Third District Court of Appeal

State of Florida

Opinion filed August 3, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-2419
Lower Tribunal No. 21-15143

M.M.W., The Mother,
Appellant,

vs.

J.W., The Father,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Angelica D. Zayas, Judge.

Leslie Ann Ferderigos (Winter Park), for appellant.

Abramowitz and Associates, and Jordan B. Abramowitz, for appellee.

Before LOGUE, SCALES, and MILLER, JJ.

MILLER, J.

Appellant, M.M.W., the mother, challenges a final judgment terminating her parental rights to her two minor children, L.S.W. and A.C.W. Unlike most cases involving the termination of parental rights, the proceedings below were commenced by way of a private petition filed by the father, appellee, J.W., on the heels of acrimonious dissolution proceedings. Finding that adequate statutory grounds for termination were not pled or proven, we reverse.

BACKGROUND

The parties wed in 2011, and their union yielded two children, L.S.W. and A.C.W., both of whom are currently under the age of nine. In 2018, the mother filed a petition for dissolution of marriage. Contentious litigation culminated in a stipulated, court-approved marital settlement agreement and parenting plan. Pursuant to the terms of the stipulation, the parents shared parental responsibility and equal timesharing. The parents agreed to abstain from alcohol, prescription drug abuse, or the use of illegal intoxicants both during and for the twenty-four-hour period preceding their respective timesharing. The mother further agreed to attend therapy and submit to daily drug and alcohol testing for ninety days.

This arrangement remained in effect for approximately one year, but the parties' relationship devolved. In early May of 2019, the father filed an

ex parte motion for full timesharing. In the motion, he alleged the mother failed to retrieve the children from school, purportedly as the result of an unconfirmed car accident, exchanged hostile and threatening text messages with the father, and transported the children to school tardy on a frequent basis.

The court granted the motion and, on May 16, 2019, ordered a psychological evaluation and substance abuse testing for the mother. The testing yielded positive results for cocaine and alcohol, and a mid-January 2020 evaluation performed by a clinical psychologist concluded the mother suffered from alcohol and other stimulant use disorder, along with associated mental health diagnoses, including anxiety and depressive disorder. The psychologist recommended residential treatment.

On May 18, 2020, the parties entered into a post-judgment mediated settlement agreement. In the agreement, the mother acknowledged she suffered from substance abuse disorder, and the parties agreed that Family Court Services personnel would endeavor to select an appropriate inpatient treatment program. The agreement separately required the mother to continue to attend outpatient treatment and comply with all further recommendations and treatment plans.

The father was endowed with exclusive decision-making authority and full timesharing pending the mother's compliance with one year of random drug and alcohol screening. The mother was further ordered to pay prospective child support, along with significant arrearages.

The mother did not enroll in an inpatient facility or submit regularly to testing. She did continue to attend therapy with various providers.

The father reported that he believed he observed the mother under the influence on multiple occasions, and, in October of 2020, the mother attended a remotely conducted group therapy session while apparently under the influence alcohol or another substance. When questioned during a subsequent wellness check, she attributed her condition to anti-anxiety medication.

Shortly thereafter, the mother reported the father to the Department of Children and Families, alleging abuse and neglect. The Department declined to take any action.

On March 25, 2021, the father filed a private petition to terminate the mother's parental rights. In the petition, the father alleged abandonment under section 39.806(1)(b), Florida Statutes (2020), and chronic substance abuse under section 39.806(1)(j), Florida Statutes. The mother was not offered a case plan.

The case proceeded to an expedited final hearing, at the conclusion of which the court granted the petition, citing chronic substance abuse under section 39.806(1)(j), Florida Statutes, and conduct threatening the lives, safety, well-being, or health of the children irrespective of services under section 39.806(1)(c), Florida Statutes. The instant appeal ensued.

As relevant to our analysis, on appeal, the mother contends: (1) her due process rights were violated because the final order terminated her parental rights on unpled statutory grounds; (2) there is no competent, substantial evidence establishing she failed or refused to submit to available treatment; and (3) the father failed to establish termination was the least restrictive means to protect the children from harm.

LEGAL ANALYSIS

I. Standard of Review

Cases "involving the State's authority to sever permanently a parent-child bond[] demand[] the close consideration the Court has long required when a family association so undeniably important is at stake." M.L.B. v. S.L.J., 519 U.S. 102, 116–17 (1996) (footnote omitted); see Santosky v. Kramer, 455 U.S. 745, 787 (1982) (Rehnquist, J., dissenting) ("Few consequences of judicial action are so grave as the severance of natural family ties."). "While a trial court's decision to terminate parental rights must

be based upon clear and convincing evidence, our review is limited to whether competent substantial evidence supports the trial court's judgment." J.G. v. Dep't of Child. & Fams., 22 So. 3d 774, 775 (Fla. 4th DCA 2009). This review is "highly deferential," In re N.F., 82 So. 3d 1188, 1191 (Fla. 2d DCA 2012), and a lower court ruling will be affirmed "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). Conversely, we review a claim of deprivation of due process in termination proceedings de novo. See A.M. v. Dep't of Child. & Fams., 223 So. 3d 312, 315 (Fla. 4th DCA 2017).

II. Single-Parent Terminations

Like many states, Florida also allows a private party to file and prosecute a petition for termination of parental rights. [1] See § 39.802(1), Fla.

[1] A sampling of the termination laws across this country shows that some states allow for privately filed petitions to terminate parental rights, while others do not. See Matter of J.I.T., 866 S.E.2d 449, 450 (N.C. 2021) (allowing mother to file petition for termination of father's parental rights based on abandonment and failure to pay child support); In re Adoption of K.P.M., 201 P.3d 833, 836 (Mont. 2009) (holding stepmother had standing to file petition to terminate mother's parental rights). But see In re Adoption of J.F., 572 A.2d 223, 225 (Pa. 1990) (noting that "a parent may not petition to terminate the parental rights of the other parent unless it is established that there is an adoption contemplated by the spouse of the petitioner"); In re Swope, 476 N.W.2d 459, 460 (Mich. Ct. App. 1991) (holding parents lacked standing to petition for termination of parental rights where child was in foster care); Osborn v. Marr, 127 S.W.3d 737, 740 (Tenn. 2004) (holding mother lacked standing to petition for termination of father's parental rights where statute allowed only prospective adoptive parent(s), licensed child-

Stat. (stating a petition may be filed "by the [Department of Children and Families], the guardian ad litem, or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true"); Cashion v. Dep't of Health & Rehab. Servs., 630 So. 2d 1244, 1245 (Fla. 3d DCA 1994) (holding parents have standing to file petition because they have knowledge of facts alleged or are informed of them and believe they are true). In circumstances where one parent has assumed a prosecutorial role, statutory considerations unique to single-parent terminations are implicated.

