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Committee on Children, Families, and Elder Affairs

REVIEW OF SECTION 63.082(6), F.S., INTERVENTION BY PRIVATE ADOPTION ENTITIES IN THE ADOPTION OF CERTAIN CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF CHILDREN AND FAMILIES

Issue Description

Section 63.082(6), F.S., provides that private adoption entities may intervene in the adoption proceeding of a minor child who is in the custody of the Department of Children and Family Services (department or DCF) if (a) parental rights have not been terminated; (b) the entity produces a favorable preliminary home study of the prospective adoptive parents; and (c) valid consents for placement of the minor with the entity have been obtained. If the court finds the adoption is in the best interest of the child, it shall enter an order immediately transferring custody to the prospective adoptive parents.

Private adoption practitioners report that there are widespread differences in adherence to this statute around the state. In several counties, intervention occurs without issue; in others, DCF and its community-based providers (CBC) are reported to object to the intervention and slow the private adoption process.

Background

Adoption is the “act of creating the legal relationship between parent and child where it did not exist.”¹ The Florida Adoption Act was enacted in 1973,² to “protect and promote the well-being of persons being adopted and their birth and adoptive parents and to provide to all children ... a permanent family life.”³ A major rewrite of the Florida Adoption Act occurred in 2001, to “provide safeguards, uniformity, and clarification regarding proceedings for termination of parental rights (TPR) and finalization proceedings in adoptions.”⁴ Due to substantial challenges the 2001 adoption reform encountered, the Legislature revised adoption law in 2003.⁵ Most recently, in 2008 the Legislature addressed issues relating to adoption, termination of parental rights, and the rights and responsibilities of unmarried biological fathers,⁶ and pertinent to this report, amended s. 63.082(6)(b), F.S.⁷

Adoption via Dependency — Post-TPR

The laws relating to protection of children who are abused, abandoned, or neglected are found primarily in Chapter 39, F.S., the dependency statutes. When a child is adjudicated dependent, DCF must ensure that the child has a plan which will lead to a permanent living arrangement.⁸ If a child in foster care will not be reunited with a parent, the department will initiate a proceeding to terminate parental rights (TPR).

¹ Section 63.032(2), F.S.

² Chapter 73-159, s. 2, Laws of Fla. Chapter 63, F.S., the Florida Adoption Act, governs all Florida adoptions.

³ Section 63.022(3), F.S.

⁴ Comm. on Child & Family Security, House of Representatives, *House of Representatives as Further Revised by the Child & Family Security Final Analysis, CS/HB 141* (June 27, 2001) (on file with the committee)

⁵ See ch. 2003-56 and ch. 2003-58, Laws of Fla.

⁶ See ch. 2008-151, Laws of Fla.

⁷ *Id.* at s. 10. Compare s.63.082(6)(b), F.S. (2008) (“Upon execution of the consent of the parent, the adoption entity **may intervene** in the dependency case...”) with s. 63.082(6)(b), F. S. (2007) (“Upon execution of the consent of the parent, the adoption entity **shall be permitted to intervene** in the dependency case...”).

⁸ See generally Part IX, Chapter 39, F.S., permanency.

Section 39.810, F.S., requires that the court must consider the “manifest best interests of the child” in a TPR proceeding, which includes an evaluation, among other factors, of:

- suitable permanent relative custody arrangements;
- the ability of the birth parent(s) to provide for the material needs of the child;
- the ability of the birth parent(s) to care for the child’s health, safety, and well-being upon the child’s return home;
- the present and future needs of the child; and
- the love, affection and emotional ties between the child and his or her parent(s), siblings, or other relatives.

In making this determination, the statute prohibits the court from comparing the attributes of the parent(s) and anyone providing a present or potential placement for the child.

If the court determines that it is in the manifest best interests of the child for their parent’s rights to be terminated, then the TPR order is entered and the child is placed in the custody of the department for permanent placement. The Legislature has determined that “adoption, under chapter 63, is the primary permanency option.”⁹

During Fiscal Year 2008-2009, the Office of State Courts Administrator reported that 2,170 juvenile dependency adoption petitions were filed statewide;¹⁰ these petitions are filed pursuant to ss. 39.812(5) and 39.813, F.S., for the adoption of a child in foster care after these parents’ rights have been terminated.

