FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-28

E.K., Mother of L.K. and R.K.,
Minor Children,

Appellant,

v.

DEPARTMENT OF CHILDREN AND
FAMILIES and C.K., Father,

Appellees.

No. 1D20-29

GUARDIAN AD LITEM PROGRAM,

Appellant,

v.

DEPARTMENT OF CHILDREN AND
FAMILIES and C.K., Father,

Appellees.

On appeal from the Circuit Court for Bay County.
Brantley S. Clark, Jr., Judge.

August 5, 2021

TANENBAUM, J.

The question in this appeal is straightforward. A trial court denies a petition for termination of a father's parental rights ("TPR") based solely on its determination that the evidence did not demonstrate that termination was the least restrictive means to protect his children. May the court do this, even though it concluded, by clear and convincing evidence, that the father had engaged in the egregious conduct set out by section 39.806(1)(f) as a ground for termination? We say no and reverse.

Before a trial court can terminate a parent's rights to his child, there must be clear and convincing evidence of the "elements required for termination." § 39.809, Fla. Stat. (2019). There are two statutory elements. *See S.M. v. Dep't of Child. & Fams.*, 202 So. 3d 769, 776–77 (Fla. 2016) (identifying two statutory elements that the trial court must consider for termination); *C.M. v. Dep't of Child. & Fams.*, 953 So. 2d 547, 550 (Fla. 1st DCA 2007) (setting out "two key determinations" required to support a "judicial decision whether to terminate parental rights").

One element to be proved is the existence of at least one of the grounds for termination specified by section 39.806. *See* § 39.806(1), Fla. Stat. ("Grounds for the termination of parental rights may be established under any of the following circumstances . . . ."); *cf.* § 39.802(4)(a) Fla. Stat. (2019) (requiring that a TPR petition contain facts showing that at least one ground listed in section 39.806 has been met); *S.M.*, 202 So. 3d at 776 (noting that for termination, section 39.806 requires "that the trial court find by clear and convincing evidence that one or more of the grounds for termination under the section has been established"). The other to be proved is that "the child's manifest best interests would be served by granting the petition to terminate parental rights." *C.M.*, 953 So. 2d at 550; *see* § 39.810, Fla. Stat. (requiring the trial court to consider "the manifest best interests of the child" in a termination hearing by evaluating "all relevant factors," including those specifically enumerated); *cf.* § 39.802(4)(c), Fla. Stat. (2019) (requiring that a TPR petition allege facts showing that the termination will serve the manifest best interest of the child in accordance with the factors set out in section 39.810).

The supreme court, however, requires that one more element be demonstrated—one that does not appear in the text of the applicable statutes. By judicial implication, before a TPR may be granted, there must be a showing that termination "is the least restrictive means of protecting the child from serious harm." *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So. 2d 565, 571 (Fla. 1991).[1] This requirement flows from the recognition that the interest of a parent in his children "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753–54.

This implied least-restrictive-means requirement, then, "is tied directly to the due process rights that must be afforded to a parent before his or her parental rights are terminated." *S.M.*, 202 So. 3d at 778. It exists where necessary to ensure, case by case, that a termination under Florida's statutory scheme comports with constitutional due-process standards. *Id.* ("[T]he least restrictive means prong is implicit in Florida's statutory scheme based on the [supreme court's] obligation to construe statutes in a constitutional manner."); *see also A.J. v. K.A.O.*, 951 So. 2d 30, 32 (Fla. 5th DCA 2007) ("Florida courts have simply added this [least-restrictive-means] test to Chapter 39 involuntary termination analysis as a constitutionally-mandated requirement."); *In re L.B.W.*, 863 So. 2d 480, 483 (Fla. 2d DCA 2004) (observing that

[1] To establish this implied element, there "ordinarily" must be a demonstration that the State "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.* This prong "simply requires that measures short of termination should be utilized if such measures can permit the safe re-establishment of the parent-child bond." *S.M.*, 202 So. 3d at 778–79 (quotation and citation omitted).

