

Third District Court of Appeal

State of Florida

Opinion filed July 3, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1057
Lower Tribunal No. 16-15849

A.H., the Mother,
Petitioner,

vs.

Department of Children and Families, et al.,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Dawn Denaro, Judge.

Eugene F. Zenobi, Criminal Conflict and Civil Regional Counsel, Third Region, and Kevin Coyle Colbert, Assistant Regional Counsel, for petitioner.

Karla Perkins, for Department of Children and Families; Thomasina F. Moore and Laura J. Lee (Tallahassee), for Guardian ad Litem Program, for respondents.

Before SALTER, MILLER, and GORDO, JJ.

MILLER, J.

Petitioner, A.H., the mother, seeks certiorari review of the trial court's orders placing her daughter, nine-year-old M.H., in the custody of two adult caregivers, not approved to serve as foster parents ("the house parents").¹ As prior to the placement, the Department of Children and Families ("the Department") failed to present the trial court with a completed home study report, as required by section 39.522(1), Florida Statutes (2019), we grant the petition.

Following a shelter hearing, M.H. was adjudicated dependent and placed in a residential child care facility, otherwise referred to as a group foster home. The house parents were assigned to oversee the children residing at the facility. During her tenure at the home, M.H. disclosed that she witnessed a child attempt to commit suicide. The home was scheduled for immediate closure as the license was not renewed. On the eve of the projected shuttering of the home, an emergency motion to relocate the child was filed in the lower tribunal. The following day, the trial court conducted a hearing on the motion. The mother appeared telephonically and was

¹ Section 39.01(30), Florida Statutes (2019), "defines 'foster care' as 'care provided a child in a foster family or boarding home, group home, agency boarding home, child care institution, or any combination thereof.' Although this definition does not refer to licensure, section 409.175(4)(a) requires that '[a] person, family foster home, or residential child-caring agency may not provide continuing full-time child care or custody unless such person, home, or agency has first procured a license from the department to provide such care.'" Dep't of Children & Families v. K.D., 45 So. 3d 46, 48 n.2 (Fla. 5th DCA 2010).

represented by counsel, however, due to the immediacy of the scheduling and the resultant short notice, she was unable to prepare and present witnesses.

During the course of the hearing, the mother expressed concern regarding the safety of M.H., premised upon the belief that the house parents had perpetrated abuse upon other children and neglected M.H.² The court pressed the issue and the house parents proffered that they had adopted two children in Virginia and were actively seeking to effect a third adoption. Notwithstanding the desire to further adopt, the house parents were contemplating “dissolving” the adoption of one of the prior adoptees. According to the house parents, the subject of the proposed dissolution suffered from attachment disorder and was engaged in self-harming behaviors.

The Department disclosed that the house parents had been accused, but cleared, of various acts of physical abuse, including restraining a child in a canine collar, catapulting a child against a wall, and inflicting deep scratches on the arm of a child. The mother alleged that while in the group foster home, M.H.’s hygiene and dental needs were left unattended, resulting in tooth decay, as evidenced by photographic documentation. Additionally, the house parents had not yet passed the rigors of a home study or equivalent requirements imposed by federal law.³ The

² The trial court examined the child, outside the presence of the parties.

³ Under federal law, “[i]n order for a State to be eligible for payments under [the relevant] part, it shall have a plan . . . [that] provides procedures for criminal records checks, including fingerprint-based checks of national crime information databases . . . for any prospective foster or adoptive parent before the foster or adoptive parent

lower tribunal granted temporary emergency custody, termed “visitation” in its order, to the house parents, and entered a second order granting nonrelative overnight visitation. The instant petition ensued.

“Certiorari is an extraordinary remedy that is available only in limited circumstances.” Charles v. State, 193 So. 3d 31, 32 (Fla. 3d DCA 2016). Certiorari review is warranted when a nonfinal order: (1) cannot be remedied on postjudgment appeal, (2) results in material injury for the remainder of the case, and (3) departs from the essential requirements of law. Fernandez-Andrew v. Fla. Peninsula Ins. Co., 208 So. 3d 835, 837 (Fla. 3d DCA 2017) (citations omitted). The first two prongs are jurisdictional and must be established by the petitioner “before this court has power to determine whether the order departs from the essential requirements of the law.” Chessler v. All Am. Semiconductor, Inc., 225 So. 3d 849, 852 (Fla. 3d DCA 2016) (quoting Parkway Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646, 649 (Fla. 2d DCA 1995)).