Adoption via Dependency — Pre-TPR

Some birth parents decide, as the dependency process unfolds but prior to the termination of their parental rights, to work with a private adoption entity¹¹ to find a permanent home for their child. The Legislature has encouraged their constitutional right¹² to do so:

It is the intent of the Legislature to provide for cooperation between private adoption entities and the Department of Children and Family Services in matters relating to permanent placement options for children in the care of the department whose birth parents wish to participate in a private adoption plan with a qualified family.¹³

In order to assert this right on behalf of the birth parents, private adoption entities may be able to intervene in dependency proceedings pursuant to s. 63.082(6), F.S. The law provides:

- The adoption entity may intervene in the dependency case as a party when it
 - obtains consents to adopt from the parents of a minor child in the custody of the department,
 - prior to the termination of their parental rights.
- The adoption entity must provide the court with a preliminary home study of the prospective adoptive parents with whom the child will be placed.
- The court must determine
 - whether the prospective adoptive parents are properly qualified to adopt the child, and
 - whether the adoption is in the child’s best interest.

⁹ Section 39.621(6), F.S.

¹⁰ E-mail to the committee from Brenda Johnson, Office of State Courts Administrator, 10/1/09 at 11:29 a.m.

¹¹“Adoption entities” are DCF; a licensed child-placing (adoption)agency; a registered or approved child-caring agency; or a Florida attorney who intends to place a child for adoption. See ss. 63.023(3), (6), (9), (11), F.S.

¹² Parents have a fundamental liberty interest in determining the care and upbringing of their children. The interest is protected by both the Florida and United States Constitutions. See *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996); FLA. CONST. art. I, s. 23. See also discussion in *Adoption Miracles*, *infra*.

¹³ Section 63.032(5), F.S.

The statute requires that the dependency court, in determining the best interest of the child prior to TPR, consider

- the birth parents' rights to determine an appropriate placement for their child,
- the permanency offered,
- the child's bonding with any potential adoptive home in which the child has been residing, and
- the importance of maintaining sibling relationships.¹⁴

If the court decides that it is in the child's best interest, the dependency court will order the transfer of custody of the minor child to the prospective adoptive parent under the supervision of the adoption entity, who shall provide monthly reports to the department until the adoption is finalized.¹⁵

Senate professional staff surveyed the 20 circuit courts to determine how often private adoption entities intervene in dependency cases; 14 responded.¹⁶ It must be noted that no circuit tracks this specific activity. Each response was compiled by querying judges, lawyers, guardians, or court personnel who may have had knowledge of these proceedings. Thus qualified, in Fiscal Year 2008-2009, between 19 and 24 cases¹⁷ were filed across the responding circuits.

Findings and/or Conclusions

Private adoption practitioners report that there are widespread differences in adherence to this statute around the state. In several counties, intervention occurs without issue; in others, DCF and its community-based providers (CBC) are reported to object to the intervention and slow the private adoption process. Reports from case law and stakeholder comments seem to bear this out.

In *Adoption Miracles*,¹⁸ a 2005 decision arising from a case in Hillsborough County, the court explained the standard it must apply when an adoption entity intervenes in a dependency case:

We note that the "best interest" determination to be made [pursuant to s. 63.082(6)(c), F.S.] under these circumstances is somewhat unique [as compared to the "manifest best interests" standard in s. 39.810, F.S.]. If the birth parent has executed a valid and binding consent to an adoption, the court is not making a comparative assessment of the birth parents versus the prospective adoptive parents. Further, section 63.082(6)(d) specifically provides that the court "shall give consideration to the rights of the birth parent to determine an appropriate placement for the child" --- an explicit recognition of the parents' constitutional right to the care, custody, and control of their children. Thus, the court is also prevented from comparing the birth parents' choice of prospective adoptive parents with other potential placements that the court or the Department might choose for the child. Viewed in this light, **the "best interest" analysis requires a determination that the birth parent's choice of prospective adoptive parents is appropriate and protects the well-being of the child; not that it is the best choice as evaluated by the court or the Department in light of other alternatives.** (Emphasis supplied; interior citations omitted.)¹⁹

It appears that this "unique" best interest determination is fueling what has been described by some as a "turf war" among the stakeholders in this process. For example, our survey asked, in how many cases did DCF or the Guardian ad Litem (GAL) object to intervention by the adoption entity pursuant to s. 63.082, F.S. Of the 19 to 24 intervention cases reported, an objection was raised in seven. Detailed responses suggest that the basis for more than half the objections was the Chapter 39 manifest best interest of the child standard. One GAL program noted:

¹⁴ Section 63.082(6)(d), F.S.