"[b]eyond these statutory requirements" found in sections 39.806 and 39.810, there is "a constitutional requirement" that the TPR be established as the least restrictive means for avoiding serious harm to the child (citing *Padgett*, 577 So. 2d at 571)); *cf. Fla. Dep't of Child. & Fams. v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004) (characterizing *Padgett* as a "binding judicial construction of the statute governing the termination of parental rights" and construing a new provision of section 39.806 as implicitly including the same least-restrictive-means requirement).[2]

The supreme court, though, qualified its judicial modification of the statute by stating "that [DCF] *ordinarily* must show that it has made a good faith effort to rehabilitate the parent and reunite the family . . . ." *Padgett*, 577 So. 2d at 571 (emphasis supplied). The court did not take long to make good on that qualification. In the case of *In re T.M.*, 641 So. 2d 410 (Fla. 1994), it held that "in such extraordinary circumstances as are described in [the egregious-conduct provision in section 39.806(1)(f)], the termination of parental rights without the use of plans or agreements is the least restrictive means." *Id.* at 413. Put in a slightly different way, in a case like this, where there is clear and convincing evidence of the parent having engaged in the egregious conduct described in section 39.806(f), a TPR is warranted and constitutional upon sufficient proof of the other statutory element—manifest best interest of the child—without the need to

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[2] *Cf. In re Seven Barrels of Wine*, 83 So. 627, 632 (Fla. 1920) ("A statute should not be so construed or applied as to make it conflict with organic law, when a construction or application conformable to the Constitution is practicable and the legislative intent is not thereby thwarted, since it must be assumed that the Legislature contemplated the enactment of a law that would conform to the Constitution, and that it would be applied to classes of cases in which it may be validly enforced."); *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 191 (Fla. 2007) (construing a statute pertaining to a termination of rights of an unmarried biological father to have a service-of-notice requirement to "avoid ruling on any potential constitutional implications of the statutory scheme either facially or as applied under these circumstances").

judicially imply the extra, least-restrictive-means element into the text.

Having set the table, we now get to the specifics of this case. C.K. is the father of L.K. and R.K. Long after C.K. and the children's mother, E.K., had separated, E.K. found a new boyfriend. A hurricane hit the area where they lived, and E.K. felt that the children would be safer with her in the aftermath. E.K. and the boyfriend drove to C.K.'s house to pick up the kids pursuant to a time-sharing agreement. C.K. refused. This led to a confrontation in which both parents grabbed the kids by their hands, and a tug-of-war ensued. C.K. threatened to shoot E.K. in the face if she took the children. The kids of course heard this threat. C.K. then went into the house to retrieve his gun. Meanwhile, E.K. loaded the children into the boyfriend's pickup truck to leave. C.K. emerged from the house with a gun, pointed it at the truck, and demanded that the children stay.

The boyfriend started to drive the truck away, with E.K. in the front passenger seat and the kids in the back. C.K. fired multiple shots into the back of the truck, bullets shattering the back window and whizzing within inches of the children's heads. One struck the boyfriend in the back of the head; he did not die, but he was seriously injured. The boyfriend as a result lost control of the truck and swerved into a ditch. The mother, sitting in the front passenger seat, hit her head on the windshield. Blood from the boyfriend's headwound spattered onto the kids, one of whom also suffered cuts from the broken glass. The children were both aware that their father was the one shooting at them, and expert testimony later established that this incident could cause them significant trauma and long-term developmental issues.

While C.K. was incarcerated and facing charges of attempted first-degree murder, attempted second-degree murder, and shooting into an occupied vehicle, the Department of Children and Families ("DCF") filed an emergency shelter petition regarding C.K., which the trial court granted, ordering the children to be placed in the custody of the mother under supervision from DCF. The kids' appointed guardian ad litem ("GAL") filed a petition for an involuntary termination of C.K.'s parental rights.

