A.M. v. D.S.

Court of Appeal of Florida, First District

March 26, 2021, Decided

Nos. 1D19-1853, 1D19-1855 (Consolidated)

Reporter
314 So. 3d 747 *; 2021 Fla. App. LEXIS 4366 **; 46 Fla. L. Weekly D 682; 2021 WL 1152402

A.M., Father of S.K.M. and E.B.M., Appellant, v. D.S. and C.S., Appellees.

Prior History: **[**1]** On appeal from the Circuit Court for Nassau County. Robert M. Foster, Judge.

Counsel: Troy M. Farquhar and Aaron J. Irving of Integrity Law, P.A., Jacksonville, for Appellant.

Michael J. Korn of Korn & Zehmer, P.A., Jacksonville, for Appellees.

Judges: TANENBAUM, J. RAY, C.J., and ROWE, J., concur.

Opinion by: TANENBAUM

Opinion

[*750] TANENBAUM, J.

Due process of law is a bedrock constitutional guaranty. It entitles every person to a meaningful opportunity to be heard, upon proper notice, before the State deprives him of a substantive right. This guaranty rings hollow, though, unless that person has a fair idea of what exactly he is defending against, and an assurance that the proceeding in which he expects to participate goes forward predictably and orderly according to a fixed set of rules. A court's switching from one type of proceeding (and a commensurate set of rules) to another (with a different set of rules)—mid-proceeding and without notice—runs directly counter to this fundamental understanding of due process. Yet, that unfortunately is what happened in these consolidated cases.

A.M., the father of minor children S.K.M. and E.B.M., appeals two final orders. One terminated A.M.'s parental rights ("TPR") as to both children pending **[**2]** their adoption by their maternal grandparents (D.S. and C.S.). The other appointed the maternal grandparents as the children's permanent guardians, based on that TPR order. As will be discussed below, there are two types of TPR proceedings—with differing rules and standards. Because the grandparents pursued a TPR in conjunction with their effort to adopt S.K.M. and E.B.M., and the sum of the record reflects that this action was litigated as an adoption case rather than a dependency case, the proceeding should have progressed in a manner consistent with chapter 63 of the Florida Statutes,[1] which governs adoptions in Florida, and the rules associated with that chapter. The trial court, however, based its TPR order on the dependency provisions of chapter 39; those provisions dictate an entirely different type of proceeding. Because of this error, which resulted in the deprivation of A.M.'s right to parent his children without due process of law, we reverse.

I.

To put our discussion of the trial court proceedings in context, we first give an overview of the law and procedure that govern terminations of parental rights. As we just noted, there are only two types of proceedings by which parental rights may be terminated: "through **[**3]** [1] adoption or [2] the strict procedures set forth in chapter 39,

[1] All references to the Florida Statutes throughout this opinion are to Florida Statutes (2017).

Florida Statutes." *Fahey v. Fahey*, 213 So. 3d 999, 1001 **[*751]** (Fla. 1st DCA 2016); *see also Casbar v. DiCanio*, 666 So. 2d 1028, 1029 (Fla. 4th DCA 1996) ("In Florida, there are only two means by which a parent's rights may be terminated: one is through adoption pursuant to [chapter 63] and the other is through the strict procedures set forth in [chapter 39]."). The two types are separate and distinct. *Cf.* § 63.037, Fla. Stat. (providing that a case in which a minor has become available for adoption as the result of a chapter 39 TPR proceeding "shall be governed by s. 39.812 and this chapter"; and exempting "[a]doption proceedings initiated under chapter 39" from certain provisions of chapter 63). Each has its own purpose and distinguishing features; and each is readily identifiable by the initiating pleading, the terminology used, and the manner in which the proceeding unfolds.

Chapter 39 TPR Proceedings

TPR proceedings under chapter 39 are primarily focused on the protection of children. *Cf.* § 39.001(1), Fla. Stat. (setting out legislative purposes for chapter 39); § 39.811(1), Fla. Stat. (requiring the trial court still to consider whether dependency has been established, even if "grounds for termination of parental rights have not been established by clear and convincing evidence"); *see S.M. v. Fla. Dep't of Child. & Fams.*, 202 So. 3d 769, 775-76 (Fla. 2016) (explaining the multi-step process before **[**4]** parental rights can be terminated under chapter 39—typically starting with a shelter petition, continuing with dependency proceedings, and ending with a permanency determination and, where necessary, termination of parental rights). In a chapter 39 TPR proceeding, then, adoption is a separate, post-disposition option, ancillary to the TPR itself. *See* § 39.813, Fla. Stat. (providing that the trial court that terminates parental rights in "proceedings pursuant to [chapter 39] shall retain exclusive jurisdiction in all matters pertaining to the child's adoption pursuant to chapter 63"); § 39.812, Fla. Stat. (providing for a "postdisposition" process, which calls for a separate adoption petition, involvement and necessary consent by the Florida Department of Children and Families ("DCF"), and the trial court's retention of jurisdiction until the adoption is finalized); *cf. B.S. v. Dep't of Child. & Fams.*, 246 So. 3d 479, 481-82 (Fla. 1st DCA 2018) (holding that while "substantive rights governing post-TPR adoptions remain in chapter 63, the procedures regarding post-TPR adoptions fall within the ambit of Chapter 39" and thus, the Florida Rules of Juvenile Procedure apply).

With one exception, a TPR petition filed under chapter 39 effectively seeks an involuntary termination. *See* § 39.806(1)(b)-(n), Fla. Stat. (setting out various **[**5]** separate and independent grounds for termination of parental rights, based on the parent's conduct that objectively could be harmful to the child, regardless of the parent's intent to be a parent); *cf. id.* at (1)(i) (establishing the prior *involuntary* termination of a parent's rights regarding the child's sibling as a ground for termination); Form 8.981, Fla. R. Juv. P. ("Petition for Involuntary Termination of Parental Rights");[2] *but see* § 39.806(1)(a), Fla. Stat. (establishing voluntary "written surrender of the child," with consent to "giving custody **[*752]** of the child to the department for subsequent adoption" as an additional ground for termination of parental rights).

All procedures in TPR proceedings under chapter 39, "including petitions, pleadings, subpoenas, summonses, and hearings," must be in accordance with the Florida Rules of Juvenile Procedure, "unless otherwise provided by law." § 39.801(1), Fla. Stat. Both DCF and the guardian ad litem ("GAL") program are parties in any chapter 39 proceedings. § 39.01(52), Fla. Stat.; *cf.* § 39.807(2)(a), Fla. Stat. (requiring trial court to "appoint a guardian ad litem to represent the best interest of the child in any termination of parental rights proceedings"); § 39.815, Fla. Stat. (providing that DCF, among others, may take an appeal in a chapter 39 TPR proceeding, **[**6]** requiring that an attorney for DCF be notified of any appeal, and that a DCF attorney "shall represent the state upon appeal").

In a chapter 39 TPR proceeding, unless there has been a voluntary surrender of parental rights, there must be an advisory hearing—in essence, an arraignment—"as soon as possible after all parties have been served with a copy of the petition and a notice of the date, time, and place of the advisory hearing for the petition." § 39.808(1), (4), Fla.

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[2] *See also Fla. Dep't of Child. & Fam. Servs. v. P.E.*, 14 So. 3d 228, 235 (Fla. 2009) ("It is undeniable that consent to termination based on the parent's failure to appear is not among the grounds for termination listed in section 39.806(1)."); *see also* § 39.001(1), (3), Fla. Stat. (specifying as legislative purposes "prevention and intervention," through DCF's child protection system, to ensure children are free from neglect, abuse, and abandonment).

Stat.; *see also* Fla. R. Juv. P. 8.510(a). At the hearing, the trial court must inform the parties of their rights, appoint counsel as required by law, and appoint the GAL, if one has not already been appointed. § 39.808(2), Fla. Stat. Both the petition and the notice of the advisory hearing must be personally served on the parent. Fla. R. Juv. P. 8.505(a). Both the statute and the rule require that the notice contain readily apparent text that is substantially similar to the following:

> FAILURE TO PERSONALLY APPEAR AT THIS ADVISORY HEARING CONSTITUTES CONSENT TO THE TERMINATION OF PARENTAL RIGHTS OF THIS CHILD (OR CHILDREN). IF YOU FAIL TO APPEAR ON THE DATE AND TIME SPECIFIED, YOU MAY LOSE ALL LEGAL RIGHTS AS A PARENT TO THE CHILD OR CHILDREN NAMED IN THE PETITION ATTACHED TO THIS NOTICE.

§ 39.801(3)(a), Fla. Stat.; Fla. R. Juv. P. 8.505(b); *cf. J.B. v. Fla. Dep't of Child. & Fam. Servs.*, 768 So. 2d 1060, 1064-65 (Fla. 2000) (cataloging **[**7]** the due process protections for TPR proceedings included in the predecessors to the chapter 39 TPR statutes).

A petition filed in a chapter 39 TPR proceeding "shall be titled a petition for termination of parental rights," Fla. R. Juv. P. 8.500(a)(2), and "styled: 'In the interest of , a child,' or: 'In the interest of , children,'" Fla. R. Juv. P. 8.220; *see also* Form 8.901, Fla. R. Juv. P. The petition must identify the parent and his residence; must "contain a showing that the parent[] [was] offered a case plan," when the law requires one; and must "contain an allegation that the parent[] will be informed of the availability of private placement of the child with an adoption entity." Fla. R. Juv. P. 8.500(b)(4)-(5); *see* § 39.802(4), Fla. Stat. There is no written answer or other pleading required to be filed by the parent. § 39.805, Fla. Stat.; Fla. R. Juv. P. 8.520(a). The final hearing is called an "adjudicatory hearing." § 39.809, Fla. Stat.; Fla. R. Juv. P. 8.525. All parties are entitled to be present at all termination hearings. Fla. R. Juv. P. 8.525(d).