¹⁵ Section 63.082(6)(c), F.S.

¹⁶ Survey responses on file with the committee.

¹⁷ One circuit responded "no more than 5" in response to the question, "In how many cases did an adoption entity petition the court to intervene in a dependency case pursuant to s. 63.082(6), F.S.?" For the purposes of the questions, "adoption entity" does not include the Department of Children and Families.

¹⁸ *In the Interest of S.N.W., a child. Adoption Miracles, LLC v. S.C.W. and Department of Children and Family Services*, 912 So.2d 368 (2d DCA 2005)

¹⁹ *Id.* at 373FN 4.

[Our] position is that the best interest of the child standard set forth in Chapter 39 should be the determining factor in these cases. The Court should not allow an adoption entity to intervene in a dependency unless the Court determines it is in the best interest of the child.

A circuit judge commented:

...If I am hearing a case involving the termination of parental rights, it makes no sense at all as to why we would trust the parents to make a decision based on the child's best interest. If they had done this previously, we would not be at TPR. In order to have a TPR hearing, the parents have been provided a number of services and have had ample opportunity to provide names of people who may alternatively care for their children. What normally happens is that the parents find people who will either allow them full and complete access to the children after adoption or actually give them the children. This is obviously not in the children's best interest....

Despite the objections and the fact that the statutory standard for intervention is permissive, the courts denied the petitions for intervention in only one of the 19 to 24 cases reported.²⁰

Adoption entities have also expressed frustration with the operation of the statutory process. Their position is straightforward: If the entity has the consent of the birth parents and a suitable home study of the prospective adoptive parents, the requirement of pleading a case for intervention is just another delay in permanency for the child.²¹ Further, most prospective adoptive placements under s. 63.082(6) are not the "sham" arrangements suggested above, but are genuine attempts by the birth parents to place their child with a family who can better provide for him or her.²² The parents' constitutional right to choose an adoptive placement for their child should be expedited, and the child should move out of the dependency system as soon as possible.

Options and/or Recommendations

The survey respondents and stakeholders with whom we spoke agreed that the operation of s. 63.082(6), F.S., could be improved. The following options express the range of amendments offered for consideration.

- **Adopt the Chapter 39 Manifest Best Interest of the Child Standard**
Section 63.082(6)(d), F.S., could be amended to require that the court determine the best interest of the child by using the (post-TPR) standards set out in Chapter 39.²³ This could safeguard against potential sham placement arrangements and maintain stability in the child's foster care placement.
- **Maintain the Existing Best Interest Standard and Reinstate Mandatory Intervention**
Maintaining the existing (pre-TPR) best interest standard will continue to recognize the parents' right to make decisions regarding their children.²⁴ Section 63.082(6)(d), F.S., could be amended to unequivocally allow for intervention by the adoption entity in the dependency proceeding, which would help focus the inquiry at hearing on the best interest of the child.
- **Remove the Matter from Dependency Court Jurisdiction**
Section 63.082(6), F.S., could be amended to require, upon filing of the consents and the preliminary home study of the prospective adoptive parents, that the court transfer jurisdiction of the case to the court where the adoption proceeding has been filed, *i.e.*, remove jurisdiction from the dependency

²⁰ The intervention was reportedly denied on the basis that the proposed intervenor was not an adoption entity. *See* Survey Responses (on file with the committee).

²¹ Discussion with Madonna Finney, Esq., July 21, 2009

²² Conversation with Charlotte Danciu, Esq., May 15, 2009.

²³ *See* Adoption via Dependency — Post-TPR *supra* at page 2.

²⁴ *See* Adoption via Dependency — Pre-TPR *supra* at page 3.

court. Because the matter will then proceed as a typical adoption case, the best interest standard in s. 63.082(6)(d) and the requirement to provide monthly supervision reports to DCF in s. 63.082(6)(c) can also be deleted.

Senate professional staff recommends that the Legislature consider reinstating mandatory intervention and maintaining the existing best interest standard. That option appears to strike a balance between the constitutional rights of the birth parents and the concerns expressed by dependency practitioners.