grounds for termination of parental rights because least restrictive means is the over arching [sic] element.

The court's discussion on the record and written order encompass several legal errors, which will be addressed in turn.

Before addressing the merits of this appeal, we are obligated to discuss the appropriate review standards in termination of parental rights cases. The trial court can dismiss a petition for termination of parental rights after hearing in two ways. First, on motion of the parent, the court can grant a judgment of dismissal pursuant to Rule 8.525(h), which reads as follows:

> **Motion for Judgment of Dismissal.** In all termination of parental rights proceedings, if at the close of the evidence for the petitioner the parents move for a judgment of dismissal and the court is of the opinion that the evidence is insufficient to sustain the grounds for termination alleged in the petition, it shall enter an order denying the termination and proceed with dispositional alternatives as provided by law.

Motions for judgment of dismissal in dependency cases are akin to motions for directed verdicts in civil cases. *See M.F. v. Fla. Dep't of Child. & Fams.*, 992 So. 2d 410, 411 (Fla. 1st DCA 2008) (citing Fla. R. Juv. P. 8.525(h) in affirming father's motion for "directed verdict"). A court may grant a motion for directed verdict "only if there [is] no evidence upon which a jury could find against the party for whom the verdict is directed." *White v. City of Waldo*, 659 So. 2d 707, 708 (Fla. 1st DCA 1995) (citation omitted). A directed verdict is appropriate "only when the evidence considered in its entirety and the reasonable inferences to be drawn therefrom fail to prove the plaintiff's case under the issues made by the pleadings." *Id.* (quoting *Hartnett v. Fowler*, 94 So. 2d 724, 725 (Fla. 1957)). "A party who moves for a directed verdict admits for the purpose of testing the motion the facts in evidence and in addition admits every reasonable and proper conclusion based thereon which is favorable to the adverse party." *Id.* In reviewing an order granting a motion for directed verdict, "an appellate court . . . must view the evidence and all inferences of fact in the light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." *Friedrich v. Fetterman & Assocs., P.A.*, 137 So. 3d 362, 365 (Fla. 2013) (quoting *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315, 329 (Fla. 2001)). An order on a motion for directed verdict is reviewed de novo. *Kopel v. Kopel*, 229 So. 3d 812, 819 (Fla. 2017). Accordingly, whether DCF's evidence

was sufficient to "sustain the grounds for termination alleged in the petition" is a question of law. Fla. R. Juv. P. 8.525(h). These are the standards applicable to granting and to reviewing an order on a motion for judgment of dismissal pursuant to Rule 8.525(h).

The second way the court can dismiss a petition for termination of parental rights following hearing is by order under Florida Rule of Juvenile Procedure 8.525(j)(3), which reads as follows:

> **Dismissing Petition.** If the court finds after all of the evidence has been presented that the allegations in the petition do not establish grounds for dependency or termination of parental rights, it shall enter an order dismissing the petition.

A dismissal under this provision means that the court has heard all of the evidence and has concluded that the petitioner has not "established by clear and convincing evidence" "the elements required by law for termination of parental rights." Fla. R. Juv. P. 8.525(a). Because the court has weighed the evidence and reached a conclusion, the order enjoys a presumption of correctness and "will not be overturned on appeal unless clearly erroneous or lacking in evidentiary support." *N.L. v. Dep't of Child. & Fam. Servs.*, 843 So. 2d 996, 999 (Fla. 1st DCA 2003). Stated differently, "the appellate court's function is not to conduct a *de novo* proceeding or reweigh the evidence by determining independently whether the evidence as a whole satisfies the clear and convincing standard, but to determine whether the record contains competent substantial evidence to meet the clear and convincing evidence standard." *Id.* at 999–1000 (citation omitted). Review of such an order is "highly deferential." *Id.* at 999. *See also J.P. v. Fla. Dep't of Child. & Fams.*, 183 So. 3d 1198 (Fla. 1st DCA 2016) (citing *N.L.*, 843 So. 2d at 1000).

The mother and father here moved for judgment of dismissal pursuant to Rule 8.525(h), which the court granted. But both parents argue that we are obligated to presume the court's order granting their motion for judgment of dismissal is correct and that we may only reverse if the order is clearly erroneous or not supported by competent substantial evidence. The parents have

confused the two dismissal mechanisms recounted above. The trial court explicitly granted their motion for judgment of dismissal under Rule 8.525(h). Thus, we cannot simply determine whether the court's order is supported by competent substantial evidence; instead, we must view the evidence and all inferences of fact in the light most favorable to DCF, as the nonmoving party, and can affirm only where no proper view of the evidence could sustain an order terminating parental rights.