Chapter 63 TPR Proceedings

Chapter 63 is the Florida Adoption Act. § 63.012, Fla. Stat. The chapter focuses, of course, on the best interest of the children; but the primary purpose of the chapter is **[*753]** to put in place safeguards for a smooth adoption. Those safeguards include ensuring that the "minor is legally free for adoption and that all adoptions are handled in accordance **[**8]** with the requirements of law"; and that the "required persons consent to the adoption or the parent-child relationship is terminated by judgment of the court." § 63.022(4)(a)-(b), Fla. Stat.

Unlike a chapter 39 TPR proceeding—where termination is its own end upon clear and convincing proof of certain statutory factors—a TPR proceeding under chapter 63 is in furtherance of and service to the adoption itself. *Cf.* § 63.089, Fla. Stat. (setting out procedures for the termination of parental rights "pending adoption," and indicating that a "judgment terminating parental rights pending adoption legally frees the child for subsequent adoption"); § 63.087(3), Fla. Stat. (providing that a "petition for adoption may not be filed until after the date the court enters the judgment terminating parental rights pending adoption," but allowing relatives to file a "joint petition for termination of parental rights and adoption" instead); § 63.102(1), Fla. Stat. (providing that anyone beside stepparent or relative must wait until TPR judgment to file petition for adoption); *cf. id.* § 63.102(6) (providing that in a case of adopting a relative, there does not need to be separate TPR proceeding and that the "final judgment of adoption shall have the effect of terminating parental rights simultaneously with the **[**9]** granting of the decree of adoption").

Unsurprisingly, then, the central inquiry in most chapter 63 TPR proceedings is whether there has been consent to the adoption by all those whose consent is required. *See* § 63.089(1), (2)(a), Fla. Stat. (requiring hearing before TPR "pending adoption," but requiring "consent to adoption" after proper notice before the hearing may be held); *id.* § 63.089(3) (providing various considerations centering on "consent," including failure to respond to TPR proceeding after notice, "unreasonably withholding his or her consent," and incapacity, as "grounds for terminating parental rights pending adoption"); *id.* § 63.088 (providing for procedure by which trial court must inquire as to whose consent must be obtained and what must be done to provide notice and obtain consent or waiver).

Chapter 63 provides that abandonment, as that term is defined in section 63.032(1), Florida Statutes, may substitute for actual consent. *See* § 63.089(3)(e), (4), Fla. Stat. (allowing trial court to enter a TPR "pending adoption" against a "person whose consent to adoption is required" where, after notice, and the court "determines by clear and convincing evidence, supported by written findings of fact," that the person has abandoned the child "under subsection (4)"). Even with **[**10]** respect to abandonment under chapter 63, though, the focus is on the parent's intention to be a parent. *See* § 63.032(1), Fla. Stat. (defining abandonment as a "situation [] sufficient to evince an intent to reject parental responsibilities," and allowing a trial court to determine abandonment based on whether, in its opinion, the parent's efforts are "marginal" and "do not evince a settled purpose to assume all parental duties"); § 63.089(4), Fla. Stat. (allowing a finding of abandonment also to be based on "whether the person alleged to have abandoned the child, while being able, failed to establish contact with the child or accept responsibility for the child's welfare" or on whether the parent is subject to ongoing incarceration at the time of the hearing and meets certain other criteria). In other words, "abandonment" under chapter 63 requires a court's assessment of whether the parent's conduct has sufficiently demonstrated an intent to avoid being a parent to the **[*754]** child such that the required consent to adoption fairly can be excused.

In a chapter 63 TPR proceeding, the Florida Family Law Rules apply. *See* Fla. Fam. L. R. P. 12.010(a) (providing that the "rules apply to all actions concerning family matters . . . except as otherwise provided by the Florida **[**11]** Rules of Juvenile Procedure," including "adoption"); *see also B.S.*, 246 So. 3d at 481. The petition must bear the title, "In the Matter of the Termination of Parental Rights for the Proposed Adoption of a Minor Child." § 63.087(4)(c), Fla. Stat.; *cf.* Fla. Fam. L. R. P. 12.100(c)(1) (requiring that "documents filed in the action must be styled in such a manner as to indicate clearly the subject matter of the document and the party requesting or obtaining relief" and that the specific caption for a chapter 63 TPR proceeding state, "In re: Termination of Parental Rights for Proposed Adoption of . . . . . (name on child's birth certificate) . . . . ., Minor Child(ren)"); Fla. Fam. L. R. P. 12.100(c)(2) (requiring that the "nomenclature used in the caption should be simple, clear, constant, and, to the extent possible, unchanging").

Unlike in a chapter 39 TPR proceeding, the parent *must* file a written answer to the petition "in accordance with the Florida Family Law Rules of Procedure." § 63.087(6), Fla. Stat.; *see* Fla. Fam. L. R. P. 12.100(a) (requiring that there be an answer to a complaint or petition); Fla. Fam. L. R. P. 12.110(c) (requiring that the pleader answer each claim asserted and "admit or deny the allegations on which the adverse party relies"). When an action under chapter 63 is "at issue," typically after the close of the pleadings, the action shall be set for **[**12]** trial. *See* Fla. Fam. L. R. P. 12.440 ("Setting Action for Trial").

II.

To be sure, there was not precise compliance with either of these chapters in the proceedings before the trial court. The record makes clear, however, that the underlying TPR action was both initiated and litigated primarily as a chapter 63 proceeding. By way of background, the children's mother tragically died in a traffic crash. She and A.M. were never married, and a paternity action between them had resulted in the mother being awarded full parental responsibility. A.M. was not awarded timesharing. The mother subsequently received a domestic violence injunction against A.M., so he was involved in the children's lives very infrequently until the mother's death. The mother's parents, D.S. and C.S., had frequently cared for and housed the children on the mother's behalf, so upon her death, they petitioned for and were appointed as the children's emergency temporary guardians pursuant to section 744.3031, Florida Statutes.

D.S. and C.S. soon thereafter filed a petition for permanent guardianship[3] in that same emergency guardianship action. At the same time, the grandparents initiated a separate action with the filing of a pleading titled, "Joint Petition for Termination of Parental **[**13]** Rights and Adoption by Maternal Grandparents." The caption read, "In re: Termination of Parental Rights Pending Adoption of: [S.M. and E.M.]." By its own terms, this petition sought termination of A.M.'s parental rights as to S.M. and E.M., pursuant to both chapter 39 and chapter 63, pending adoption by their maternal grandparents. This approach to the pleading was odd, because as explained in the

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[3] The petition stated it was filed pursuant to chapter 744, Florida Statutes, but that chapter does not provide for a grant of a permanent guardianship.

preceding section, chapter 39 does not provide for a TPR proceeding pending adoption; only **[*755]** chapter 63 does, and it does so expressly. *See* §§ 63.087-.089, Fla. Stat. According to the petition, the grandparents sought to adopt the children in order to formalize the parent-child relationship that already existed between them.

The petition did not specify a statutory ground for termination listed in section 39.806, Florida Statutes. It did allege, though, that A.M. "neglected and abandoned the minor children, within the meaning of Section 39.01(1), Florida Statutes 2017." Further, the petition asserted that A.M. had not supported the children since their birth. It also averred that A.M. was "unfit" to be a father; that he did "not have the capacity to care for the children"; and that he had a history of substance abuse and criminal behavior, which "pose[d] a threat to the children's **[**14]** safety, well-being, physical, mental and emotional health." According to the petition, there were grounds for the termination of A.M.'s parental rights pursuant to sections 39.01(1) and 39.806, Florida Statutes. It asked for the termination of A.M.'s "parental rights in accordance with Chapter 39, Florida Statutes" and "a Final Judgment of Adoption of the Minor Children by the Petitioners."

In the petition, there was the following allegation, which is redolent of a chapter 63, pre-adoption TPR proceeding: "A copy of this Petition was served on all known persons whose consent is required but did not waive notice, as well as on all persons whose consent is required but did not provide consent."[4] The summons that accompanied the petition matched the summons template used in matters governed by the Florida Family Law Rules, which also suggests the grandparents initiated the action under chapter 63. For instance, it directed A.M. "to file a written response to the attached complaint/petition with the clerk of this circuit court," a requirement that exists only in a chapter 63 proceeding. It stated that A.M. "may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the **[**15]** phone book)." The summons did not mention that A.M. would have a right to appointed counsel, as he would in a chapter 39 proceeding. It also contained a warning about rule 12.285 of the Florida Family Law Rules of Procedure —a rule that does not apply in TPR proceedings under chapter 39. A.M. filed an answer, just as someone would do in a chapter 63 proceeding.

At the same time, the case followed a course that did not have the typical progress markers of a chapter 39 proceeding. There was no appointment of a GAL for the children in the case.[5] *See* § 39.807(2)(a), Fla. Stat. There also does not appear to have been any notice to and no participation by DCF in the case. There does not appear to have been an advisory hearing; instead, there was a hearing on the grandparents' motion to set trial. The trial court considered that motion on the same day that it considered a motion to withdraw filed by A.M.'s lawyer. The trial court granted that motion to withdraw, but it did not have the colloquy with A.M., statutorily required in a chapter 39 proceeding, about his right to counsel or the right to have counsel appointed for him if he could not afford replacement counsel. *See* **[*756]** § 39.807(1), Fla. Stat. The trial court simply directed that all future filings be sent directly to A.M. A couple days after that, **[**16]** the trial court set the case "for trial, without jury, in chambers" about two months hence.

