DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

In the Interest of M.S., a child.

A.R., a child, by and through her parents,

Appellant,

v.

DEPARTMENT OF CHILDREN AND FAMILIES and GUARDIAN AD LITEM PROGRAM,

Appellees.

No. 2D20-2477

October 15, 2021

Appeal from the Circuit Court for DeSoto County; Don T. Hall, Judge.

Karen Gievers, Tallahassee, and Valentina Villalobos and Octavia Brown, Tampa, for Appellant.

Meredith K. Hall, Children's Legal Services, Appellate Division, Bradenton, for Appellee Department of Children and Families.

Thomasina F. Moore, Statewide Director of Appeals, and Sara Elizabeth Goldfarb, Senior Attorney, Appellate Division, Tallahassee, for Appellee Guardian ad Litem Program.

CASANUEVA, Judge.

Appellant, A.R., by and through her adoptive parents, seeks review of the circuit court's order striking notices of appearance and designations and a motion to enforce sibling visitation and request for hearing and precluding A.R. from filing pleadings, motions, notices, and requests in the underlying matter. We reverse and remand for the limited purpose of providing A.R. with notice of the Appellees' joint motion to strike and an opportunity to be heard on that motion and to assert that A.R's participation in the underlying matter is in M.S.'s best interests. If the court grants A.R. participant status, A.R. may be heard on the matter of the maintenance of the sibling group as the Florida Legislature has provided.

In the underlying dependency matter, the parental rights of the parents of M.S. were terminated, and M.S. was permanently committed to the Department of Children and Families (the Department) for adoption. A.R., who shares the same biological

parents as M.S., had been privately adopted as an infant before M.S.'s birth. A.R. and M.S. never enjoyed regular sibling visitation, with only one face-to-face visit and one or two telephone visits.

In M.S.'s posttermination dependency proceeding, two attorneys filed a notice of appearance and designation of email address as counsel for A.R.'s adoptive parents, a motion to enforce sibling visitation, and a request for a hearing on behalf of A.R. through her adoptive parents. Another attorney filed a separate notice of appearance and designation of email address as co-counsel for A.R., by and through her adoptive parents. A.R. attempted to set a hearing on the motion to enforce sibling visitation. The Department and the Guardian Ad Litem Program (GALP) thereafter filed a joint motion to strike the notices of appearance and designations and the motion to enforce sibling visitation and request for hearing and to strike and to prevent all future pleadings, motions, notices, and requests. The joint motion was not served on A.R.

The circuit court summarily granted the joint motion. In its order, the court found that because A.R. was neither a party nor a participant in the proceeding, A.R. was not entitled to file motions,

to request hearings, to receive notice of the pleadings filed in the proceedings, or to an opportunity to be heard. The court directed the GALP and the Department not to provide A.R. with a copy of the joint motion, denied the request for a hearing on the motion to enforce sibling visitation, and ordered that "[A.R.] and any representative, next friend, or attorney" not file, and the clerk of court not accept, "any further pleadings, motions, notices, requests, or papers . . . from [appellant] and any representative, next friend, or attorney" in the underlying matter. A.R. appealed this order.

On appeal, A.R. argues among other things that the circuit court's order violated A.R.'s constitutional due process rights because the joint motion was not served upon A.R., A.R. did not receive a hearing on the motion, and A.R. was not afforded an opportunity to present evidence or be heard either on the motion to enforce visitation or on the joint motion to strike. "Whether a trial court has violated a party's due process rights is subject to de novo review." *See Dobson v. U.S. Nat'l Ass'n*, 217 So. 3d 1173, 1174 (Fla. 5th DCA 2017) (citing *VMD Fin. Servs., Inc. v. CB Loan Purchase Assocs.*, 68 So. 3d 997, 999 (Fla. 4th DCA 2011)).

> To assess whether a violation of due process has occurred, we must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. *Econ. Dev. Corp. of Dade Cnty., Inc. v. Stierheim*, 782 F. 2d 952, 953–54 (11th Cir. 1986). Absent such a deprivation, there can be no denial of due process. *Id.* Due process is a flexible concept and requires only that the proceeding be essentially fair. *See Carillon Cmty. Residential v. Seminole Cnty.,* 45 So. 3d 7, 9 (Fla. 5th DCA 2010) (citing *Gilbert v. Homar,* 520 U.S. 924, 930, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997)). The extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved. *Id.* As a result, there is no single test which applies to determine whether the requirements of procedural due process have been met. *Id.* Courts instead consider the individualized facts of each case to determine whether the defendant has been accorded the process which the state and federal constitutions demand. *Id.*

Abdool v. Bondi, 141 So. 3d 529, 544 (Fla. 2014). "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972).

We recognize that dependency proceedings are confidential[1] and that the persons entitled to notice of the pleadings therein and

[1] *See* § 39.0132(3), Fla. Stat. (2020).

the right to participate in those proceedings is limited.[2] With the limitations of the dependency proceeding set forth and recognized it must still be ascertained whether the Legislature has afforded A.R. the means to become involved in the instant judicial proceeding and, if so, the extent that A.R. may be involved. To answer that question, it is necessary to examine the legislatively crafted definitions that apply and whether the statutorily created proceeding contains a recognizable basis for involvement.