The grounds for single-parent terminations are limited to those contained within section 39.811(6), Florida Statutes. Abandonment, as pled by the father in his petition, is not among them. However, both statutory factors identified by the trial court—chronic substance abuse and conduct that threatens the lives, safety, well-being, or health of the children irrespective of services—are authorized bases for single-parent termination. See § 39.811(6)(e), Fla. Stat. Thus, we examine each of the mother's assertions of error, in turn.

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placing agency, the child's guardian ad litem, a court appointed special advocate, or the department to do so); In Int. of H.J.E., 359 N.W.2d 471, 474 (Iowa 1984) (holding biological father was not authorized to file parental rights termination petition where statute allowed only child's guardian or custodian, department of human services, juvenile court officer, or county attorney to do so).

III. Three-Prong Test in Termination Cases

A petitioning party must first prove at least one of the enumerated statutory grounds for termination of parental rights by clear and convincing evidence. N.B. v. Dep't of Child. & Fams., 289 So. 3d 29, 32 (Fla. 3d DCA 2019). The trial court must then consider whether termination is in the best interests of the child. Finally, because the fundamental right of parents to procreate and make decisions regarding the care, custody, and control of their children is recognized by both the Florida Constitution and the United States Constitution, and the right "does not evaporate simply because they have not been model parents," Santosky, 455 U.S. at 753, a petitioning party must further prove that termination is "the least restrictive means of protecting the child from serious harm." Statewide Guardian Ad Litem Program v. A.A., 171 So. 3d 174, 177 (Fla. 5th DCA 2015).

The least restrictive means analysis springs from due process considerations. See S.M. v. Fla. Dep't of Child. & Fams., 202 So. 3d 769, 778 (Fla. 2016). When the state infringes upon this constitutionally protected relationship, it must do so in a narrowly tailored manner. A.J. v. K.A.O., 951 So. 2d 30, 32–33 (Fla. 5th DCA 2007). Thus, "the least restrictive means prong is implicit in Florida's statutory scheme based on the Court's obligation to construe statutes in a constitutional manner." S.M., 202 So. 3d at 778.

In proceedings culminating in termination, regardless of who files suit, "the end result is the same—the state, via the judicial branch, terminates a parent's constitutionally-protected parental rights." A.J., 951 So. 2d at 33. Consequently, least restrictive means applies equally to privately prosecuted termination petitions. Id.

The Florida Supreme Court has cautioned, however, that the least restrictive means prong "is not intended to preserve a parental bond at the cost of a child's future." S.M., 202 So. 3d at 778 (quoting Dep't of Child. & Fams. v. B.B., 824 So. 2d 1000, 1009 (Fla. 5th DCA 2002)). "Rather[,] . . . it simply requires that measures short of termination should be utilized if such measures can permit the safe re-establishment of the parent-child bond." Id. at 778–79 (quoting B.B., 824 So. 2d at 1009).

The test "focuses specifically on what actions were taken by the State before [the] filing [of] a petition to terminate the parent's rights." Id. at 778. Thus, ordinarily, it is satisfied where the parent was offered a case plan and provided with the help and services necessary to complete the case plan. Id. The Florida Supreme Court has further recognized in "extraordinary circumstances," including egregious abuse, termination without a case plan may satisfy constitutional concerns. In Int. of T.M., 641 So. 2d 410, 413 (Fla. 1994).

There is no statutory obligation to offer an agreement or plan in cases involving chronic substance abuse or conduct threatening the lives, safety, well-being, or health of the children irrespective of services. See § 39.806(2), Fla. Stat. The failure to do so, however, "does not eliminate [the petitioner's] burden to prove that termination is the least restrictive means, as the test is based upon fundamental parental rights." J.B. v. Dep't of Child. & Fams., 107 So. 3d 1196, 1202 (Fla. 1st DCA 2013).

IV. Chronic Substance Abuse

The mother contends the father failed to establish termination based on chronic substance abuse. Section 39.806(1)(j), Florida Statutes, authorizes termination when the parent has "a history of extensive, abusive, and chronic use of alcohol or a controlled substance which renders [him or her] incapable of caring for the child." This statutory ground supports termination only where the parent has "refused or failed to complete available treatment for such use during the 3-year period immediately preceding the filing of the petition for termination of parental rights." Id.

In the instant case, the father adduced competent, substantial evidence the mother suffered from chronic substance abuse disorder. Although the mother did not directly harm the children, there was testimony opining the children were at risk of anticipatory neglect in the event the

disorder was left untreated. The father therefore satisfied the first statutory prong.

With regard to the second prong, experienced treatment providers unanimously concluded that the mother required residential treatment. In the order of termination, the trial court concluded the mother refused or failed to submit to available treatment. A careful review of the record, however, yields the opposite conclusion.

A confluence of pandemic-related delays and capacity issues initially prevented enrollment. When restrictions were eventually lifted, the mother was placed on a waiting list for an available bed. The testifying social worker, however, was unable to confirm whether the mother was ever informed that a bed became available.

Further, the mother presented uncontroverted evidence she lacked adequate financial resources to pay for residential treatment. Under these circumstances, we conclude the father failed to present competent, substantial evidence the mother refused or failed to complete available treatment. See C.A. v. Dep't of Child. & Fams., 988 So. 2d 1247, 1249 (Fla. 4th DCA 2008) (reversing a guardianship order where the mother remained on a waiting list for treatment and lacked financial resources to comply with treatment).

V. Due Process Considerations

The mother next contends that she was denied due process. Her argument in this context is two-fold. First, she contends the failure to plead single-parent termination under section 39.811(6), Florida Statutes, rendered the proceedings defective, and then she asserts that reliance by the trial court on the unpled statutory grounds contained within section 39.806(1)(c), Florida Statutes, in support of termination deprived her of due process.

"Termination cases are frequently referred to as the civil death penalty for families." C.S. v. Dep't of Child. & Fams., 124 So. 3d 978, 981 (Fla. 4th DCA 2013) (Warner, J., dissenting). That is because "[f]ew forms of state action are both so severe and irreversible" as the termination of the parent-child relationship. Santosky, 455 U.S. at 759. Thus, "[a] court may not deprive a parent of a fundamental liberty interest in his or her offspring without an opportunity to assess and rebut the alleged reasons for termination." S.H. v. Dep't of Child. & Fams., 264 So. 3d 1094, 1096 (Fla. 5th DCA 2019).

We eschew the contention that a petitioning party is required to specifically plead single-parent termination. Instead, due process is satisfied when the petitioner alleges statutory grounds that the legislature has

authorized as a basis for single-parent termination. Such allegations place the parent on notice that, if proven, single-parent termination is proper. See Dep't of Child. & Fams. v. A.L., 307 So. 3d 978, 985 (Fla. 1st DCA 2020) ("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. . . . [T]he 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."). This is sufficient to satisfy due process.