There is another item of note in the record. The trial court granted the grandparents' motion, over A.M.'s objection, to allow the children to testify in camera. Its order cited Florida Family Law Rule 12.407, which precludes a minor child from being brought to court to appear as a witness in family law proceedings (including adoption) without a prior court order based on good cause. The trial court did this rather than cite Florida Rule of Juvenile Procedure 8.255(d), which sets out a process for examination of minors in camera in chapter 39 TPR proceedings.

Four days before that trial was to commence, A.M.'s new counsel (retained just a couple days earlier) moved for a continuance. The motion pointed out that A.M. was indigent, was not advised of his right to court-appointed counsel, and had gone unrepresented for over two months leading up to the trial. According to the motion, new counsel would not have had sufficient time to prepare. Moreover, A.M. was in jail and would not be released until two weeks after the date set for trial, so A.M. could not attend.

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[4] Curiously, the petition also contained a warning that "failure to personally appear at the advisory hearing constitutes consent" to a TPR. At best, inconsistent statements like this, together with citations to chapter 39, created procedural confusion.

[5] There does appear in the record an order referencing a GAL appointed by the trial court in an earlier TPR proceeding initiated by the then-living mother and her boyfriend. There is no indication of any participation in this TPR by any GAL.

On the first day of the trial, A.M.'s counsel reiterated his objections. Counsel asserted that A.M. did not **[**17]** receive the notice required by section 63.088, Florida Statutes, noted that "[e]ven a private adoption is considered to be State interference" and implicates "a parent's fundamental liberty interest," and referenced section 63.088, Florida Statutes, as "designed to protect the parent's fundamental rights by giving them warning and giving them notice of the time and date and location of the proposed hearing." He further stated as follows: "Finally, I think that given that we're dealing with such a fundamental right here that my client should also be afforded to be present and to provide testimony to the court." Counsel noted that he had just been retained, so he did not have much time to make "arrangements for him to be here." He did try "to set up a telephone appearance." At no point did counsel for the grandparents stand up and contend that the proceeding instead was going forward under chapter 39.

The trial court decided to proceed, finding as follows:

> [T]he father has had an attorney of record since [earlier in the year], an answer was filed on behalf of the father . . . . The father had plenty of time [following his lawyer's withdrawal] to either request from the court indigent counsel or secured new counsel, which he actually has done. The father's **[**18]** failure to appear today is due to his own actions. He's been incarcerated since . . . after this hearing was set. That's plenty of time for him to have arranged to appear by telephone if he so wished, and accordingly, I deny the father's motion.

That first day of trial went on in A.M.'s absence. Of course, there also was no GAL or DCF attorney present. The trial carried over to a second day. Notably, the grandparents' counsel served a notice regarding that subsequent date. It asked A.M. and his counsel to "take notice that a petition to terminate parental rights pending adoption has been filed" and that "[t]here will be a hearing on the petition to terminate parental rights pending adoption." And, notably, it contained this notice: "UNDER FLORIDA STATUTES *SECTION 63.089*, FAILURE TO TIMEY [SIC] FILE A WRITTEN RESPONSE TO THIS NOTICE AND THE PETITION WITH THE COURT OR TO APPEAR AT THIS **[*757]** HEARING CONSTITUTES GROUNDS UPON WHICH THE COURT SHALL END ANY PARENTAL RIGHTS YOU MAY OR [SIC] ASSERT REGARDING THE MINOR CHILD." (emphasis supplied; capitalization in original). A transport order appears to have been entered, and A.M. attended. Again, neither a GAL nor a representative of DCF was present. One final day of testimony **[**19]** was taken a couple weeks later; A.M. was there with his counsel, but there still was no GAL or DCF representative.

A.M., his mother, and his wife (among others) testified at the trial. Their testimony focused on the contacts that A.M. had had with the children and on his on-again-off-again child support payments, ostensibly presented by A.M. with the intent to address directly the question of abandonment under chapter 63. A clinical psychologist also testified. She discussed her recommendation that there should not be reunification of the children with A.M. and that custody and placement should permanently be placed with the grandparents. A.M. had objected to this testimony (which would be relevant only in a chapter 39 TPR proceeding) because she had nothing to say that was relevant to the question of whether A.M. abandoned the children under chapter 63, the ultimate issue in the proceeding. At the close of the third day of testimony, the trial court asked counsel to submit proposed TPR orders. "To save time, because there may be *some likelihood* that the petition for parental rights is not granted, we would go into the guardianship case and I would like to have proposed permanent guardian **[**20]** orders entered, which would outline the process by which [A.M.] would have contact with his children." (emphasis supplied).[6]

The trial court later rendered an "Order Terminating Parental Rights of Minor Children Pending Adoption by Maternal Grandparents." The order states that the trial court "considered and evaluated all relevant factors, including the statutory factors set forth in Section 39.810, Florida Statutes." According to the order, the trial court

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[6] The highlighted language is a separate cause for concern over how the trial court conducted the TPR proceeding. Compare it with the clear-and-convincing-evidence standard that is applicable in *both* types of TPR proceedings: "The evidence must be of such weight that it produces in the mind of the trier of fact a *firm belief* or conviction, *without hesitancy*, as to the truth of the allegations sought to be established." *Inquiry Concerning a Judge*, 645 So. 2d 398, 404 (Fla. 1994) (emphases supplied) (quoting another source). In addition, as we discuss later, the trial court could not grant a permanent guardianship except as post-disposition relief in connection with a chapter 39 TPR.

found, "based on clear and convincing evidence, that grounds for the termination of the parental rights of [A.M.] are established, *pursuant to Section 39.806*." (emphasis supplied).[7]

The trial court then set out specific findings that tracked nine of the eleven factors required to be considered as part of the "manifest best interests of the child" statutory element set out for chapter 39 TPR proceedings. *See* § 39.810(1)-(5), (7), (9)-(11), Fla. Stat. However, the trial court failed to make any specific findings to support its determination. The trial court concluded that "[A.M.] has abandoned the minor children, as defined in Section 39.01(1)." *Cf.* § 39.806(1)(b), Fla. Stat. (establishing abandonment, as that term is defined in section 39.01(1), as a ground for the termination of parental rights). The trial court also determined **[**21]** "that reunification of the children with [A.M.] poses a substantial risk of significant harm to the **[*758]** children," based on his criminal history, likelihood of continued incarceration, and substance abuse, "which renders him incapable of caring for the child [sic]." *Cf.* § 39.806(1)(d), Fla. Stat. (establishing parent's incarceration, based on one or more enumerated, objective criteria, as a ground for termination); § 39.806(1)(j), Fla. Stat. (establishing history of substance abuse, under some circumstances, as a ground for termination if it "renders [the parent] incapable of caring for the child"). On the same day, the trial court rendered an order granting the grandparents' permanent guardianship petition.

In his motion for rehearing on both orders, A.M. preserved the main issue now on appeal by highlighting up front, in unmistakable language, that the trial court had conflated the two types of TPR proceedings. A.M. explained that chapter 39 proceedings "are dependency proceedings," governed by Florida's juvenile procedural rules. Chapter 63 proceedings are governed by the family law rules. A.M. explained that he was proceeding under the family law rules because the case was "assigned a Domestic Relations case number" and "did not proceed **[**22]** in the Juvenile Court"; and because the type of petition that the grandparents filed (a joint petition for TPR and adoption) "is *only* authorized under *Florida Statute 63.087(3)* for relative adoptions."

A.M. in turn argued that the trial court incorrectly utilized the definition of "abandonment" under section 39.01(1), Florida Statutes, rather than the definition found at section 63.032(1). According to A.M., the main difference between the two definitions is that under chapter 63's definition, a finding of abandonment must be based on a determination that the parent exhibited conduct that showed an intent to forego all rights to the child. A.M. made a similar argument in his motion for rehearing directed to the guardianship order. That is, chapter 744 does not authorize permanent guardianships; a permanent guardianship could be granted only pursuant to a chapter 39 proceeding.

The trial court denied both motions for rehearing without elaboration. We have both the TPR order and the permanent guardianship order before us for review.

III.

A.

A.M. makes several arguments on appeal, but his argument that the trial court applied the wrong definition of "abandonment" provides a sufficient basis for reversal. The trial court's termination of A.M.'s parental rights based **[**23]** on an entirely different statutory definition and inquiry—unannounced prior to issuance of the TPR order—amounted to a failure to afford A.M. due process of law in connection with its permanently taking a substantive right from him.

As we already have explained, there are substantive differences between the definitions of abandonment in chapters 39 and 63. In a chapter 39 TPR proceeding, there can be abandonment, even if the parent has made financial contributions to the child's care or has established contacts with the child. *See* § 39.01(1), Fla. Stat. The definition of abandonment in chapter 39 requires the trial court to determine whether the parent "has made no *significant* contribution to the child's care and maintenance" or whether the parent "has failed to establish or maintain a *substantial and positive* relationship with the child, or both." *Id.* (emphasis supplied). The inquiry is objective, presumably to be considered from the perspective of the child's welfare. This characterization finds

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[7] As it did in its pretrial orders, the trial court included in the TPR order several references to provisions in chapter 63.

support in the criteria to be considered for whether there has been a "substantial and **[*759]** positive relationship"; the trial court is to ask whether there was "frequent and regular contact" through "frequent and regular **[**24]** visitation or frequent and regular communication." *Id.* "Marginal," "incidental," or "token" efforts do not count. *Id.* Moreover, not just present incarceration but past incarceration can be a basis for abandonment under chapter 39. *See id.* ("The incarceration, repeated incarceration, or extended incarceration of a parent . . . may support a finding of abandonment.").