Applying this proper standard, we find that the trial court failed to consider the evidence and all inferences drawn therefrom in a light most favorable to DCF. DCF established a prima facie case as to each of the alleged grounds. Accordingly, the trial court should have denied the motion for judgment of dismissal.

The trial court also erred by only considering one ground as to one parent. Florida Rule of Juvenile Procedure 8.525(h), requires the court to consider *all* grounds alleged in the petition, but the trial court only considered the mother's failure to comply with a case plan. Section 39.806(1) provides that "[g]rounds for the termination of parental rights may be established *under any* of the following circumstances[.]" (Emphasis added). Any one of the three grounds alleged by DCF would have been sufficient, and as addressed below, DCF was not required to plead single-parent termination. The grounds as to the mother do not control the grounds as to the father.

The trial court additionally erred in considering the least restrictive means analysis on the motion for judgment of dismissal. The order stated the court "does not have to address the statutory grounds for termination of parental rights" in its order on the motion to dismiss "because least restrictive means is the over arching [sic] element." We disagree. While manifest best interest and least restrictive means must be considered in the final determination of termination, a motion for judgment of dismissal under Rule 8.525(h) may only be granted when the petitioner has failed to adduce sufficient evidence to sustain the grounds for termination alleged in the petition.

While we reverse for the reasons mentioned above, we address additional issues raised by DCF and GAL that are likely to arise

on remand. *See Geissler v. State*, 90 So. 3d 941, 944 (Fla. 2d DCA 2012) (finding it necessary to discuss nondispositive issues "because they are likely to recur in a new trial").

Not only did the trial court err in applying the least restrictive means test to the motion for judgment of dismissal, its least restrictive means analysis was incorrect. *S.M. v. Florida Department of Children & Families,* 202 So. 3d 769, 778 (Fla. 2016), holds that the least restrictive means analysis "is tied directly to the due process rights that must be afforded a parent before his or her parental rights are terminated," and "focuses specifically on what actions were taken by the State before filing a petition to terminate the parent's rights." The supreme court explained, "this prong is generally satisfied by DCF offering the parent a case plan and providing the parent with the help and services necessary to complete the case plan," and it cautioned the test "is not intended to preserve a parental bond at the cost of a child's future." *Id.* (quoting *Fla. Dep't of Child. & Fams. v. B.B.*, 824 So. 2d 1000, 1009 (Fla. 5th DCA 2002)). This Court explained in *J.P. v. Department of Children and Families*, the least restrictive means test "does not mean that no alternative to termination of parental rights is conceivable by a court." 183 So. 3d at 1204–05.

Further, the trial court's analysis failed to consider the legal implications of the least restrictive means prong to the other two grounds as to the mother and all three grounds as applied to the father. Section 39.806(2), Florida Statutes, covers the two grounds ignored by the trial court and provides "[r]easonable efforts to preserve and reunify families are not required" in cases of abandonment or where the child's well-being is threatened by continuing the parent-child relationship. For terminations based on sections 39.806(1)(b) and (c), Florida Statutes, DCF does not have to provide an opportunity to comply with a case plan and to receive services. *Guardian ad Litem Program v. C.W.*, 255 So. 3d 882, 890 (Fla. 2d DCA 2018); *C.A.H. v. Dep't of Child. & Fams.*, 830 So. 2d 939, 941 (Fla. 4th DCA 2002). The supreme court has recognized that in "extraordinary circumstances," termination of parental rights without the use of case plans is the least restrictive means. *In re T.M.*, 641 So. 2d 410, 413 (Fla. 1994). Accordingly, the

mother's compliance or non-compliance with her case plan was not dispositive in the least restrictive means analysis.

The trial court further erred when it only considered evidence after the permanent guardianship case plan entered in April 2019. In ruling on the motion for judgment of dismissal, the trial court was clear that it was only considering evidence that occurred after the most recently accepted case plan in April 2019. Because no judicially-noticed documents after April 2019 showed incidents of domestic violence, the court ruled that DCF had failed to prove termination was the least restrictive means of protecting the children from the mother. The court went further, orally, stating there was "essentially zero [evidence of any domestic abuse in the record] from that point on moving forward, because the – all items that were requested to be judicially noticed, the most recent item was from February of 2019. And that predates the case plan[.]"