Our analysis regarding the second asserted issue is slightly different. Here, the father alleged abandonment under section 39.806(1)(b), Florida Statutes, and chronic substance abuse under section 39.806(1)(j), Florida Statutes, in the petition. The trial court properly rejected abandonment, as it is not available to effectuate a single-parent termination, and additionally found that the mother engaged in conduct threatening the lives, safety, well-being, or health of the children. § 39.806(1)(c), Fla. Stat.

Reiterating the holding of this court in L.A.G. v. Department of Children & Family Services, 963 So. 2d 725, 726 (Fla. 3d DCA 2007), we conclude that terminating parental rights solely on a statutory ground not pled in the petition constitutes a denial of due process. See also T.H. v. Dep't of Child.

& Fams., 226 So. 3d 915, 918 (Fla. 4th DCA 2017) (reversing final judgment to extent it terminated parental rights based on unpled grounds); D.W.Q. v. A.B., 200 So. 3d 87, 88 (Fla. 5th DCA 2015) (reversing final judgment because it cited unpled grounds for termination); R.S. v. Dep't of Child. & Fams., 872 So. 2d 412, 413 (Fla. 4th DCA 2004) (reversing order of termination entered on unpled grounds because adequate notice and meaningful hearing were required); Z.M. v. Dep't of Child. & Fam. Servs., 981 So. 2d 1267, 1269 (Fla. 1st DCA 2008) (reversing order of termination where trial court first raised unpled ground after petitioner's case-in-chief). And, here, section 39.806(1)(c), Florida Statutes, was neither alleged in the petition nor referenced in the more definite statement. The ground was not argued in opening statement or closing argument. Indeed, "[t]he first time section 39.806(1)(c) appear[ed] in this case [was] in the written termination order." L.A.G., 963 So. 2d at 726. Because the father failed to prove alternative statutory grounds for termination, we conclude reliance on this ground was in error. See id.

VI. Conclusion

In closing, the mother presents compelling arguments that, under the unique circumstances of this case, the father failed to satisfy the least restrictive means test. Observing that the family court judge, Judge Valerie

Manno Schurr, astutely and commendably fashioned measures designed to provide the mother with an avenue for rehabilitation, while ensuring the children were "well cared for and secure," we note that many of the concerns inherent in termination cases are not present here. In re G.R., 793 So. 2d 988, 989 (Fla. 2d DCA 2001). Nonetheless, because the mother's first two issues on appeal are dispositive, we decline to reach whether the father satisfied his burden on this prong. Accordingly, we reverse and remand the final judgment under review.

Reversed and remanded.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

DCA CASE NO. 3D21-2419
L.T. CASE NOS: 21-15143

M.M.W., THE MOTHER
Appellant(s)/Petitioner(s)
Vs

J.W., THE FATHER
Appellee(s)/Respondent(s)

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

This is an appeal from the trial court's Final Judgment of Termination of Parental Rights, granting the Appellees' Petition to Terminate the Appellant's Parental Rights. The Appellant Monica M. Wahler shall be referred to as the "Appellant" or by her proper name. The Appellee, Joshua H. Wahler shall be referred to as the "Appellee" or by his proper names.

Citations to the Appendix attached to the Apellant's Initial Brief are denoted as "App. [letter]; [page number(s)]." The transcript from the trial held by the trial court on July 27, 2021, September 3, 2021, October 12, 2021, and November 16, 2021, will be denoted as "TR. 07/27/21, TR. 09/03/21, TR. 10/12/21, and 11/16/2021."

STATEMENT OF THE CASE AND FACTS

Appellant and Appellee were married on September 3, 2011, in Miami, Florida. During their marriage, the Appellant gave birth to two (2) minor children, L.S.W., born (03/10/14) and A.C.W., born (11/20/15). Three (3) years after the born of their youngest child, the Appellant, filed a Petition for Dissolution of Marriage on March 16, 2018. On October 23, 2018, the trial court filed a Final Judgment App. B, p. 33-36., incorporating a Marital Settlement Agreement

(MSA) and Parenting Plan (PP) App. A, p. 5-32. Under Clause VI & VII, of the Parenting Plan, the Appellant agreed to substance abuse testing, registration for Sober Link, and substance abuse counseling.

On May 2, 2019, the Appellee filed a Supplemental Petition for Modification of the Final Judgment App. C, p. 37- 58., premised on allegations of the Appellant's behavior. On May 19, 2020, the Appellant and Appellee entered into a Mediated Settlement Agreement (MSA) App. D, p. 59-70., that was adopted by the trial court to resolve the Supplemental Petition for Modification of the Final Judgment App. E, p. 71-79. The MSA gave the Appellant a series of requirements to complete prior to enjoying timesharing with her children. During this time, COVID made its way to Florida, causing many tasks in the MSA to be delayed for completion.

Less than a year after the filing of the MSA, on March 25, 2021, the Appellee filed a Petition for Termination of Parental Rights App. F, p. 80-97., which alleged grounds that were limited to abandonment and substance abuse. On April 25, 2021, the Appellant filed a Motion to Dismiss App. G, p. 98-100., alleging the Petition for Termination did not state a cause of action under § 39.806, specifically under § 39.806(j), as the Appellant argued there

had not been a three (3) year period preceding the filing of the petition in which the Appellant had refused or failed to complete available treatment. However, the trial court denied the Appellant's motion to dismiss and proceeded to move the case in dependency court forward.

On May 11, 2021, the trial court appointed Miguel Firpi, as the Guardian Ad Litem. App. H, p. 101-102. On May 21, 2021, the Appellee filed a more definite statement, defining with specificity the allegations for the factors determined under Florida Statute § 39.810. App. I, p. 103-111. On July 24, 2021, the Guardian Ad Litem filed his report. App. K, p. 120-143.

A three (3) day trial was held on July 27, 2021, September 3, 2021, and October 12, 2021. On November 16, 2021, the trial court gave an oral ruling following by the filing of a Final Judgment, in which the court made the following findings: App. O, p. 228-274

A. Grounds for severing one parents right without severing the other parents' rights were found under Section 39.911(6)

B. Ground for Termination of Parental Rights were found under Fla. Stat. Ann. § 39.806(1)(c)

C. Ground for Termination of Parental Rights were found under Fla. Stat. Ann. § 39.806 (1)(j)

D. Termination of Parental Rights was found to be the least restrictive means

E. Termination of Parental Rights was found to be in the Manifest Best Interest of the Children under Florida Statute § 39.810

The Appellant filed a timely Notice of Appeal in this Court (Third DCA Case No.: 3D21-2419)

SUMMARY OF ARGUMENT

The trial court's final judgment granting the termination of parental rights should be reversed for multiple reasons. The trial court granted relief not pled in the Appellee's Petition for Termination of Parental Rights when findings were made under Section 39.811(6) and Fla. Stat. Ann. § 39.806(1)(c). Thus, depriving the Appellant of due process. The trial court abused their discretion in relying on child hearsay statements and non-qualified witness testimony to substantiate the grounds to prove Fla. Stat. Ann. § 39.806(1)(c), after the Appellee failed to allege these grounds in his Petition for Termination. The trial court abused their discretion and irreversibly errored in striking the Appellant's rebuttal witness.