In a chapter 63 TPR proceeding, by contrast, the definition of abandonment is subjective, which is consistent with the purpose of such a proceeding: to determine whether there is consent to the adoption, or whether lack of consent should be excused. *Compare* § 63.089(2), (3), Fla. Stat. (requiring consent to adoption, waiver after notice, or abandonment of child by biological father before proceeding with hearing and TPR), *and id.* § 63.062(1), (2) (requiring written consent to adoption as condition precedent to granting TPR pending adoption, unless one or more grounds set out in section 63.089(3) is demonstrated), *with id.* § 63.032(1) (defining abandonment in terms of parent's "intent to reject personal responsibilities" or lack of "settled purpose to assume all parental duties"), *and id.* § 63.089(4) (providing that abandonment may be based on parent's failure, despite "being able, [] to **[**25]** establish contact with the child or accept responsibility for the child's welfare"); *cf. J.S. v. S.A.*, 912 So. 2d 650, 659 (Fla. 4th DCA 2005) ("The court may excuse the father's consent to adoption if it finds by clear and convincing evidence that the father has abandoned the minor child."); *S.M.K. v. S.L.E.*, 238 So. 3d 925, 928 (Fla. 5th DCA 2018) (explaining that "consent of certain persons is required before an adoption petition may be granted" but that abandonment "waives the consent requirement").

Under this definition, the trial court must look to whether the parent "*while being able*, makes little or no provision for the child's support or makes little or no effort to communicate with the child," such that the situation "evince[s] an intent to reject parental responsibilities." § 63.032(1), Fla. Stat. (emphasis supplied); *Hinkle v. Lindsey*, 424 So. 2d 983, 985 (Fla. 5th DCA 1983) (noting that abandonment in the adoption context is "defined as conduct which manifests a settled purpose to permanently forego all parental rights and the shirking of the responsibilities cast by law and nature so as to relinquish all parental claims to the child" (internal quotation and citations omitted); *id.* (emphasizing, however, that "shirking of parental duties and obligations" does not, alone, prove abandonment in an adoption proceeding).

The trial court may declare a child abandoned **[**26]** if it forms an "opinion" that the parent's efforts "are only marginal efforts that *do not* evince a settled purpose to assume all parental duties." § 63.032(1), Fla. Stat. (emphasis supplied). In this type of inquiry, the question is not whether, objectively, the parent is supporting the child enough, regardless of his or her financial resources. *Cf. Hinkle*, 424 So. 2d at 985 (explaining that in the adoption context, a father's being behind on child-support payments, alone, is not clear and convincing evidence of his intent to abandon the child, especially where the father had sent some support and made some efforts to contact and see the child); *S.M.K.*, 238 So. 3d at 929 (concluding that where record evidence showed that the father had attempted to assert his parental rights, mere prior failures by the parent to provide child support was not enough to support determination that the father had a settled purpose to forego his rights to the child). Rather, the key to the abandonment **[*760]** inquiry under chapter 63 is whether the parent has made any effort at all to support or make contact with the child, where the parent otherwise is *able* to do so.

Whether a parent has abandoned the child, such that the parent's consent is not required before proceeding with adoption, **[**27]** is *the* threshold inquiry in a chapter 63 TPR proceeding. If there is not clear and convincing evidence of abandonment, the lack of consent to adoption by the father cannot be excused, and the petition seeking both the TPR and adoption should be dismissed. *See* § 63.089(5), Fla. Stat. (requiring dismissal of petition if there is not clear and convincing evidence that a parent's rights to the child should be terminated and requiring that the order include written findings as to abandonment criteria "if rejecting a claim of abandonment"); *Hinkle*, 424 So. 2d at 985 (holding that in an adoption proceeding, the "threshold question of abandonment must first be determined," and that the "trial court cannot decide the case on the child's best interest unless the evidence first supports a finding of abandonment by the non-consenting natural parent"); *Webb*, 473 So. 2d at 1379 (same); *V.M. v. Home at Last Adoption Agency*, 93 So. 3d 1112, 1114 (Fla. 5th DCA 2012) (holding that after finding that the

evidence did not support abandonment in an adoption proceeding, the trial court "had no choice but to dismiss the petition").

All of this is to say that the respective definitions of abandonment in chapter 39 and chapter 63 are not interchangeable. The type of TPR proceeding determines which definition must be applied to the facts of the case, and **[**28]** the inquiry in a chapter 63 TPR proceeding must be whether there was a demonstration of abandonment as that term is used in chapter 63. Determining whether there is abandonment under the definition in chapter 39 in a proceeding that appears to the parent to be under chapter 63, without notice, effectively deprives the parent of a meaningful opportunity to defend his rights in an orderly process. This falls far short of comporting with due process requirements.

B.

The lack of due process is the deficiency we must remedy here. The trial court granted the TPR in reliance on the definition of abandonment found in chapter 39. In fact, despite its several mentions of chapter 63 provisions, the analysis in the TPR order relies almost entirely on the chapter 39 TPR paradigm. Consent or abandonment under chapter 63 does not appear to have been seriously considered, if at all. The trial court did this without any advance notice to A.M. that the proceeding converted from an adoption proceeding to, essentially, a dependency proceeding. Of course, A.M. had every reason to believe that he was defending against a charge of abandonment in a chapter 63 proceeding and in opposition to the grandparents' **[**29]** proposed adoption. The trial court, though, considered the petition under a different set of statutes, definitions, and procedures. An expectation of a fair and orderly proceeding demands more.

We pause here to note that the trial court terminated A.M.'s *fundamental* right to be a parent to his children. *S.M.*, 202 So. 3d at 778 ("Florida courts have long recognized this fundamental parental right to enjoy the custody, fellowship and companionship of their offspring. This rule is older than the common law itself." (quotations, citations, internal ellipses, and brackets omitted)). Both the United States Constitution and the Florida Constitution guarantee that a person will not be deprived of his liberty "without due process **[*761]** of law." Amend. V, U.S. Const.; Art. I, § 9, Fla. Const. It also remains as a "basic proposition that a parent has a natural Godgiven [sic] legal right to enjoy the custody, fellowship and companionship of his [or her] offspring." *State ex rel. Sparks v. Reeves*, 97 So. 2d 18, 20 (Fla. 1957). Indeed, both the U.S. Supreme Court and the Supreme Court of Florida recognize this right as a fundamental liberty interest that requires due process of law before it can be extinguished. *See generally Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *J.B. v. Fla. Dep't of Child. & Fam. Servs.*, 768 So. 2d 1060 (Fla. 2000); *cf. In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995) ("We recognize the sanctity of the biological connection, and we look carefully **[**30]** at anything that would sever the biological parent-child link.").

In turn, before it can be said that a trial court has provided the process that is due before terminating someone's parental rights, there at least must be strict compliance with the procedures that actually have been prescribed by law for doing so. *Cf. Walker v. Sauvinet*, 92 U.S. 90, 92-93, 23 L. Ed. 678 (1875) (explaining that constitutionally required due process is afforded "if the trial is had according to the settled course of judicial proceedings" and that "[d]ue process of law is process due according to the law of the land," which in a State is the process established "by the law of the State"); *Hinkle*, 424 So. 2d at 986 (recognizing that natural law gives certain rights to the parent of a child, which "can be taken away only in strict compliance with the law"). Our supreme court once described due process as follows:

> Due process of law guarantees to every citizen the right to have that course of legal procedure *which has been established* in our judicial system for the protection and enforcement of private rights. It contemplates that the defendant shall be given fair notice and afforded a real opportunity to be heard and defend[,] in an *orderly procedure*, before judgment is rendered against **[**31]** him.

State ex rel. Gore v. Chillingworth, 126 Fla. 645, 171 So. 649, 654 (Fla. 1936) (internal citations omitted) (emphasis supplied); *see also Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L. Ed. 565 (1877) (explaining that due process ensures

that there is "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights").

This said, a parent is entitled to notice of the basis for the termination proceeding to which he is subject, so that he may adequately prepare for and meaningfully defend against it at a trial or adjudicatory proceeding. *See B.T. v. Dep't of Child. & Fams.*, 300 So. 3d 1273, 1281 (Fla. 1st DCA 2020); *see also R.S. v. Dep't of Child. & Fams.*, 872 So. 2d 412, 413 (Fla. 4th DCA 2004) (finding denial of due process where termination of parental rights was based on a previously unpleaded and un-mentioned ground, such that parent "was unaware that her parental rights were subject to termination at the hearing on the ground not pleaded, and consequently, she was unprepared to rebut the ground"); *cf. Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (explaining that due process principles require that a person "have timely and adequate notice detailing the reasons for a proposed termination, and an *effective* opportunity to defend" (emphasis supplied)).

The TPR proceeding in this case had all the indicia of a chapter 63 proceeding. The title of the petition was filed as one to terminate **[**32]** parental rights "pending adoption," **[*762]** which is a pleading that exists only under chapter 63. The caption used in all filings in the case reflected that it was a TPR proceeding "pending adoption." The summons served on A.M. required that he answer the petition and cited the family law rules, both of which are inconsistent with a chapter 39 proceeding. There was no advisory hearing, which chapter 39 proceedings necessarily have shortly after service of the petition. When A.M.'s counsel filed a motion to withdraw, and the trial court granted the motion, there was no advisory hearing, as would be expressly required by section 39.807(1)(b), Florida Statutes.