As the protection of the health, safety, and well-being of a child is of paramount importance under Florida law, and a custody determination that fails to comport with Florida law poses an immediate threat of irreparable harm to the child, we have jurisdiction. See Mahmood v. Mahmood, 15 So. 3d 1, 3 (Fla. 4th DCA

may be finally approved for placement of a child . . .” 42 U.S.C. § 671(a)(20)(A) (2018); see also S.M. v. Fla. Dep’t of Children & Families, 202 So. 3d 769, 781 (Fla. 2016).

2009) (“A court’s failure to apply the statute to protect a child from abuse is reviewable by certiorari, since the situation presents the possibility of irreparable harm to the child.”); see also Guardian Ad Litem Program v. R.A., 995 So. 2d 1083, 1084 (Fla. 5th DCA 2008) (granting certiorari relief from an order changing placement of a dependent child without following the clear statutory directives). Thus, we confine our analysis to the controlling, unambiguous law governing the out-of-home placement of dependent children.

Section 39.523(1)(c), Florida Statutes (2019), provides: “that whenever a child is unable to safely remain at home with a parent, the most appropriate available out-of-home placement shall be chosen after an assessment of the child’s needs and the availability of caregivers qualified to meet the child’s needs.” Further, section 39.522(1), Florida Statutes (2019), governing changes of custody effected following an adjudication of dependency, states: “If the child is not placed in foster care, then the new placement for the child must meet the home study criteria and court approval pursuant to this chapter.” Finally, section 39.521(2)(o), Florida Statutes (2019), regulating disposition hearings, sets forth the following:⁴

If the child has been removed from the home and will be remaining with a relative, parent, or other adult approved by the court, a home study report concerning the proposed placement shall be provided to the court . . . The department may not place the child or continue the placement of the child in a home under shelter or postdisposition

⁴ Section 39.521(2)(o)1-8, Florida Statutes (2019), sets forth the minimum requirements for a home study.

placement if the results of the home study are unfavorable, unless the court finds that this placement is in the child's best interest.

Here, although we commend the diligence of the trial court in promptly convening a hearing, and are cognizant that exigent circumstances were precipitated by the necessitated relocation of the child, we find that the failure of the Department to comply with the statutory requisites presented a fatal impediment to placing the child in the home of the nonrelative caregivers. As the trial court was not presented with a home study report, the placement did not comply with the statutory postdisposition change of custody requirements. Consequently, the court departed from the essential requirements of law in rendering the two orders under review. See Dep't of Children & Families v. T.L., 854 So. 2d 819, 821 (Fla. 4th DCA 2003) ("The statute does not give the trial court the authority to place the child in a home without conducting any home study at all."); see also Dep't of Children & Families v. R.G., 821 So. 2d 477 (Fla. 4th DCA 2002); cf. C.M. v. Dep't of Children & Families, 953 So. 2d 547, 556 (Fla. 1st DCA 2007) ("Because the evidentiary record was incomplete in this case, the trial court was not yet ready to make an informed determination . . ."). Accordingly, we grant the petition for certiorari and quash the orders entered below.⁵

⁵ We express no opinion as to the propriety of the placement following a completed home study and duly noticed hearing that comports with all constitutionally imposed due process requirements. See Amend. XIV, U.S. Const.; Art. I, § 9, Fla. Const.; In re E.G-S., 113 So. 3d 77, 79 (Fla. 2d DCA 2013) ("All procedures in a dependency

Petition granted; orders quashed.

case must comport with due process principles.”). “Basic due process requires a party be provided notice and a meaningful opportunity to be heard, the denial of which constitutes fundamental error.” Pena v. Rodriguez, 44 Fla. L. Weekly D1346, D1347 (Fla. 3d DCA May 22, 2019) (citing Nationstar Mortg., LLC v. Weiler, 227 So. 3d 181, 184-85 (Fla. 2d DCA 2017); Slotnick v. Slotnick, 891 So. 2d 1086, 1089 (Fla. 4th DCA 2004)). Here, the emergency scheduling of the hearing rendered the mother unable to adequately prepare to present evidence, including witness testimony, to substantiate the allegations of abuse and neglect. Moreover, as the Department engaged in conjecture by proffering its anticipated conclusions of the yet to be completed home study report, the mother was divested of her ability to challenge, contest, or rebut any findings therein.