Moreover, these unreliable facts relied by the trial court in the final judgment do not satisfy the grounds for termination of parental rights nor do they satisfy that termination of parental rights would be the least restrictive means when there was a family law final judgment in place for the protection of the children to was working. Lastly, the trial court's final judgment not only violates the Appellant's due process, it violates public policy and the legislative intent behind Chapter 39 when the trial court relied on a family law

final judgment intended to serve as a "step-up" plan for timesharing under § 61.13 to serve as a case management plan under Chapter 39 to justify the termination of parental rights.

ARGUMENT

I. TERMINATION OF PARENTAL RIGHTS WAS NOT NECESSARY TO PROTECT THE CHILDREN AND IS AGAINST THE STATUTORY INTENT OF CHAPTER 39

The law does not take lightly the significance of terminating a parent's right to a child. The Florida Supreme Court continues to recognize that parents have a fundamental right to privacy in rearing their children. See, *e.g.*, *Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000). Consequently, the law ensures that there are procedural and substantive safeguards in place for the parent, while recognizing the paramount concern: the best interests of the child.

A. The Children Did Not Have a Need for "Permanency"

Permanency of placement for children is one of the main intents for terminating parental rights. Termination of parental rights is primarily a process by which parental rights are terminated and a child is permanently committed to the custody of the Department of Children and Families (the department) for the purpose of adoption

under *F.S.* Chapter 39. Permanency for the child, whether in the home of the parents or in another home, is the driving force behind *F.S.* Chapter 39 and the purpose of a termination of parental rights action.TERMINATIONOF PARENTAL RIGHTS, JUVL FL-CLE 17-1 c

B. <u>The Children Were Already Protected by the Family Court Final Judgment</u>

Although unified family court is a single court system with comprehensive jurisdiction over all cases involving children and relating to families, juvenile issues rely on statutes far different from statutes relied on for family issues. Juvenile court issues are expected to treat children as wards of the state where the state steps in to exercise guardianship over a child and apply the doctrine of parens patriae. Statutory provisions relating to juvenile proceedings are found primarily in *F.S.* Chapters 39, 984, and 985.HISTORY AND PHILOSOPHY OF THE JUVENILE COURT, JUVL FL-CLE 1-1. Family law issues are primarily found in *F.S* Chapter 61. The court under *F.S* Ch. 61 is required to evaluate all factors affecting the welfare and interests of the child, including without limitation any evidence of child abuse and, in addition to a long list of factors, any other fact considered by the court to be relevant FLA. STAT.

§61.13(3)(l) and (m) (2007). Upon a finding of detriment to the child, the court can order sole parental responsibility with or without visitation. Certainly, the court in a *F.S* Ch. 61, or other family law proceeding, can enter an order which limits or even eliminates visitation and contact by a parent with a child to protect the children from abuse by the parent. A trial court has broad discretion to restrict visitation when necessary to protect the welfare of the children, provided that restrictions on visitation must be supported by some evidence in the record showing that they are necessary. FLA. STAT. §61.13(2)(b) (2007). *Coyne v. Coyne*, 895 So. 2d 469, 473 (Fla. 2d D.C.A. 2005).

In the instant case, the Final Judgment entered on May 19, 2020, served to protect the children and provide them permanency. This final judgment was successfully working without the need to legally terminate the Appellant's *legal* parental rights. Terminating the Appellant's parental rights did nothing more then deprive the children of their right to child support, among other rights, such as inheritance rights.

C. <u>There Was No Need for State Protection of the Children</u>

Under public policy, the intent behind chapter 39 is to provide for prevention and intervention through the department's child protection system. Although some 3rd parties, have standing to initiate termination of parental rights proceedings, Chapter 39 was intended to be used by the department acting on behalf of the state to protect children, strengthen a child's family ties, and ensure permanent placement of a child by not allowing a child to remain in foster care longer than one (1) year.

Hence, the reason for the strict time requirements and state funded services offered to parents and children in dependency cases. The intent of Chapter 39 was to offer procedures for the *state* to protect children. The final judgment terminating parental rights in the instant case, goes against statutory intent by allowing a parent to use *F.S.* Chapter 39 to remedy non-compliance of a *F.S.* Chapter 61 family court judgment. Moreover, in *F.S.* Chapter 39 cases, where one parent has not been rehabilitated and the child is safe with the other parent, it is not proper to file to terminate parental rights. The court simply creates an order and places the child with the parent considered to be safe until the other parent can provide evidence to modify the restricted order. Fla. Stat. Ann. § 39.001 (West).

D. Public Policy Concerns

The Final Judgment in this case not only goes against *F.S.* Chapter 39 statutory intent, but it opens the door to parties using *F.S.* Chapter 39 to remedy non-compliance of *F.S.* Chapter 61 judgments. Clearly, there are remedies available for non-compliance of *F.S.* Chapter 61 judgments and they should be utilized. Furthermore, if courts allow termination of parental rights to be sought out from non-compliance of a *F.S.* Chapter 61 judgment, a party is deprived reasonable efforts a state is required to give parents in achieving rehabilitation. Thus, is creates a loophole in the system that lowers the standard in termination of parental rights cases and modifies the requirements for least restrictive means. This could open the door to an influx of parents seeking to evade child support for the benefit of the children.

Additionally, this final judgment alters and redefines harm to a child under *F.S.* Chapter 39, by re-defining "harm" to include a parent's inability to see a child based on a *F.S.* Chapter 61 order that was acting to protect the child. This would encourage a large influx of parents to file petitions to terminate parental rights under *F.S.* Chapter 39, to evade financial responsible to their children. Parents

involved in highly contentious litigation, where one parent's timesharing has been restricted and step-up plans ordered, would use *F.S.* Chapter 39, petitions for termination of parental rights as remedies rather than seeking petitions for modifications in family court cases. Thus, allowing this *F.S.* Chapter 39, final judgment to stand would be detrimental to the intent behind *F.S.* Chapter 39.

II. FAILURE TO ALLEGE SECTION 39.811(6) IN PETITION FOR TERMINATION OF PARENTAL RIGHTS

It is required, that *F.S.* 39.811(6)(e) be alleged in the termination of parental rights (TPR) petition if there is a chance that only one parent's rights will be terminated. *In the Interest of E.D.*, 884 So.2d 291 (Fla. 2nd DCA 2004). In the Appellee's Petition for Termination of Parental right failed to cite any statutory grounds for a termination of parental rights. Although, later Appellee stated he was seeking termination under § 39.806(j) and § 39.806(b). Regardless, the Petition for TPR, was never amended to include these grounds. More concerning is the trial court severed parental rights, under §39.811(6) and Fla. Stat. Ann. § 39.806(c), which was never pled by the Appellee. Thus, the Appellant's due process was violated when notice was never given for the Appellant to defend on these

grounds. It is well established in the law, that, "terminating parental rights on a ground not pled constitutes a denial of the procedural due process rights of notice and fair hearing." *S.H. v. Dept. of Children & Families*, 264 So.3d 1094 (Fla. 5th DCA 2019) Fla Stat. §39.811(6) main intent was to be used if there was continued harm to a child. Not only was the Appellant not given notice to this intended argument, but the trial court allowed testimony on this argument to be presented, while denying the Appellant the ability to rebut this testimony when the trial court struck the Appellant's rebuttal witness and denied the Appellant's ore tenus motion for continuance.