DCF was not a party to the proceeding, as it would have been in a chapter 39 proceeding. *Cf. McCaskill v. McCaskill*, 477 So. 2d 36, 37 (Fla. 2d DCA 1985) (identifying absence of the State as a party as one indicator that the petition failed to properly invoke the trial court's jurisdiction under chapter 39); Fla. R. Juv. P. 8.255(a) ("The department must be represented by an attorney at every stage of these [termination] proceedings."). The trial court also did not appoint a GAL in this proceeding, something that section 39.807(2), Florida Statutes, requires. *Cf. G.S. v. Dep't of Child. & Fam. Servs.*, 838 So. 2d 1221, 1222 (Fla. 3d DCA 2003) (reversing chapter 39 TPR because the trial court failed to appoint a guardian ad litem for the child, which was "a clear violation **[**33]** of the statutory mandates" for such a proceeding).

The trial court entered an "Order Setting Action for Trial Without Jury," something that is consistent with the family law rules (which provide for non-jury and jury trials), and inconsistent with the juvenile rules (which provide only for adjudicatory hearings). *Compare* Fla. Fam. L. R. P. 12.430 ("Demand for Jury Trial; Waiver"), Fla. Fam. L. R. P. 12.431 ("Jury Trial"), *and* Fla. Fam. L. R. P. 12.440 ("Setting Action for Trial"), *with* Fla. R. Juv. P. 8.110 (providing for "adjudicatory hearing" for juvenile delinquency proceedings), § 39.809, Fla. Stat. (requiring that the trial court "consider the elements required for termination" at an "adjudicatory hearing," which "must be conducted by the judge without a jury"), *and* Fla. R. Juv. P. 8.255 ("General Provisions for Hearings"). One or more notices and orders in the case cited to chapter 63 and the family law rules.

Even though the grandparents' petition at best improperly sought a TPR pursuant to both chapter 39 and chapter 63, those two chapters govern entirely different and separate proceedings, as we already explained. The grandparents' stated intent in their petition was adoption, with the TPR they sought being auxiliary to this effort. Their counsel and the trial court conducted the proceedings as if they were pursuant **[**34]** to chapter 63. A.M., then, reasonably could assume that he was defending against a chapter 63 TPR proceeding, where the only matter in dispute was whether he abandoned the children under section 63.089(4), Florida Statutes. Notably, the evidence that A.M. presented at trial focused on the child support payments that he did make and his efforts at maintaining contact with the children. There was no advance notice that the chapter 63 proceeding had become a chapter 39 proceeding. From all of this, we easily conclude that the manner in which the trial court went about terminating A.M.'s parental rights was fundamentally unfair. The structural defects in the process, as we have described them, constitute reversible error. *Cf. Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907-08, 198 L. Ed. 2d 420 (2017) (discussing types of structural error, including one that "always results in fundamental unfairness"); *Ray v. State*, 403 So. 2d 956, 960 (Fla. **[*763]** 1981) (holding that error that amounts to denial of due process is fundamental error requiring reversal).

The grandparents argue that we can still affirm, because the record supports a determination of abandonment even under the chapter 63 definition. We disagree. The trial court, not us, must make findings of fact as to whether there was abandonment, as that term is defined in section 63.032(1), in light of the factors **[**35]** set out in section 63.089(4). The trial court made no specific factual findings at all, let alone any findings regarding A.M.'s intent to be a father to the children. "Because the ultimate issue is the intent of the parent, as determined by reasonable inferences that may be drawn from the conduct of the parent, it is a question of fact for the trial judge." *M.A.F. v. E.J.S.*, 917 So. 2d 236, 239 (Fla. 5th DCA 2005). "The judge must consider the factors enumerated in the statute and all other relevant factors" as set out in section 63.089(4), Florida Statutes. *Id.* (internal quotation omitted). It is within the trial court's discretion "to determine the weight to attribute to each factor." *Id.* The trial court "heard the testimony and observed the witnesses, and is in the best position to evaluate the evidence," so it is the trial court, not us, in the first instance that "must rule, one way or the other, on the issue of abandonment" using the proper definition. *Webb*, 473 So. 2d at 1379 (refusing to affirm under tipsy coachman doctrine, even though there was evidence to support abandonment, where the trial court failed to make any finding regarding abandonment at all, because "such finding should be made by the trial court").

This case, then, is like the decision in *In the Interest of T.S.*, 471 So. 2d 543 (Fla. 1st DCA 1985), where this court reversed and remanded because the **[**36]** trial court did not make a specific finding as to whether the parent abandoned the child; and unlike the decision in *A.T. v. Department of Health and Rehabilitative Services*, 490 So. 2d 155 (Fla. 1st DCA 1986), where this court affirmed, despite a deficiency in the trial court's findings. In *A.T.*, the trial court phrased its findings of fact "almost entirely in the language" of the statute, but this court nevertheless approved the disposition because the record revealed "overwhelming evidence supporting permanent commitment" to the State for adoption. *Id.*, 490 So. 2d at 156. The *A.T.* court distinguished *T.S.* because there, the trial court "did not specifically state that [the parent] had abandoned or neglected the child." *Id.* at 157. Here, we do not have a determination at all by the trial court under the proper statute (just as there was no specific determination under the applicable statute in *T.S.*). Unlike in *A.T.*, there is no legally appropriate conclusion by the trial court, and we cannot assess whether there is overwhelming evidence to support a legal conclusion that the trial court did not make.

On remand, the trial court does not need to conduct a new trial if it can make the necessary findings and reach the appropriate conclusions based on the record as it exists. In the interest of expediency, **[**37]** if the grandparents instead intend to seek a chapter 39 TPR, they may convert the proceeding by filing an amended petition that makes that conversion clear and puts A.M. on notice so that he can prepare to defend accordingly. *Cf. Home at Last Adoption Agency, Inc. v. V.M.*, 126 So. 3d 1236, 1240-41 (Fla. 5th DCA 2013) (finding no error in "conversion" of chapter 63 proceeding to a chapter 39 proceeding through an amended petition, where the case proceeded to trial in the manner it otherwise would have had a new case been filed under chapter 39). If the grandparents do choose to convert the proceeding, **[*764]** the parties and the trial court must strictly comply with all the applicable statutory provisions in chapter 39. This would include holding a new final evidentiary hearing (read: an "adjudicatory hearing") that comports with all the applicable requirements of chapter 39 and the procedural rules for juvenile proceedings.

IV.

Because the order establishing a permanent guardianship was premised on the trial court's treatment of the chapter 63 proceeding as a chapter 39 proceeding without advance notice of doing so, we reverse that order as well.

Guardianship proceedings are typically governed by chapter 744, Florida Statutes; the grandparents invoked chapter 744 in their petition for permanent guardianship. **[**38]** But chapter 744 does not allow for *permanent* guardianship as a remedy. *See* §§ 744.301-.3085, Fla. Stat. ("Types of Guardianship."). Nor does chapter 744 make any provision for allowing the court to enter a judgment terminating parental rights. *See In re Guardianship of J.L.C.*, 567 So. 2d 21 (Fla. 2d DCA 1990). Rather, permanent guardianship of a minor child is authorized only after that child has been removed and adjudicated dependent through a proceeding under chapter 39, and only after the court has held a permanency hearing. *See* §§ 39.621-.6231, Fla. Stat. The court can then order permanent guardianship with a suitable relative or other adult, though only after it finds that reunification or adoption would not be in the best interest of the child and makes other specific factual findings enumerated under sections 39.621

through 39.6231, Florida Statutes. *See also T.B. v. Dep't of Child. & Fams.*, 189 So. 3d 150, 153 (Fla. 4th DCA 2015).

As we have explained, the trial court improperly proceeded, without notice to A.M., under chapter 39, rather than chapter 63. There being no legal basis in chapter 744 for the permanent guardianship, the permanent guardianship ostensibly granted under chapter 39 also effectively deprived A.M. of a substantive right without due process of law.

V.

Both orders on review deprived A.M. of his fundamental right to parent his children without his first having proper notice and a meaningful **[**39]** opportunity to be heard in defense. Both the TPR order and the order granting a permanent guardianship are REVERSED. These cases are REMANDED for further proceedings consistent with this opinion.

RAY, C.J., and ROWE, J., concur.

