Third District Court of Appeal

State of Florida

Opinion filed October 23, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1307
Lower Tribunal No. 18-15614

R.B., the Mother,
Appellant,

vs.

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

An appeal from the Circuit Court for Miami-Dade County, Vivianne del Rio, Judge.

Thomas Butler, P.A. and Thomas J. Butler, for appellant.

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

Before LOGUE, MILLER, and LOBREE, JJ.

MILLER, J.

The mother, R.B., challenges an adjudication of dependency rendered below, as to her four-year-old son, D.B., following the untimely and tragic death of his half-sibling. On appeal, R.B. contends the evidence adduced by the Department of Children and Families ("the Department") was insufficient to sustain a finding of dependency. For the reasons elucidated below, we conclude the lower tribunal's decision was well-supported and affirm.

FACTS AND BACKGROUND

On Thanksgiving Day 2018, after soiling her diaper, eight-month-old A.H. sustained second and third-degree immersion burns on over thirty percent of her body, having been submerged in scalding water while under the supervision of her father, T.H. The mother's older child, four-year-old D.B., was home during the incident and heard A.H. screaming in agony. A.H.'s injuries proved fatal and an investigation followed.

The probe by both law enforcement and child protection investigators revealed that A.H. suffered from exposure in utero to controlled substances, due to the mother's prenatal drug abuse. The Department initiated action by enrolling the mother in therapeutic treatment. Thereafter, the Department received two separate referrals involving the family.

Approximately one month prior to A.H.'s death, the mother and father became involved in a heated dispute over child care. The parties were both scheduled to

appear at their places of employment and failed to make child-care arrangements. Consequently, the mother left A.H. and D.B. unsupervised in the home for an extended period of time.

That day, the mother appeared at the father's place of employment and became aggressive. A domestic altercation ensued, and the father contacted law enforcement. The responding officer subsequently learned the children had been deserted, and the mother was arrested for child neglect.

On the day A.H. sustained her life-ending burns, the father materialized at the home of the mother. The mother departed from the residence, leaving the children under his charge. After the infant was burned, the mother returned to the home. Upon discovering the severity and extent of the burns, the mother telephoned the police.

Assigned investigators detected the odor of marijuana in the residence. It was deemed particularly pungent in the bathroom in which A.H. was abused. Thereafter, the father was arrested for child neglect.

The mother denied the father lived in the home. Although she initially cooperated in the investigation into A.H.'s death, she voiced her opinion the injuries were accidental. She furnished varying explanations for the genesis of the burns, including laying the blame on a defective hot water heater. She later explained the father placed the child in the bathtub and left her unattended.

The mother further provided conflicting accounts as to her whereabouts at the time of the incident. Specifically, she told one investigator she was on the porch of the home, and alerted to the crisis when she heard the cries of the infant. However, she told another individual she was at the neighbor's house when she was summoned by the father.

Shortly after the incident, the mother was screened for the presence of illegal drugs, and tested positive for marijuana.[1] After A.H. died, experts opined that the resultant pattern of injury supported the conclusion that A.H. was likely forcibly restrained, and futilely attempted to resist, as she was submerged in hot water. Thus, her injuries were intentionally inflicted, and constituted severe child abuse.[2]

The mother was offered a variety of voluntary services, which she declined.[3] Thereafter, the Department filed a petition for dependency, alleging neglect. An evidentiary hearing followed, and the lower tribunal adjudicated D.B. dependent. The instant appeal ensued.

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[1] The father tested positive for both marijuana and cocaine.

[2] According to the medical reports, A.H. was suffering from untreated flu at the time she sustained her injuries.

[3] The mother also refused to participate in the development of the case plan. See § 39.6011(1)((d) ("If a parent is unwilling . . . to participate in developing a case plan, the department shall document that unwillingness . . . to participate . . . **The unwillingness . . . of the parent to participate in developing a case plan does not preclude the filing of a petition for dependency** or for termination of parental rights.") (emphasis added).

STANDARD OF REVIEW

"In a dependency proceeding, [the Department] must establish its allegations by 'a preponderance of the evidence.'" In re M.F., 770 So. 2d 1189, 1192 (Fla. 2000). "A court's final ruling of dependency is a mixed question of law and fact and will be sustained on review if the court applied the correct law and its ruling is supported by competent substantial evidence in the record. Competent substantial evidence is tantamount to legally sufficient evidence." Id.

LEGAL ANALYSIS

Although "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder," Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944), as was so eloquently posited nearly forty years ago by Justice Rehnquist in his dissenting opinion in the landmark case of Santosky v. Kramer, 455 U.S. 745, 790, 102 S. Ct. 1388, 1414, 71 L. Ed. 2d 599 (1982):

> In addition to the child's interest in a normal homelife, "the State has an urgent interest in the welfare of the child." Lassiter v. Dep't of Social Servs., 452 U.S. 18, 27, 101 S. Ct., 2153, 2160, 68 L. Ed. 2d 640 (1981). Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." Prince, 321 U.S. at 168, 64 S. Ct. at 443. Thus, "the whole community" has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." Id. at 165, 64 S. Ct. at 442;

> see also Ginsberg v. New York, 390 U.S. 629, 640-41, 88 S. Ct. 1274, 1281-82, 20 L. Ed. 2d 195 (1968).