Despite these due process violations, there was no evidence of continuing serious harm on the children, that would warrant a single parent adoption. The Appellee attempts to argue the Appellants non-voluntary absence from the children's lives constitutes serious harm and terminating the parental rights of the Appellant would give the children closure. However, it has been similarly argued in cases where a parent is incarcerated, and the courts have not found that reason to terminate an incarcerated parents rights. In the 2nd DCA, "[A] trial court was precluded from terminating parental rights on the

statutory ground that continuing the parental relationship with the incarcerated parent would be harmful to the child under section 39.806(1)(d)(3) where no evidence regarding the impact of continuing the parent-child relationship is offered." *In re N.S.,* 898 So.2d 1194, 1198 (Fla. 2d DCA 2005). Parental rights are a "fundamental liberty interest" that cannot be terminated based on incarceration alone. *In re J.B.,* 923 So.2d 1201, 1205–06 (Fla. 2d DCA 2006).

In the instant case there was no evidence of continued serious harm to the children. In fact, Appellee's own witness Dr. Stone, testified that the children were in therapy to deal with not seeing their mother, and could give no evidence of any act the mother engaged in the harmed the children. A case that have relied on similar arguments and successfully demonstrated continued harm, had two (2) therapist who testified a parent was "extremely detrimental to the children's mental health," and would 'completely destroy' " the child *Cf. R.M. v. Dep't of Children & Families,* 847 So.2d 1103, 1104 (Fla. 4th DCA 2003) The therapist in the instant case said nothing that would rise to the level of the testimony given in *Cf. R.M. v. Dep't of Children & Families.*

For the above-mentioned reasons, the trial court's final judgment should be vacated based in the inability to correctly apply *F.S.* 39.811(6).

III. FAILURE TO ESTABLISH GROUNDS FOR TERMINATION OF PARENTAL RIGHTS UNDER § 39.806 (1)(C)

Under § 39.806(1)(c), it must be found that a parent's *continuing* involvement in a parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services.

Under § 39.806(1)(c), the trial court would need to make finding of facts to demonstrate the Appellant's behavior has caused some type of harm to the children that would continue should the Appellant continue to have legal parental rights. There was no evidence presented the Appellant had ever physically or mentally harmed the children. The trial court improperly relied of non-qualified witnesses to make a finding of emotional harm by relying on the Guardian Ad Litem and the Appellee testimony. Both, who never conducted any type of objective evaluation in the children emotional state.

A. Court Granted Relief Not Requested

The Appellee failed to allege § 39.806(1)(c), as grounds to terminate parental rights. Courts are not authorized to award relief not requested in the pleadings. *Romero v. Brabham*, 300 So. 3d 665 (Fla. Dist. Ct. App. 2020) To grant unrequested relief is an abuse of discretion by the trial court and is reversible error. *Id.* A court should not grant relief not requested in the pleadings absent proper notice to the parties. Granting unrequested relief absent proper notice is a violation of due process. U.S. Const. Amend. 14.*Romero v. Brabham*, 300 So. 3d 665 (Fla. Dist. Ct. App. 2020) Trial court cannot award relief where it has not been pled. *Musi v. Credo, LLC*, 273 So. 3d 93 (Fla. Dist. Ct. App. 2019), reh'g denied (Feb. 13, 2019) A trial court is without jurisdiction to award relief that was not requested in the pleadings or tried by consent. *MTGLQ Invs., L. P. v. Moore*, 293 So. 3d 610 (Fla. Dist. Ct. App. 2020)A trial court is without jurisdiction to award relief that was not requested in the pleadings or tried by consent; therefore, a judgment which grants relief wholly outside the pleadings is void. *Bank of Am., N.A. v. Nash*, 200 So. 3d 131 (Fla. Dist. Ct. App. 2016) Granting relief which was neither requested by

appropriate pleadings nor tried by consent is a violation of due process. U.S.C.A. Const.Amend. 14. *Id.*

The Appellee never pled during the trial he was intending to prove grounds under § 39.806(1)(c). The first time there was mention of this statute was during the oral ruling when the trial court added findings for grounds of termination under this statute.

B. Reliance of Non-Qualified Witness Statements to Establish Continuing Harm under § 39.806(c)

Under Fla. Stat. Ann. § 39.806(1)(c), the trial court overstepped its authority when it based its findings on non-qualified witness testimony to determine keeping the Appellant as the legal parent would cause future emotional and mental harm of the children because she was not capable of rehabilitation. There were no psychological evaluations performed for any of the children in this case nor was there any testimony given by a qualified professional who examined the children to make this type of finding. The trial court premises its findings from testimony given by the Appellee and the Guardian Ad Litem, who had only been assigned to the case for four (4) months and met with the children 3 times. Furthermore, the

scope of the guardian ad litems role was clearly addressed in the order of appointing guardian ad litem, which never included acting as an expert to determine continuing emotional harm of the children. Neither the Appellee nor the Guardian Ad Litem were qualified to make any finding of prospective emotional and mental harm to the children. The Appellant properly reserved this argument on the record. TR. 09/03/21 pp.40. It is well established in the law that a Guardian Ad Litem is not considered an expert for purposes of testifying that future emotional harm would occur if the Appellant's parental rights are not terminated because the Appellant was beyond rehabilitation. *See S.S. v. D.L.,* 944 So. 2d 553, 558 (Fla. 4th DCA 2007) ("We recognize that the guardian ad litem testified that S.S. was beyond rehabilitation. However, that opinion, which may yet turn out to be correct, was not expert."). Instead, the opposite was true. All experts who had been involved in the mother's care opined improvement was possible, and safe reunification remained both viable and reasonably foreseeable if the Appellant completed recommended treatment.

The Appellee's only qualified witness, Dr. Abarje determined the Appellant had the *capability to improve* with the correct treatment, as testified

APPELLANT COUNSEL:

Dr. Abarje, you give recommendations in your report because you suspect, if somebody follows those recommendations, their -- their condition will improve; correct?

DR ABARJE:

That is correct

APPELLANT COUNSEL:

All right. And you believe that if Ms. Wahler follows your recommendations, the ones that you gave, that her condition would improve; correct?