	ADOPTION	**GUARDIANSHIP**	**TEMPORARY/ CONCURRENT**
What statute & rules?	Chapter 63 & FL. Fam. L. R. P.	Chapter 744 & FL Probate Rules	Chapter 751 & FL. Fam. L. R. P.
Who has standing?	The TPR petition (pending adoption) may be filed by a parent/person having physical custody of the minor. The petition may be filed by an adoption entity only if a parent or person having physical or legal custody who has executed a consent to adoption pursuant to s. 63.082 also consents in writing to the adoption entity filing the petition. The original of such consent must be filed with the petition. See *F.S. 63.087(4)(b).*	Except as provided in subsection (4), upon petition of a parent, brother, sister, next of kin, or other person interested in the welfare of a minor, a guardian for a minor may be appointed by the court without the necessity of adjudication pursuant to s. 744.331.... *F.S. 744.3021(1).*	The following individuals may bring proceedings in the circuit court to determine the ***temporary*** *or concurrent* custody of a minor child: (a) Any extended family member who has the signed, notarized consent of the child's legal parents; or (b) Any extended family member who is caring full-time for the child in the role of a substitute parent and with whom the child is presently living. In addition to the requirements of subsection (1) [above], an individual seeking ***concurrent*** custody must: (a) Currently have physical custody of the child or have had physical custody of the child for at least 10 days in any 30-day period within the last 12 months; and (b) Not have signed, written documentation from a parent which is sufficient to enable the custodian to do all of the things necessary to care for the child which are available to custodians who have an order issued under s. 751.05. See *F.S. 751.02.*

What grounds? **What needs to be presented?**	For **TPR** – clear and convincing evidence with written findings that each person whose consent to adoption is required: ▪ Has executed a valid consent ▪ Has executed an aff. of nonpaternity ▪ Has been served with a notice of intended adoption plan and failed to timely respond ▪ Has been properly served notice and failed to file a written answer or personally appear at the evidentiary hearing ▪ Has been properly served notice and has been determined to have abandoned the child, **OR** ▪ Is found by court to be unreasonably withholding consent. See *F.S. 63.089*. For **Adoption** – date for parent to file an appeal of TPR has passed and no appeal is pending, and that the adoption is in the best interest of the person to be adopted. See *F.S. 63.142*.	Upon petition, the court may appoint a guardian for a minor without appointing an examining committee or conducting an adjudicatory hearing pursuant to s. 744.331. See *F.S. 744.342*.	For **Temporary Custody**: ▪ Consent of both parents (or one parent if other parent is deceased or unknown) ▪ Consent of one parent (temporary only), if the other parent is found, by clear and convincing evidence, to be unfit. The Court must find that the parent has abused, abandoned, or neglected the child as defined in Chapter 39. ▪ Both parents found to be unfit (temporary only), by clear and convincing evidence, to be unfit. The Court must find that the parent has abused, abandoned, or neglected the child as defined in Chapter 39. For **Concurrent Custody**: ▪ Consent of both parents (or one parent if other parent is deceased or unknown) See *F.S. 751.05*.
What can the Court do? **Is there any judicial oversight afterwards?**	A preliminary home study and post-placement (pre-finalization) supervision is required unless the adoption is a stepparent, relative, or adult adoption; in those cases, the Court may require a home study for good cause. See *F.S. 63.092, F.S. 63.125*. **No oversight once the adoption is finalized.**	Annual guardianship reports (plans for guardians of the physical person & accountings for guardians of the property) are required unless waived by the Court. See *F.S. 744.3675, 744.3678*.	Once 751 entered, no follow up is provided for in statute but, based on court procedure or case law, the Court may be continue its involvement via case management or status conferences.

Is it this permanent? **Can it be modified?**	Consent to adoption of a child under 6 months of age is irrevocable – fraud and duress are only bases for invalidation. HOWEVER, consent to adoption of a child older than 6 months of age is subject to 3-day revocation period – thereafter, fraud and duress are only bases for invalidation. See See *F.S. 63.082(4)(b) & F.S. 63.082(4)(c)*. Statute of Repose: ▪ A TPR judgment pending adoption is voidable and any later judgment of adoption of that minor is voidable if, upon a parent's motion for relief from judgment, the court finds that the adoption substantially fails to meet the requirements of this chapter. **The motion must be filed within a reasonable time, but not later than 1 year after the date the judgment terminating parental rights was entered.** *See F.S. 63.142(4)*. ▪ … an action or proceeding of any kind to vacate, set aside, or otherwise nullify a judgment of adoption or an underlying judgment terminating parental rights on any ground may not be filed more than 1 year after entry of the judgment terminating parental rights. *F.S. 63.182*. **Very, very difficult to undo if proper procedure is followed from the outset!**	A guardian may be removed for a variety of reasons, including abuse of powers, failure to comply with an order of the court, incapacity or illness (including substance use issues), and conflict of interest. See *F.S. 744.474* for full list. Among family members involved in minor guardianships, the most applicable basis may be, "Upon a showing that removal of the current guardian is in the best interest of the ward. In determining whether a guardian who is related by blood or marriage to the ward is to be removed, there shall be a rebuttable presumption that the guardian is acting in the best interests of the ward." See *F.S. 744.474(20)*.	At any time, either or both of the child's parents may petition the court to modify or terminate the order granting temporary custody. *F.S. 751.05(6)*. The court may modify an order granting temporary custody if the parties consent or if modification is in the best interest of the child. *F.S. 751.05(6)(a)*. The court shall terminate the order upon a finding that the parent is a fit parent, or by consent of the parties, except that the court may require the parties to comply with provisions approved in the order which are related to a reasonable plan for transitioning custody before terminating the order. *F.S. 751.05(6)(b)*.

1IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.:[redacted]

DIVISION: FM-B

IN RE: THE ADOPTION OF

[redacted]

ORDER OF DISMISSAL OF JOINT PETITION FOR ADOPTION BY STEP-PARENT

This cause came before the Court for hearing on February 18, 2025 on a Joint Petition for Adoption by Step-Parent filed on July 25, 2024. The Court having heard argument of counsel and being otherwise fully advised in the premises, finds as follows:

Factual and Procedural Background

The Petitioners were married on [redacted] 2019, and the birth of their minor children took place on [redacted] 2020. At the birth of the minor children the Petitioner, [redacted] was placed on the birth certificates because the children were born within wedlock. The Petitioner petitions this Court to adopt the minor child through a step-parent adoption, pursuant to section 63 ("Adoption Act"), Florida Statutes (2024).

Petitioner, [redacted] are both listed on the minor children's birth certificate pursuant to Florida Statute 382.013(2)(a).

Applicable Law

Adoption is meant to create a legal relationship between the person adopting and the minor child as if the child had been born within wedlock. Pursuant to section 63.032(2), Florida Statutes (2024), adoption is defined as:

The act of creating the legal relationship between parent and child where it did not exist, thereby declaring the child to be legally the child of the adoptive parent/s and their heir at law and entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock.

Legal Analysis

In this instant petition, the Petitioner, [redacted] does not fall into a category of who is eligible to adopt in Florida, pursuant to section 63.042(2), Florida Statutes (2024). It has already been considered by the Fourth District Court of Appeal whether a parent whose rights are intact can adopt their legal child through a petition to adopt:

The right to adopt a person is a privilege bestowed by the legislature; for a court to entertain an adoption petition, the proposed familial arrangement must be within the parameters allowed by the Adoption Act. The Adoption Act as a whole precludes an individual with parental rights at the time of the petition from joining in an adoption proceeding as "a petitioner" because a petitioner is one seeking to adopt the child and a parent (whose rights are intact) cannot adopt his own child.

I.B. v. Adoption of Z.E.S., 238 So. 3d 847 (Fla. 4th DCA 2018).

Petitioner, [redacted] has an established legal relationship to the minor children since she was married to [redacted] at the time [redacted] gave birth to the minor children and was placed on the birth certificate. Adoption is meant to create a legal relationship that does not currently exist. Here a legal relationship exists and there is not a legal procedure in Florida for this step- parent adoption to occur.

If the Petitioners travel out of state their marriage will be recognized because the United States Supreme Court has already held that same sex couples have a fundamental right to marry, and States must recognize their marriage. Obergefell v. Hodges, 576 U.S. 644 (2015). Even if the law changes as to same sex marriage that would not change the fact that there is not currently a legal procedure in Florida to allow a second parent adoption by a parent whose rights are intact to their minor child.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that the Petition for Step-Parent Adoption is hereby **DISMISSED.**

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this Wednesday, February 26, 2025

[redacted]

RUSSELL L. HEALEY, CIRCUIT JUDGE

[redacted]

Copies to:

[redacted] Esq.
Via e-portal filing

THE KIDS ARE ALRIGHT

The Ins and Outs of Adoption, Guardianship, and Relative Custody Actions (Chapter 751)

Adoption

Chapter 39 v. Chapter 63

Two ways to terminate parental rights in Florida

(1)Chapter 39 proceedings, which may or may not be followed by an adoption

(2)Chapter 63 proceedings, which must include an adoption

Chapter 39:
Proceedings Relating to Children

Governs both proceedings for adjudication of dependency and termination of parental rights ("TPR")

Termination of parental rights is pursued for the purpose of protecting the child

Petitions for Termination of Parental Rights may be filed by the Department of Children & 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." F.S. 39.802.

Only the Department can file a Shelter Petition asking the Court to approve the removal of a child from his or her parent(s)

Chapter 39

Includes strict procedures for TPR on a variety of grounds, such as:

- Voluntary surrender to the Department – gives the Department custody in order to place the child for adoption with the Dept's choice of parent
- Abandonment as defined at F.S. 39.01 (not the same as abandonment in Chapter 63)
- Conduct that demonstrates that the continuing involvement of the parent in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child
- Failure to substantially comply with a case plan
- Engaged in egregious conduct or "failed to protect" against egregious conduct that threatens child or child's sibling
- Subjected the child or another child to aggravated child abuse, sexual battery or sexual abuse, or chronic abuse
- Parental rights to a sibling have been terminated involuntarily

More Requirements of Chapter 39 TPR

ALLOWS FOR SINGLE-PARENT TPR WITHOUT SUBSEQUENT STEPPARENT ADOPTION IN SOME CASES *F.S. 39.811(6)*

PROCEEDINGS FOLLOW FLORIDA JUVENILE RULES OF PROCEDURE

REQUIRES APPOINTMENT OF A GAL

SEARCH OF THE FLORIDA PUTATIVE FATHER REGISTRY IS REQUIRED ONLY IF THE FATHER'S IDENTITY IS UNKNOWN

STRICT DUE PROCESS REQUIREMENTS, INCLUDING:

Strict Due Process Requirements

APPOINTMENT OF COUNSEL

PERSONAL SERVICE OF TPR PETITION & NOTICE OF AN ADVISORY HEARING – INCLUDES BIG, BOLD WARNING THAT FAILURE TO APPEAR = CONSENT TO TPR