Section 39.502(6), Florida Statutes (2020), creates a duty of notification. It places a duty of notification upon "the petitioner or moving party to notify all participants and parties known to the petitioner or moving party of all hearings subsequent to the initial hearing unless notice is contained" in other identified documents. Thus, to be entitled to notice, a person must be either a participant or a party. The record is clear that A.R. does not qualify under the statutory definition of a party found in section 39.01(58), Florida

---

[2] *See* § 39.502(17) (requiring reasonable notice of all proceedings and hearings under that chapter be provided to certain identified persons and "all other parties and participants"); *see also* § 39.01(57), (58) (defining party and participant); Fla. R. Juv. P. 8.235(a) (providing for the filing of motions by a party).

Statutes (2020). A.R. is not a parent, the Department, or other recognized person. Therefore, to sustain a claim of entitlement to statutory notice, A.R. must establish that A.R. qualifies as a participant.

Again, we look to the statutory language provided by the Legislature in section 39.01(57) to determine whether A.R. is a "participant." The definition of a "participant" is a

> person who is not a party but who should receive notice of hearings involving the child, including the actual custodian of the child, the foster parents or the legal custodian of the child, identified prospective parents, and any other person whose participation may be in the best interest of the child.

Thus, A.R. can only qualify as a "participant" by establishing that as the biological sibling of M.S., A.R.'s participation is in the best interest of M.S. In comparison, it may be argued that A.R.'s connection to M.S. by blood precedes that of a forthcoming adoptive parent whose rights arise later from the operation of a final judgment. However, it is not necessary to answer that question at this time, and it may well be an answer that is better provided by legislative enactment. We pause to note that the Legislature, either intentionally or not, excluded a biological sibling from being a next

of kin when the sibling is a minor. Section 39.01(51) defines "next of kin," in part, as "an adult relative of a child who is the child's brother [or] sister." In terms of placement or adoption, this classification is certainly pertinent.[3]

Section 39.502(17) establishes and affords to a participant the right to "be given reasonable notice of all proceedings and hearings provided for under this part." By statutory mandate, the definition of participant applies "for purposes of a shelter proceeding, dependency proceeding, or termination of parental rights proceeding" and importantly, a participant "may be granted leave of court to be heard without the necessity of filing a motion to intervene." § 39.01(57).

Turning now to the provisions of Florida's adoption chapter, we observe that certain statutes impact the instant case. These statutory provisions enacted by our Legislature once again invoke the "best interest of the child" mandate.

---

[3] The understanding of "family" implies a biological relationship, *Smith v. Org. of Foster Fams. for Equity & Reform*, 431 U.S. 816, 843 (1977), and a biological relationship is present here.

In section 63.022, Florida Statutes (2020), we find this legislative language repeatedly used. First, section 63.022(2) expressly provides that in adoption proceedings the Legislature's intent was that "the best interest of the child should govern and be of foremost concern in the court's determination." To ensure the primacy of the "child's best interest" the Legislature imposed a duty upon the trial court that it "shall make a specific finding as to the best interest of the child in accordance with the provisions of this chapter." *Id.* Included within the legislative intent was that when necessary "to protect and promote the well-being of persons being adopted" the court is empowered "whenever appropriate, to maintain sibling groups." § 63.022(3). Finally, and once again, the Legislature demanded that in adoption proceedings "the court shall enter such orders as it deems necessary and suitable to promote and protect the best interests of the person to be adopted." § 63.022(4)(k).

Without question, we conclude that the Legislature of this state has made it clear that the navigation beacon to be followed here is the "best interest of the child" and it allows a sibling the opportunity to seek a best interest determination. The statutory

framework of dependency does not require a motion to intervene, only that the sibling demonstrate that its participation is in the best interest of the other sibling. Similarly, in adoption proceedings the statutes acknowledge that maintaining sibling groups may be in their mutual best interest.

We must therefore conclude that the judicial determination of the best interest of the child is encompassed by the demand of due process of law and that A.R. must be afforded both notice and an opportunity to be heard before a judicial determination on the issue may be entered. Accordingly, we hold that, at a minimum, due process requires an evidentiary hearing be held to judicially determine whether "best interest" as required by statute has been established. *See Abdool*, 141 So. 3d at 544; *Roth*, 408 U.S. at 569-70.

It follows that A.R. must be given notice of the joint motion to strike and the opportunity to be heard in response to that motion and to establish that A.R.'s participation in the underlying matter is in M.S.'s best interests. If A.R. is granted participant status, we hold that A.R., as set forth herein, may be heard on the matter of

the maintenance of the sibling group as our Legislature has provided.

Reversed and remanded with directions.

NORTHCUTT and KELLY, JJ., Concur.

Opinion subject to revision prior to official publication.