Regardless of whether there was evidence of domestic violence occurring after February 2019, the least restrictive means test is not time-bound by a particular case plan and *S.M.* is clear that the least restrictive means inquiry focuses on the actions taken by the State before termination, not the parent's behavior. 202 So. 3d at 780. In order to assess DCF's "good faith effort[s] to rehabilitate the parent and reunite the family," the trial court must consider all such efforts from the time DCF stepped in through the time it filed the termination petition. *Id.* at 778 (quoting *Padgett*, 577 So. 2d at 571).

In *S.M.*, the supreme court considered not only DCF's efforts "over a four-year period to work toward reunification by offering the mother three case plans," but it also noted DCF's efforts to prevent the shelter in the first place prior to initiating the legal case. *Id.* at 783–84. Accordingly, the least restrictive means inquiry encompasses the full history of DCF's efforts to rehabilitate a parent before seeking to terminate parental rights, including even those actions that precede the initiation of a particular legal case. Here, DCF provided the family services and case plans in 2011, 2013, and from 2017- to present. The trial court erred in refusing to consider any evidence occurring prior to April 2019.

The trial court also erred in concluding "[t]he Department's attempt to call into question the appropriateness of the permanent guardian amounts to an amendment of the petition to add an additional grounds [sic]." The trial court orally stated "the motion dealing with [I.L.'s change of placement] was only filed on the eve of trial" and found that considering it on that date "would be unfair to the parties involved." However, it is unclear why or how the trial court believed hearing evidence regarding the fitness of I.L.'s current placement would amend the grounds for termination. The grounds alleged as to both parents concerned abandonment, continuing involvement, and case plan compliance. The quality of the children's current placement is irrelevant to these grounds.

Finally, DCF was not required to plead single-parent termination in order for the trial court to terminate only one of the parent's rights. The court orally stated it believed it was precluded from considering single-parent termination because that had not been specifically pled in the termination petition, and therefore it considered only the mother, concluding that if it did not terminate her parental rights, it could not terminate the father's.

Section 39.811, Florida Statutes, provides for the trial court's dispositional powers regarding petitions for termination of parental rights. In subsection (6), the statute explicitly permits the trial court to sever parental rights as to one parent, but not the other under specifically enumerated circumstances. As relevant here, those circumstances include when "the protection of the child demands termination of the rights of a single parent," and "the parent whose parental rights are being terminated meets any of the criteria specified" in section 39.806(1)(c). § 39.811(6)(d), (e), Fla. Stat. Indeed, the parent is already on notice the petitioner is attempting to terminate their parental rights based on their independent actions, through the specific facts and termination grounds alleged in the petition as to the parent.

In *In re E.R.*, 49 So. 3d 846, 856-57 (Fla. 2d DCA 2010), the Second District considered this question arising out of a similar procedural posture. Like here, in that case the trial court had denied termination of parental rights and noted in its ruling that it believed it lacked the authority to enter a single-parent termination because that issue had not been pled or specifically

argued by DCF. The court rejected that analysis. Looking at section 39.811, the court concluded that statute "addresses the authority of the court and not the duties of the petitioner." *E.R.*, 49 So. 3d at 856 (footnote omitted). Therefore, it determined the trial court had authority to enter single-parent termination sua sponte "where the facts justify that result." *Id.* at 856–57.

We reverse because the trial court erred by misapplying the proper standard in granting a motion for judgment of dismissal, by applying the least restrictive means test to that determination, and by failing to consider all three grounds as to each parent. Because there is competent substantial evidence to support the grounds alleged by DCF, the trial court is directed to enter an order denying the motion for judgment of dismissal. On remand, the trial court should consider the issues and evidence consistent with the law discussed in this opinion.

REVERSED and REMANDED with directions.

RAY, C.J., and ROBERTS, J., concur.

---

***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

---

Angela M. Holck, Pensacola, and Sarah J. Rumph, Tallahassee, for Appellant Department of Children and Families; Thomasina F. Moore and Sara Goldfarb, Florida Statewide Guardian ad Litem Office, Tallahassee, for Appellant Guardian ad Litem Program.

Anne Marie Perine, Tallahassee, and Crystal McBee Frusciante, Sunrise, Office of Criminal Conflict & Civil Regional Counsel, for Appellee T.I. David Maldonado, Lakeland, for Appellee A.L.