MUST BE NOTIFIED OF ABILITY TO PLACE CHILD WITH PRIVATE ADOPTION ENTITY

ADJUDICATORY HEARING

(FINAL HEARING)

ADOPTION PURSUANT TO CH. 39 TPR CONTROLLED BY F.S. 39.812 AND CHAPTER 63 –SOME PORTIONS OF CHAPTER 63 ARE EXPLICITLY INAPPLICABLE

SEE F.S. 63.037

Chapter 63: Adoption

Ch. 63 governs all adoptions, including those pursuant to Ch. 39 TPR, and newborn/private placements, stepparent, relative, and adult adoptions

Termination of parental rights is pursued ***only*** for the purpose of subsequent adoption – no single parent TPRs are permitted without an adopting parent to "step into the shoes" of the parent being TPR'd

Includes provisions for both the TPR and adoption portions of the case

Relative, stepparent, and adult adoptions – can file a joint petition for TPR and adoption, and typically accomplish both in one hearing

All other adoptions – must petition for and accomplish TPR before petitioning for adoption, and separate hearings are required

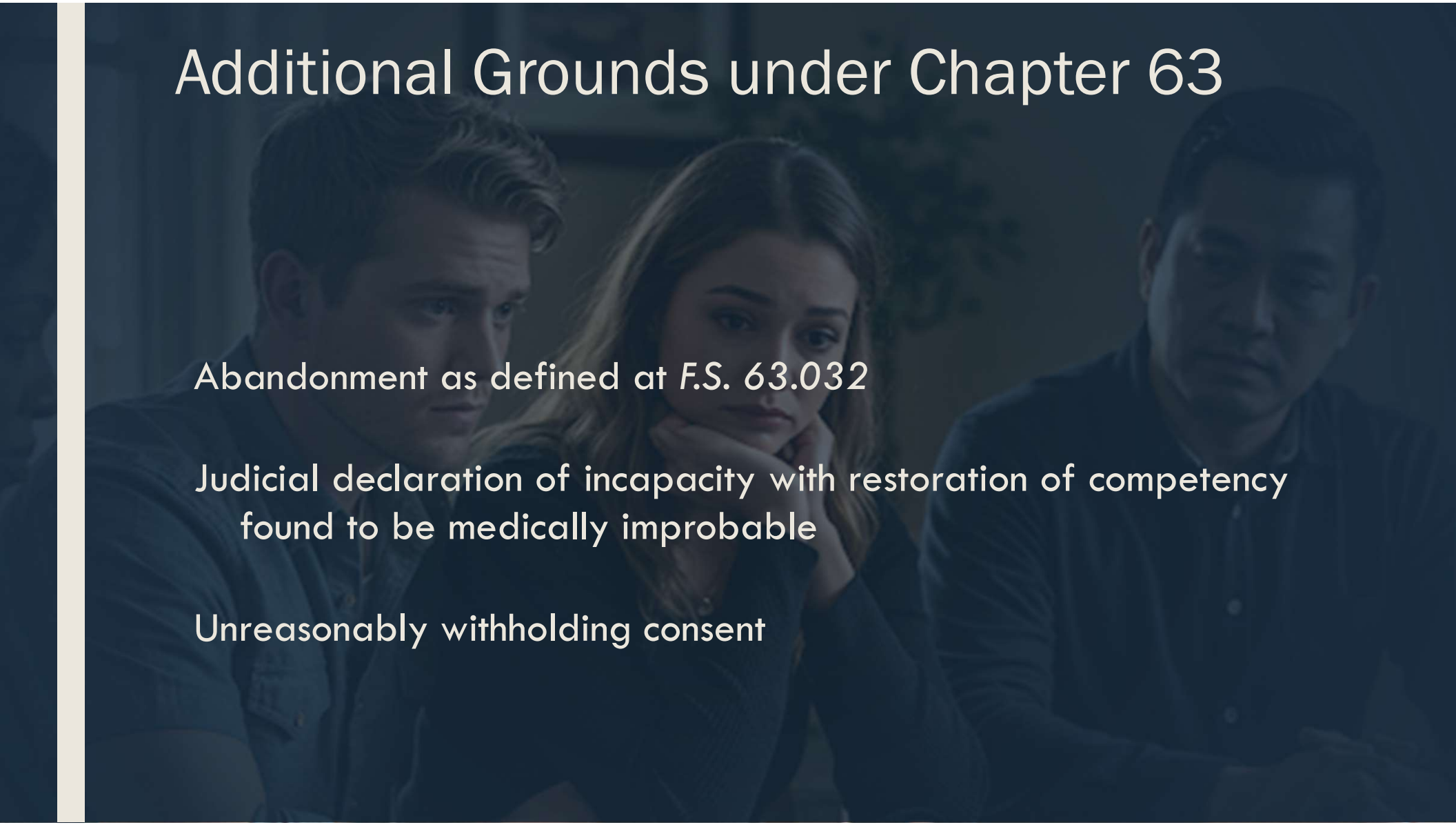
Grounds for TPR under Ch. 63 are more limited than under Ch. 39:

Consent – note that Chapter 63 is extremely detailed about whose consent is required. See F.S. 63.062 regarding fathers, in particular.

Affidavit of nonpaternity – despite the title, any father or potential/alleged father can sign an affidavit of nonpaternity in lieu of consent

Failure to respond and/or appear after service and notice

Additional Grounds under Chapter 63



Abandonment as defined at *F.S. 63.032*

Judicial declaration of incapacity with restoration of competency found to be medically improbable

Unreasonably withholding consent

Due Process Requirements

- *Appointment of counsel is NOT addressed in Chapter 63, but rather in case law. An indigent legal parent is entitled to appointed counsel in an adoption proceeding that involves the involuntary termination of his or her parental rights pursuant to chapter 63. M.G.C. v. M.C., 899 So. 2d 486 (Fla. 2nd DCA 2005).*
- *Notice requirements are explained at F.S. 63.088 and there are important, detailed distinctions that bear careful study.*

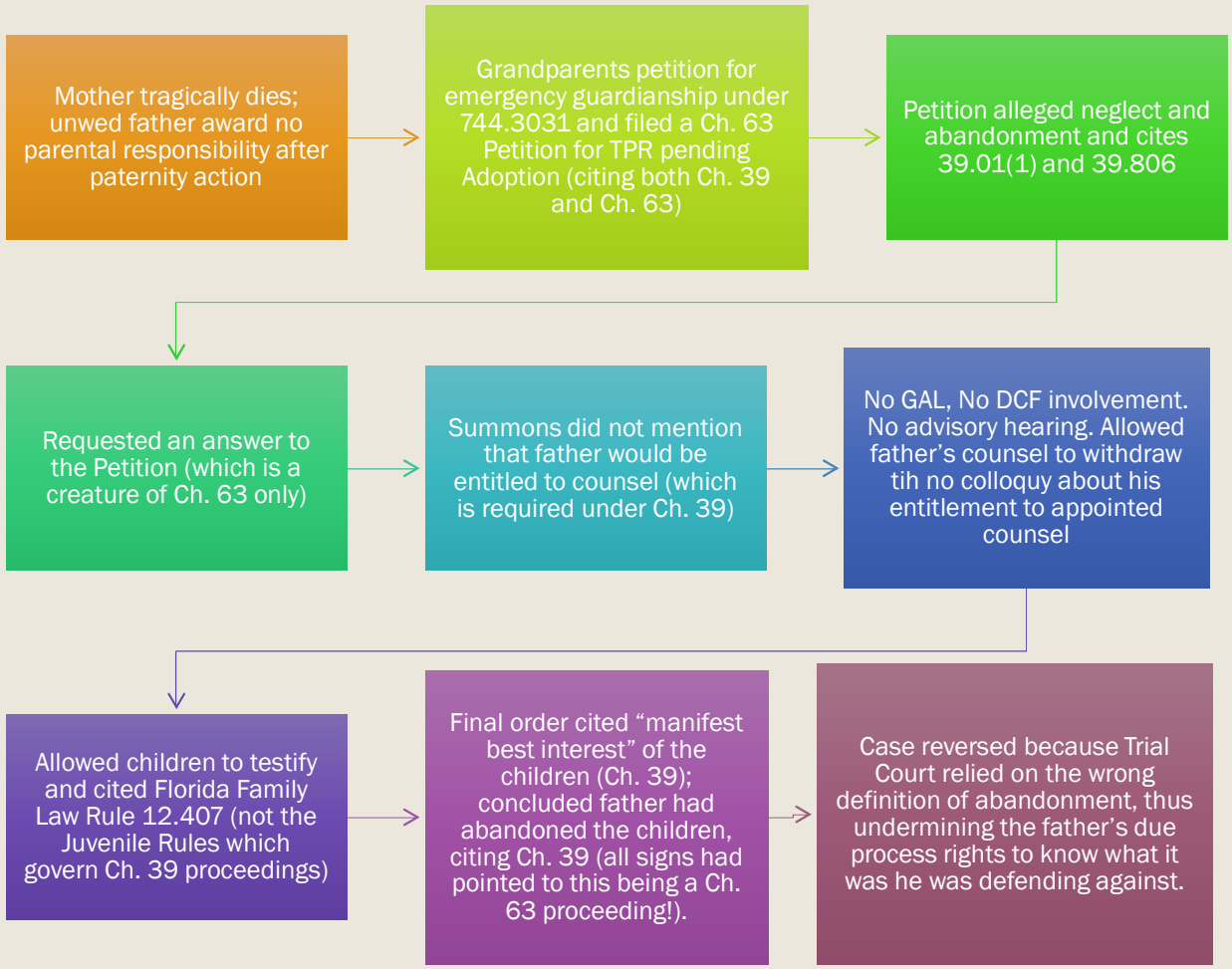
A.M. v. D.S., 314 So.3d 747 (1st DCA 2021)

The two types of TPR proceedings under Ch. 39 and Ch. 63 are "separate and distinct."