A court-ordered mediation resulted in C.K.'s agreement to consent to a dependency adjudication and to complete a case plan and

accept services provided by DCF. DCF filed the case plan with the court. At an adjudicatory hearing, DCF stated that "the most challenging aspect of this case" was whether termination was the least restrictive means to protect the children. For this reason, DCF chose to seek a determination of dependency and to file a case plan, rather than petition for a TPR. DCF determined that "providing a case plan would be a reasonable due process control to apply to the case," in the light of the father's incarceration, the existence of a no-contact order, and the availability of safe placement with the mother.

In its written order that followed, the trial court found that the GAL had proven the first element for termination by adducing "clear and convincing evidence that the father engaged in egregious conduct that endangered the children's lives and safety." *See* § 39.806(1)(f), Fla. Stat. (providing that a ground for termination has been established if the "parent[] 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"). According to the trial court, the evidence showed that the "father's actions were willful, without justification, and presented an immediate threat to the children." His actions also "were deplorable, flagrant, and outrageous by a normal standard of conduct."[3] Nonetheless, the court denied the petition.

The trial court treated the least-restrictive-means requirement as an apropos element that the GAL failed to establish by clear and convincing evidence. It found that the children remained in the "safe and appropriate placement" of the mother since being sheltered after the incident. The court also found that "the availability of remedial services for the father represents a less restrictive alternative to termination of parental rights" that still will "provide the children with safety and permanency." The court noted that C.K. consented to dependency and that services "present an opportunity to safely re-establish the children's bond with the father." The court adjudicated the children dependent in lieu of granting the TPR petition and held the dependency case open "as the father's progress on the tasks of the

[3] C.K. does not contest the trial court's determination that this statutory ground was proven sufficiently.

case plan is assessed." The court did not make any findings regarding the manifest-best-interest element set out in section 39.810.

The GAL and the mother argue on appeal[4] that the trial court erred by denying the TPR petition based on a failure to prove the least-restrictive means element, and we agree. In a case where a TPR petition relies on section 39.806(1)(f) as its basis, and that ground is proven with clear and convincing evidence at an adjudicatory hearing—as it was in this case—there is no least-restrictive-means element to be proven and, consequently, no authority for a trial court to deny a TPR petition based on a failure to meet that element. Nonetheless, the trial court still must determine the other *statutory* element—whether termination is in the manifest best interest of the children after consideration of the factors set out in section 39.810. *See* § 39.809(1), Fla. Stat. (directing the trial court to "consider the elements required for termination," which "must be established by clear and convincing evidence" for termination to be granted); *S.M.*, 202 So. 3d at 776 (noting "Florida Statutes also require that the trial court shall consider the manifest best interests of the child by evaluating the relevant factors listed under section 39.810" (internal quotations omitted)).

That did not happen in this case, so we both reverse the denial of the TPR petition and remand the matter for the trial court to make the manifest-best-interest findings. *See C.C. v. Dep't of Child. & Fam. Servs.*, 812 So. 2d 520, 523 (Fla. 1st DCA 2002) (remanding for fact-finding regarding manifest best interests of the child, even though ground listed in section 39.806 was proven, because "[f]ull and accurate fact finding is essential" for *both* the section 39.806 ground for termination *and* the "question whether it is in the child's best interests to do so"). If the trial court determines, based on sufficient evidence, that termination is in the manifest best interest of the children, it must grant the TPR petition.

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[4] The GAL and the mother filed their operative notices of appeal on January 3, 2020. On June 25, 2020, this court relinquished jurisdiction to the trial court for the appointment of substitute appellate counsel for the father. The father filed his answer brief on August 10, 2020, and the appeal was perfected with the GAL's filing of a reply brief on August 21, 2020.

REVERSED and REMANDED with instructions.

ROWE, C.J., concurs; MAKAR, J., concurs in result with opinion.

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

MAKAR, J., concurring in result.