DR ABARJE:

Correct

APPELLEE COUNSEL:

It's not an entirely lost cause; is that true

DR ABARJE:

No….with significant treatment and patience***, <u>most</u> patients will achieve significant improvement***

TR. 09/23/21 pp. 34 & 35.

"'Where the record demonstrates [that] a reasonable basis exists to find the parent's problems could be improved, parental rights cannot be terminated."' *In the Interest of G.C.A.*, 863 So.2d 476, 479 (Fla. 2d DCA 2004), quoting *M.H. v. Dept. of Children & Families*, 866 So.2d 220, 223 (Fla. 1st DCA 2004). See *M.E. v. Florida Dept. of Children & Families*, 919 So.2d 637 (Fla. 3d DCA 2006).

C. <u>No Threat of Continuing Harm</u>

Further, the only testimony presented by a qualified witness, confirmed the children were *currently suffering* from not having the Appellant in their lives, as evidenced by the testimony of the children's therapist Dr. Jones, who made no statements that terminating the Appellants parental rights would alleviate the current harm to the children because the nature of the harm is the children's inability to see the Appellant. Further, Dr Jones had no knowledge of whether rehabilitation would be possible for the Appellant.

APPELLEE COUNSEL:

Is part of your treatment with the children addressing any emotional

impact that they have had regarding their relationship with their mother?

DR JONES:

Yes.

APPELLEE COUNSEL:

Would you say that's the primary thing that you treat them for?

DR JONES:

Yes.

APPELLEE COUNSEL:

And do you believe, moving forward to the future, that that's something that you ought to continue treating them for?

DR JONES:

Yes.

APPELLEE COUNSEL:

Is one sub-topic of that addressing the lack of involvement that the mother has had in their lives?

DR JONES:

Yes.

TR. 09/23/21 pp. 12

Thus, terminating the Appellant as the *legal* parent would <u>not</u> alleviate the children's current suffering nor allowing the Appellant

to retain legal rights to her children would *not harm them anymore then they currently were being harmed*. The Appellant had not been able to have a meaningful relationship with the children over the past two (2) years.

It is illogical for the trial court to believe permanently removing the parents' legal rights and not allowing any chance for these two young children to ever reunite with the Appellant would alleviate continued harm to the children when evidence clearly demonstrates the children's current harm is a result of not being able to see the Appellant. Further, the termination of the Appellant's legal rights not only secures the children will have no hope to ever see the Appellant during their childhood, but it takes away the children's right to receive child support from the Appellant and terminates their inheritance rights. Thus, terminating the Appellant's parental rights clearly would cause the children more harm than they are already experiencing. Additionally, the type of harm alleged does not rise to the level of continuing harm in cases that have successfully argued emotional harm, as previously referenced.

Under Fla. Stat. Ann. § 39.806(1)(c), the trial court overstepped its authority when it based its findings on the Appellant's substance

abuse with no findings of a *nexus* between harm to the children and the Appellant's substance abuse, other than bringing closure to the young children's lives. The trial court flawed in finding that the need for closure in the children lives would threaten the life, safety, well-being, physical, mental or emotional harm to the children and meet the requirements under this section of the statute for grounds to terminate parental rights. To terminate parental rights on the ground of conduct, there must be a nexus between the conduct and the abuse, neglect, or specific harm to the child. West's F.S.A. § 39.806.*D.P. v. Dep't of Child. & Fam. Servs.*, 930 So. 2d 798 (Fla. Dist. Ct. App. 2006)

In the instant case, the most the trial court could find were a few isolated events years ago, such as on one occasion the Appellant got the children to school late because she was asleep or that the Appellant told the children during a video conference that she would see them soon and never did. There was no evidence over the past two years that the Appellant's conduct is directly harming the children. Thus, it can be concluded that any harm to the children is a direct result of not being able to see the Appellant.

The Appellee's argument that giving the young children closure would eliminate their current harm, is speculative at best. The trial court would have to justify this with evidence that would *clearly and certainty* predict this. The issue in termination of parental rights cases on ground that the parent's continuing involvement with children threatens their lives, safety, and well-being, irrespective of services offered, is whether future parental behavior, which will adversely affect the child, can be clearly and certainly predicted, i.e., whether it is likely to happen or expected. Fla. Stat. Ann. § 39.806(1)(c*).Q.L. v. Dep't of Child. & Fams.,* 280 So. 3d 107 (Fla. Dist. Ct. App. 2019) There was qualified witness who offered testimony that closure would clearly and certainty eliminate the children emotional harm.

Cases who determined that a parents substance abuse was a main factor to grounds for termination of parental rights, were more concerned about finding permanency for the children. *W.N. v. Dep't of Child. & Fam. Servs*., 919 So. 2d 589 (Fla. Dist. Ct. App. 2006). However, in the instant case, the children continue to reside in the care of the Appellee permanently. Thus, permanency is not an issue.

D. Reliance of Child Hearsay Statements to Meet Requirements Under § 39.806(c)

Under Fla. Stat. Ann. § 39.806(1)(c), the trial court overstepped its authority when child hearsay statements were relied on despite the standing objection on hearsay. Child hearsay statements brought as a statement under Fla. Stat. Ann. § 90.803 requires there to be a hearing on the reliability and unavailability on the child. During the trial Appellee argues these statements should come in under *Adamson v. State*, 569 So. 2d 495, 495 (Fla. Dist. Ct. App. 1990) because the Appellee claims the Appellant opened the door by questioning the Appellee on the Guardian Ad Litem report during cross examination. However, the only question asked referencing the Guardian Ad Litem report was confined to the Appellee's role in how the children got the idea that the court would decide whether they could see the Appellant again. TR. 09/23/21, pp. 66 & 67. In *Adamson v State*, the trial court allowed proper *limited* inquiry to question asked on a statement that would otherwise be inadmissible hearsay. The trial court never opened the door to all statements that constitute inadmissible hearsay, as the trial court did in this case. The trial incorrectly relied on all the inadmissible hearsay statements

of the very young minor children for the determination that the Appellant had caused her children harm. Further, the trial court did not confine the children's statements to the limited statement about how the children would get the idea that the court would determine whether they could see the Appellant again. Thus, that should be the only statement that could be brought into evidence. The Appellant properly reserved the objection to hearsay, of the children's statements. TR. 09/03/21 pp.42.

E. Denial of Rebuttal Witness to Negate Facts Alleged under § 39.806(c)

Under Fla. Stat. Ann. § 39.806(1)(c), the trial court overstepped its authority when the Appellants rebuttal witness was not allowed to rebut the testimony of the Guardian Ad Litem, to the likelihood of continued harm to the children. Appellant argues that a continuance should be granted to allow rebuttal evidence to rebut the statements of the Guardian Ad Litem, who testified outside the report, offering non-qualified testimony to prospective harm to the children. In response, the trial court denied the Appellants ore tenus motion to continue the trial claiming a continuance would be prejudicial to the children. However, there was no evidence suggesting how this would

be prejudicial to the children. TR.10/12/21 pp. 6-20. It is well established in Florida case law, the analysis in determining when to strike a witness or continue a trial. Before exercising its discretion to admit or exclude late-disclosed exhibits or witness testimony, trial court must analyze the following factors to determine whether the objecting party would be prejudiced: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case or other cases. *Montero v. Corzo*, 320 So. 3d 976 (Fla. Dist. Ct. App. 2021). In the instant case, the trial court never applied this analysis and simply stated the children would be prejudiced.