In accord with these principles, in circumstances involving abuse, neglect, or abandonment, or the imminent risk of the same, the state's *parens patriae* authority is implicated, "the welfare of the child will . . . be given primacy over the natural rights of the parent," and an adjudication of dependency is warranted. Roy v. Holmes, 111 So. 2d 468, 471 (Fla. 2d DCA 1959); see also § 39.01(15)(f), Fla. Stat. (2019) ("'Child who is found to be dependent' means a child who . . . is found by the court . . . [t]o be at substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodians.").

Under Florida law, abuse is defined as "any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired . . . Abuse of a child includes acts or omissions." § 39.01(2), Fla. Stat. Further, "'[n]eglect' occurs when a child . . . is permitted to live in an environment when such . . . environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired." § 39.01(50), Fla. Stat. Finally, among those factors that may give rise to "harm" is the following:

> Leaving a child without adult supervision or arrangement appropriate for the child's age or mental or physical condition, so that the child is unable to care for the child's own needs or another's basic needs or is

> unable to exercise good judgment in responding to any kind of physical or emotional crisis.

§ 39.01(35)(a)(3), Fla. Stat.

Here, the evidence was not largely in dispute and the lower court properly resolved the few contested facts, to the extent credibility findings were required. In the weeks prior to the infliction of the fatal injuries, despite their tender age, D.B. and A.H. were left by their mother to fend for themselves.[4] It is axiomatic that young children are unable to independently fulfill those fundamental physiological and safety needs required to support survival. See Vorchheimer v. Philadelphian Owners Ass'n, 903 F.3d 100, 106 (3d Cir. 2018) ("English speakers and writers typically reserve 'necessary' for our physiological needs and perhaps our needs for health and safety.") (citing A. H. Maslow, A Theory of Human Motivation, 50 Psych. Rev. 370 (1943) (identifying physiological and safety necessities as paramount on the hierarchy of needs)). Moreover, it does not require a particularly vivid imagination to envision any number of scenarios, all of which predictably end in tragedy, reasonably anticipated to result from of such temporary abandonment, as it is evident that infants and toddlers are ill-equipped to respond to a physical or emotional crisis.

[4] The mother contends that reliance upon this incident is violative of due process, as the prosecution elected not to proceed forward on the criminal case. We disagree, as the standard for dependency is substantially lower than that by which criminal cases are adjudged. See In re M.F., 770 So. 2d at 1192 ("In a dependency proceeding, DCF must establish its allegations by 'a preponderance of the evidence.'") (citing Fla. R. Juv. P. 8.330(a)).

This incident did not stand in isolation. The Department adduced evidence that on the very day A.H. was injured, the mother either used, or permitted the father to use, marijuana, in the presence of the children. Additionally, D.B. was present in the home and forced to endure A.H.'s cries of anguish during the bout of abuse.

After the tragedy, rather than focusing on the need to protect and heal D.B., the mother elected to direct her efforts at ensuring the father's vindication. Consistent with this goal, and contrary to her own testimony during the evidentiary hearing, that was rejected, in large part, by the lower tribunal, she failed to fully sever her ties with the father.[5] Further, expert testimony, deemed worthy of belief by the court, established that D.B. was severely traumatized, and that a premature return to the family home would likely exacerbate his emotional wounds. Finally, the perilous nature of his home environment placed him at palpable risk of future injury.

Hence, we conclude that the trial court did not err in finding that the historical evidence of neglect, the circumstances preceding the sibling's death, and the actions of the mother, considered in sum, amply supported the determination that D.B. was both neglected and at imminent risk of harm. Accordingly, we decline to embrace the assignments of error.

[5] The lower court found the father retained access to the home.

In closing, as was the trial judge, we are cognizant that the mother suffered a debilitating loss in the indescribable death of her daughter. Indeed, her pain leaps off the pages of the hearing transcript. However, as aptly penned by our articulate and esteemed sister court:

> Nevertheless, the primary purpose of a petition for dependency is to protect the child, not to punish the caregiver. § 39.001, Fla. Stat. (2018); A.B. v. Dep't of Children & Family Servs., 901 So. 2d 324, 327 (Fla. 3d DCA 2005). [Accordingly], we conclude the trial court did not err . . . [The Department] will engage with the mother to develop a case plan, with the goal of reunification of the mother with her child[]. Thus, this dependency action—unlike a TPR action—shouldn't be viewed as an ending, but rather, as a beginning.

J.D. v. Dep't of Children & Families, 263 So. 3d 60, 63 (Fla. 4th DCA 2019). Thus, we affirm the sound order under review.

Affirmed.