Appellants, E.K. and the Guardian ad Litem Program, appeal the trial court's order denying the expedited petition for termination of parental rights as to the father, C.K. I agree that the trial court erred in not granting termination of rights under the circumstances. It is undisputed that the father fired multiple shots into a vehicle he knew was occupied by his two young daughters along with their mother and her boyfriend. Bullets came within inches of the girls and one struck the boyfriend, who was driving, in the head; when the boyfriend lost control of the vehicle, the mother hit her head on the windshield; the father approached with gun drawn demanding that his daughters, both splattered in blood, come with him with resulting psychological harm and trauma. At the inception of this appeal, the father was incarcerated awaiting trial on charges of attempted first-degree murder, three counts of attempted second-degree murder, and shooting into an occupied vehicle.

This outrageous incident, along with other prior violent acts and threats involving the family, easily fit within the statutory definition of "egregious conduct," *see* § 39.806(1)(f), Fla. Stat. (2020) ("egregious conduct" means "abuse, abandonment, neglect, or any other conduct that is deplorable, flagrant, or outrageous by a normal standard of conduct"), and thereby warranted the termination of the father's parental rights without a remedial reunification plan. *Id.* § 39.806(2) ("Reasonable efforts to preserve and reunify families are not required if a court of competent jurisdiction has determined that any of the events described in paragraphs (1)(b)-(d) or paragraphs (f)-(m) have occurred.").

The uptake is that once it is established that a disqualifying event occurred, such as "egregious conduct" as statutorily defined, the father was not entitled to a case plan. Where these statutorily-defined extraordinary circumstances are proven, the least restrictive means *is* termination. *In re T.M.*, 641 So. 2d 410, 413 (Fla. 1994)) ("[T]ermination of parental rights without the use of plans or agreements is the least restrictive means."); *see In re X.W.*, 255 So. 3d 882, 890 (Fla. 2d DCA 2018) ("[T]he supreme court has recognized that 'in extraordinary circumstances,' termination of parental rights without the use of case plans is the least restrictive means.") (*citing In re T.M.*). As the Fourth District stated in *M.C. v. Department of Children & Family Services*:

> Our legislature has expressly provided that reasonable efforts to preserve and unify families need not be required where a court of competent jurisdiction has determined that egregious conduct has occurred. . . . Simply, where egregious conduct occurs, the child's paramount safety and well-being prevails, and parental rights can be expeditiously terminated in the child's best interests.

814 So. 2d 449, 452 (Fla. 4th DCA 2001). Because the statutory basis for termination was proven under subsection 39.806(1)(f), it was error to go beyond that subsection to determine whether reasonable reunification efforts with the father existed; while such considerations may form the basis for denial of termination under subsection 39.806(1)(d)(3) (parent of child incarcerated), for example, they do not as to "egregious conduct" under subsection 39.806(1)(f), which—as the trial court held—was established by clear and convincing evidence as to the father.

A reversal is necessitated, but it is unclear how the trial judge will make the manifest best interest findings at this juncture where the petition was filed in January 2019, a hearing was held in July 2019, the order denying the petition was entered in December 2019, and the case has been on appeal since January 2020. Circumstances may have changed in the past two years. Is the trial court to make the best interests determination based on the evidence received at the July 2019 hearing? Or is the evidentiary record open and a new hearing to be held? The Fifth District rejected the argument that an amended TPR order entered

25 months after the original TPR hearing contained "stale" factual findings that required a new hearing in *P.J. v. Department of Children & Families*, 821 So. 2d 442, 442 (Fla. 5th DCA 2002). Much like here, the amended TPR order in *P.J.* was necessitated by a remand from the appellate court in a prior appeal. The point of *P.J.* is that a two-year delay is not a basis for a new evidentiary hearing where the existing facts of record demonstrate acts of "egregious conduct" that "speak for themselves." *Id.* at 443. *P.J.* did not foreclose situations where a new evidentiary hearing (or a limited one based on changed circumstances) may be warranted, but the egregiousness of the conduct in this case parallels that in *P.J.,* making it a judgment call whether a new or limited hearing is appropriate.

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