The Appellant requested a continuance to allow the Appellee to take the deposition of the rebuttal witness, however, the trial court denied it, despite the Appellant reserving this argument for the record. It is important to note, the Appellant introduced a rebuttal witness after the "surprise in fact" testimony of the Guardian Ad Litem testifying outside the scope as a Guardian Ad Litem report. Yet,

the trial court, abused its discretion in not allowing the Appellant to provide testimony from their rebuttal witness.

To strike a parties witness is considered the most severe sanction. In a record in medical malpractice action brought by wife of deceased patient against hospital and surgeon did not support trial court's exclusion of testimony by wife's sole emergency resuscitation expert witness as to the possibility, raised by hospital and surgeon, that patient's respiratory failure was caused by inadvertent stimulation of the vagus nerve, despite contention that wife's designation of witness did not state that he would testify about vagus nerve; such testimony was inferable from designation that witness would discuss standard of care on resuscitation, and any surprise to hospital and surgeon could be remedied by means less drastic than exclusion of the testimony. *Wax v. Tenet Health Sys. Hosps., Inc.,* 955 So. 2d 1 (Fla. Dist. Ct. App. 2006)

If a disclosed expert witness's trial testimony is even arguably within the scope of expected testimony disclosed in the designation of the witness, exclusion of the testimony by the witness should not be employed. *Id.* In the instances where a good faith misimpression as to the scope of a disclosed expert witness's testimony occurs, the

trial judge has other remedies besides exclusion of the disputed testimony to correct any injustice; these would include a delay in the testimony of that witness to allow additional discovery testimony of the proposed witness or, in an extreme case, giving the party claiming to have been aggrieved by the designation the right to call additional experts. *Id.* Coworker should have been allowed to testify in workers' compensation proceeding to rebut employer's misrepresentation defense, even though coworker was not on pretrial list of witnesses, where there was no showing or assertion of prejudice or other compelling circumstances warranting exclusion of that rebuttal witness. *Walters v. Keebler Co.,* 652 So. 2d 976 (Fla. Dist. Ct. App. 1995) Exclusion of unlisted witness' testimony is a drastic remedy which should pertain in only the most compelling circumstances. *Id.*

Unlisted witness should generally be allowed to testify when opposing party is not prejudiced by late disclosure and compelling circumstances are not otherwise shown. *Id.* Thus, the trial court should have allowed the testimony of the Appellant's rebuttal witness prior to relying on statements made by the Guardian Ad Litem for their final judgment.

IV. FAILURE TO ESTABLISH GROUNDS FOR TERMINATION OF PARENTAL RIGHTS UNDER § 39.806 (1)(j)

Under Fla. Stat. Ann. § 39.806 (1)(j), the trial court did not have competent substantial evidence that the Appellant had refused or failed to complete available treatment (3) years prior to the filing of the petition for termination. The only evidence suggesting any agreement for treatment of the Appellant dated back to September 11, 2018 in the Final Judgment for Dissolution of Marriage and a 2nd agreement resolving the Supplemental Petition for Modification of Final Judgment that was entered into on May 19, 2020. However, there were no due dates, indicating when treatment was to be completed by nor was there any indication that failure to complete treatment by a specific date would result in the Appellee seeking termination of parental rights.

A. Improperly Allowing the Final Judgment to Serve as a Case Management Plan

Under Fla. Stat. Ann. § 39.806 (1)(j), the trial court improperly relies on facts never admitted into evidence to demonstrate the Appellant had suffered from issues with substance abuse since 2016. There was no evidence presented of any formalized agreement to treatment prior to 2018. Whether the Appellant has a history of

substance abuse, is irrelevant, to the issue of a refusal of available treatment during the (3) year period immediately preceding the filing of the petition for termination of parental rights. The trial court improperly relies on *F.S.* Chapter 61 consented final judgment in determining the Appellant refused available treatment by substituting this agreement to take the place of a case management plan. It was clear that non-compliance of *F.S.* Chapter 61 consented final judgment would result in restricted contact with her children. However, there was no clauses indicating this *F.S.* Chapter 61 consented final judgment was going to serve as a case management plan to determine whether a single parent adoption and termination of parental rights would be pursued. There is no evidence of a breach of this agreement, other then no complying with drug testing for 52 weeks from the date the agreement was made. However, all other clauses never indicated any due dates that tasks were to be completed by nor did the Appellant consent to the failure of completing all task by March of 2021, would it result in terminating her parental legal rights.

The Appellant's Due Process was violated when her rights were terminated based on non-compliance of *F.S.* Chapter 61 consented

final judgment without *reasonable efforts* provided to her in achieving rehabilitation. Furthermore, this *F.S.* Chapter 61 consented final judgment did not give her any assistance, goal dates, deadlines to complete each task, and she was not given notice that her parental rights would be terminated if she breached this stipulation. The only notice the Appellant was given was after the petition for termination of parental rights was filed.

Termination of Parental Rights cases are generally of two types: those in which the child was adjudicated dependent and the parents were offered an opportunity to resume custody through substantial compliance with a case plan (see *F.S.* 39.806(1)(e); § 17.2.C), and those in which no case plan was offered to the parents (see *F.S.* 39.806(1)(a), (1)(b), (1)(c), (1)(d), (1)(f)-(1)(n); § 17.2.B).

The essence of the agreement was not understood nor believed that is would serve as a last measure for the Appellant to comply in furtherance of the Appellee seeking to terminate her parental rights. Thus, using this agreement as evidence to fulfill § 39.806 (1)(j), was flawed.

Essentially, the trial court attempted to use the *F.S.* Chapter 61 consented final judgment, in place of a *F.S.* Chapter 39 case plan.

Unlike, the *F.S.* Chapter 61 consented final judgment there are various requirements in a *F.S.* Chapter 39 case plan. Requirements for case plans are found in *F.S.* 39.6011

The Appellee's witness, Erica Ruiz, testified that because of COVID there was difficulty initially getting into in-patient treatment and the Appellant was seeking to meet the requirements from the May 2020 stipulation during the height of the COVID pandemic. TR 07/27/21 pp.97. Thus, the trial court did not place any weight on whether treatment had been available or was affected by COVID when determining the Appellant's parental rights should be terminated un 39.806(1)(j). Despite this, the facts fail to demonstrate that it had been (3) years preceding the filing of the petition for termination of parental rights on March 25, 2021.