- Ch. 39 pursues a TPR as its own end upon clear and convincing proof of certain statutory factors.
- Abandonment is an independent ground for termination (not a substitute for consent)
- Determination of abandonment requires the Court to determinate whether the parent has made a "significant contribution to the child's care" or whether the parent "has failed to establish or maintain a substantial and positive relationship with the child."
- ***Objective*** test, considered from the perspective of the child's welfare.
- Looks for "frequent and regular contact"; "marginal" or "token" efforts do not count.

- Ch. 63 pursues TPR in furtherance of the adoption.
- Asks, Is there consent? OR
- Does parent's conduct demonstrate an intent to avoid being a parent?, therefore consent should be excused.
- Abandonment definition is focused on the parent's ***subjective*** intention to be a parent (while being able).
- 63.032(1) defines abandonment as "evincing an intent to reject parental responsibilities"; whether the parent's efforts are "marginal" and "do not evince a settled purpose to assume parental duties."
- Abandonment is defined as "conduct which manifests a settled purpose to permanently forego all parental rights and the shirking of the responsibilities case by law and nature so as to relinquish all parental claims to the child."

A.M. v. D.S., 314 So.3d 747 (cont'd) "The respective definitions of abandonment in chapter 39 and chapter 63 ***are not interchangeable.***"



Trending issues
Second Parent Adoptions: No legal authority

Children born to intact marriages (including same-sex intact marriages) are the legal child of both parents

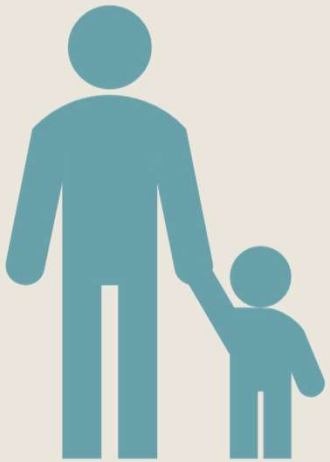
Adoption is meant to create a legal relationship between the person adopting and the minor child where it did not previously exist

Two married parents already both have an established legal relationship to a child born to their intact marriage

Obergefell v. Hodges established a fundamental right to marry which will be recognized across states. The child is already the legal child of both parents.

Therefore, there is no procedure by which a legal parent can adopt their own child

Joint Petition for Adoption by Stepparent ***DISMISSED***.



Chapter 751 Basics

This statute was amended to clarify certain provisions, including due process and considerations for awarding temporary custody. Temporary or concurrent custody with the parents' consent or over their objection if they are temporarily "unfit."

751.011 Definitions.—As used in this chapter, the term:

(1) "Concurrent custody" means that an eligible extended family member is awarded custodial rights to care for a child concurrently with the child's parent or parents.

(2) "Extended family member" means a person who is:

(a) A relative of a minor child within the third degree by blood or marriage to the parent;

(b) The stepparent of a minor child if the stepparent is currently married to the parent of the child and is not a party in a pending dissolution, separate maintenance, domestic violence, or other civil or criminal proceeding in any court of competent jurisdiction involving one or both of the child's parents as an adverse party; or

(c) An individual who qualifies as "fictive kin" as defined in s. 39.01.

751.02 Temporary or concurrent custody proceedings; jurisdiction.

(1) The following individuals may bring proceedings in the circuit court to determine the temporary or concurrent custody of a minor child:

(a) Any extended family member who has the signed, notarized consent of the child's legal parents; **OR**

(b) Any extended family member who is caring full time for the child in the role of a substitute parent and with whom the child is presently living.

(2) In addition to the requirements of subsection (1), an individual seeking concurrent custody must:

(a) Currently have physical custody of the child or have had physical custody of the child for at least 10 days in any 30-day period within the last 12 months; **AND**

(b) Not have signed, written documentation from a parent which is sufficient to enable the custodian to do all of the things necessary to care for the child which are available to custodians who have an order issued under s. 751.05.

CHAPTER 751 UPDATES:

Extends the definition of Extended Family Member to include “fictive kin” as defined in s. 39.01. (751.011(2)(c)).

- “Fictive kin” means a person unrelated by birth, marriage, or adoption but who has an emotionally significant relationship, which possesses the characteristics of a family relationship, to a child.

CHAPTER 751 UPDATES:

751.03—MUST put in the Petition a reasonable plan for transitioning custody and other provisions that are related to the best interest of the child.

Expands the power of the Court to establish and enforce transition plans.

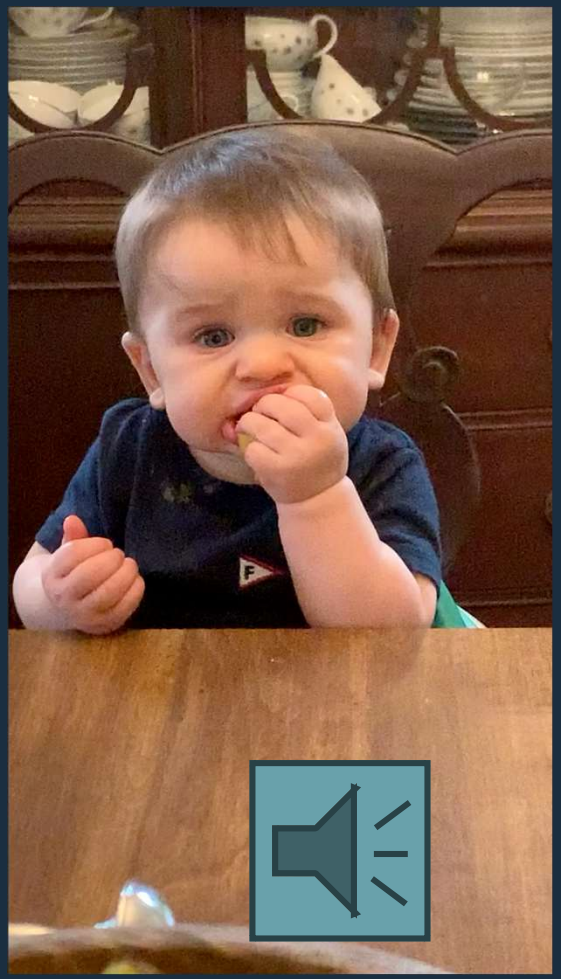
751.05(4)(a): The order must expressly state that the grant of custody does not affect the ability of the child's parent or parents to obtain physical custody of the child at any time . . .the court may *approve* provisions. . .which are related to the best interest of the child, including a reasonable transition plan that provides for a return of custody back to the child's parent or parents.

751.05(4)(b): Temporary custody of the minor child to the petitioner may *include* provisions requested in the petition which are related to the best interest of the child, including a reasonable transition plan that provides for a return of custody back to the parent or parents, and ***may also grant visitation rights to the child's parent or parents, if it is in the best interest of the child.***

751.05(6)(b): "… the court may require the parties to comply with provisions approved in the order which are related to a reasonable plan for transitioning custody before terminating the order."

751.05(6)(c) If the order was entered AFTER a finding that the child's parent or parents are unfit. The Court may, ***on its own motion***, establish reasonable conditions, which are in the best interests of the child, for transitioning the child back to the custody of the child's parent or parents.

WE'D LIKE TO CONCLUDE WITH A WELLNESS SLIDE SHOW INSPIRED BY OUR CHILD-CENTERED PRESENTATION



LITIGATION: IT'S SOUR, BUT WE KEEP GOING BACK FOR MORE

WHEN YOUR CLIENT KEEPS TELLING YOU HE'S AN "ASS" BUT SHE'S OBVIOUSLY STILL IN LOVE WITH HIM

HOW IT FEELS TO BE “DRUNK” ON YOUR OWN THEORY OF THE CASE

WHEN YOU FIND A CASE DIRECTLY ON POINT IN YOUR CLIENT'S FAVOR

WHEN THE JUDGE ASKS YOU TO ARTICULATE YOUR COMPLICATED LEGAL ARGUMENT, AGAIN

WHEN THE JUDGE ASKS YOU TO DRAFT THE PROPOSED ORDER, ADOPTS ALL YOUR FINDINGS, AND THEN CHANGES THE PROPOSED RULING TO SAY "BUT DESPITE ALL THAT. . ." AND YOU LOSE.

VISION OF OUR INTERNAL SCREEN WHILE THE JUDGE RENDERS HER RULING AT A TRIAL SCHEDULED THE WEEK BEFORE VACATION

“DO YOU KNOW WHAT A MOTION TO WITHDRAW FOR NON-PAYMENT LOOKS LIKE?”

OUR INTERNAL MONOLOGUE WHEN WE'RE IN TRIAL ON BAD FACTS

("I'VE JUST GOT TO DO IT; I'VE JUST GOT TO!")

HOW SWEET IT IS TO SEE THEM ALL GROWN UP!


THIS CONCLUDES
OUR APRIL 2025
FAMILY LAW
WELLNESS
MOMENTS SLIDE
SHOW

THE END

April Pupillage Group 2025
Helmed by Molly Sasso
Sasso Guerrero & Henderlite
Special Thanks to all my Team
for contributing to this
presentation!