V. TERMINATING THE APPELLANT'S PARENTAL RIGHTS IS NOT THE LEAST RESTRICTIVE MEANS

A. Children Were Currently Being Protected by the Family Court 2020 Final Judgment

Under the Least Restrictive Means analysis, Terminating the Appellants rights was not the least restrictive means when the children were not in foster care and had been living free of any

harm with the Appellee for the past (2) years. There were no instances since the May 2020 stipulation was entered that would rise to the level of serious harm to the children. Thus, *F.S.* Chapter 61 consented final judgment had successfully worked to keep the children from harm for the past two years.

Multiple appellate districts have established a termination of parental rights would be the least restrictive means if it kept the children from serious harm. *Padgett v. Dept. of Health & Rehabilitative Services*, 577 So.2d 565 (Fla. 1991); *W.R. v. Dept. of Children & Families*, 928 So.2d 414 (Fla. 1st DCA 2006); *C.B. v. Dept. of Children & Families*, 874 So.2d 1246 (Fla. 4th DCA 2004). However, evidence in the instant case, does not rise to the level of serious harm. Thus, the trial court failed to properly apply the least restrictive means analysis.

B. <u>Failure to Prove Reasonable Efforts</u>

Additionally, an important part of the least restrictive means test is the state's efforts to provide reasonable efforts to a parent while working on a case plan to be rehabilitated. Although the state was not involved in this case, the Appellee attempts to replace the normal method of rehabilitation, by use of a case plan, with the *F.S.* Chapter

61 consented final judgment. Thus, the Appellee should have provided evidence of his reasonable efforts to assist the Appellant in achieving rehabilitation. It is well established in case law for all districts in Florida, the burden of the department to demonstrate reasonable efforts as an integral part of the least restrictive means test. Appellate Courts, specifically seek out actions were taken by the State before filing a petition to terminate the parent's rights." *S.M. v. Florida Dept. of Children & Families*, 202 So.3d 769, 778 (Fla. 2016). To meet this standard, the department "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. 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. *S.M.*, 202 So.3d at 778. "To satisfy the least restrictive means prong, DCF must 'ordinarily' prove that before it files a petition to terminate the parent's rights, DCF made a 'good faith effort to rehabilitate the parent and reunite the family."' *S.M.*, 202 So.3d at 788, quoting *Florida Dept. of Children & Families v. F.L.*, 880 So.2d 602, 609 (Fla.2004).

Under unique circumstances, the state does not have to provide a case plan to a parent. Under [*F.S.* 39.806(2)], reasonable efforts to preserve and reunify families are not required when termination is proven under sections 39.806(1)(b) through (d) or (f) through (m)." In *In the Interest of T.M.*, 641 So.2d 410 (Fla. 1994), the court held that TPR without the use of plans or agreements was the least restrictive alternative in cases of severe or continuing abuse or neglect or in cases of egregious abuse. See *In the Interest of Z.C.(1)*, 88 So.3d 977 (Fla. 2d DCA 2012), *disapproved in part on other grounds* 192 So.3d 592. However, the instant case does not meet the criteria for these exceptions.

Furthermore, there were no issues of permanency for the children. The children were not at any risk that would validate not allowing the Appellant more time to comply with a proper treatment program which all parties testified could improve the Appellants condition. Unlike well-established case law, where the appellate court found the Department of Children and Families failed to prove that any measures short of termination would have been appropriate, as required for termination of mother's parental rights**;** there was no impediment to allowing mother time to undergo further therapy and

submit to psychological evaluation, as foster parents, including relatives, expressed willingness to continue to foster children. *I.T. v. Dep't of Child. & Fams.*, 277 So. 3d 678 (Fla. Dist. Ct. App. 2019). *I.T. v. Dep't of Child. & Fams* demonstrates the intent behind least restrictive means, suggesting the issue of permanency and stability for children as one of the main considerations in a termination for parental rights.

In the instant case, like *I.T. v. Dep't of Child. & Fams*, the children had been permanently residing with the Appellee and would continue to reside with him. Thus, there was no reason to not allow the Appellant more time to seek treatment, prior to the termination of her parental rights. The trial court failed to establish any measures short of termination to be used to protect the child from harm. Further, the trial court solely relies on the testimony of non-qualified guardian ad litem, who has never worked in a dependency case and recommended termination of parental rights to give the children closure. There was no testimony given by any witness to establish serious harm on the children as a result of maintaining her legal parental rights. Specifically, there was no therapist who could provide testimony to

any serious harm the Appellant had perpetrated onto the children in two (2) years.

Although, the trial court attempts to justify their ruling by claiming the Appellant was given multiple chances to comply with treatment. The trial court fails to recognize the assistance a parent receives from the state in a case management plan, which includes financial assistance, goal dates, clear understanding of the intent behind each case plan, among many other assistive measures assumed by the state to demonstrate the state met their burden to provide reasonable efforts in assisting parents to achieve rehabilitation. Thus, how can the trial court determine the Appellant was not in compliance when there were no goals dates indicated putting her on notice to when various tasks should be completed.

The trial court failed to properly apply the least restrictive means test when there was no evidence from the Appellee as to reasonable efforts made to assist the Appellant in achieving rehabilitation nor was there any evidence the Appellant met the criteria for the exception to not be afforded a case plan prior to the termination of her parental rights.

The trial court finds that there is no reasonable basis to believe the parent will improve". However, the trial court fails to address improvement was unlikely even with *good faith efforts to assist the parent***.** *See E.R. v. Dep't of Children & Family Servs.,* 937 So.2d 1196, 1198–99 (Fla. 3d DCA 2006); *accord L.A.G. v. Dep't of Children & Family Servs.,* 963 So.2d 725, 727 (Fla. 3d DCA 2007) (reversing a termination of parental rights where the record was "replete with" evidence of the mother's efforts to comply with the case plan*).D.M. v. Dep't of Child. & Fams.*, 79 So. 3d 136, 139 (Fla. Dist. Ct. App. 2012) Thus, the Appellant, was never given good faith efforts by a 3rd party, such as the state, in achieving rehabilitation.

CONCLUSION

Based upon the arguments and citations of authority cited herein, this Honorable Court should VACATE the trial court's Final Judgment for Termination of Parental Rights and remand this cause to the trial court for further proceedings consistent herein.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to the font and size requirements set forth in Fla. R. App. P. 9.210(a)(2), the Appellant's Initial Brief is in compliance with the requirements set forth in Florida Rule of Appellate Procedure 9.045(b), in that the foregoing Initial Brief was prepared using Bookman Old Style, 14- point.

By: /s/ Leslie A Ferderigos
LESLIE A FERDERIGOS
Florida Bar 0127526

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by e-mail to all attorneys/interested parties identified in the Portal Electronic Service List on this 19 day of January 2022.

By: /s/ Leslie A Ferderigos
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Florida Bar 0127526