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03-1602

LAST CASE ON THE COURT'S DOCKET THIS MORNING IS THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES VERSUS F.L.

GOOD MORNING. I AM JOHN RIMES WITH THE OFFICE OF THE ATTORNEY GENERAL, REPRESENTING THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES IN THIS CASE AND ALSO WITH ME IS DENNIS MOORE. DECLARING SECTION 109.106 PAREN I TO BE UNCONSTITUTIONAL. IT IS NOT QUITE CLEAR FROM THE COURT'S DECISION UPON WHAT BASIS THAT DECISION WAS MADE, BUT IT APPEARS TO HAVE BEEN MADE BASED UPON EITHER THE DETERMINATION OF THE SUPREME COURT THAT THE STATUTE IMPROPERLY UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF FROM THE PRESENTER IN A TERMINATION OF PARENTAL RIGHTS CASE TO THE RESPONDENT OR ALTERNATIVELY DID NOT ACCURATELY REFLECT THE FACT THAT ANY STATUTE RELATING TO THE TERMINATION OF PARENTAL RIGHTS HAS TO MEET THE STATUTES --

WHAT DID IT SAY?

35.106 PAREN 1 PAREN I PROVIDES THAT THE BASIS OF TERMINATION OF PARENTAL RIGHTS CAN APPLY TO THE TERMINATION OF PARENTAL RIGHTS TO THAT SAME PARENT AND IT ALSO APPLIES THAT UNDER THOSE SAME CIRCUMSTANCES, THE DEPARTMENT IS NOT REQUIRED PRIOR TO BRINGING A PETITION, TO OFFER SERVICES.

SO DOES -- PRIOR TO BRINGING A PETITION, TO OFFER SERVICES.

SO DOES THAT MEAN THAT, ONCE THE DEPARTMENT HAS DEMONSTRATED THAT THIS PERSON HAS, IN FACT, HAD ANOTHER CHILD THAT WAS TAKEN AWAY INVOLUNTARILY, THAT IS THE END OF THE INQUIRY?

NO, YOUR HONOR.

YOU HAVE DEMONSTRATED THAT PARTICULAR, THAT PARTICULAR GROUNDS FOR TERMINATION, CORRECT?

WE HAVE, UNDER THOSE CIRCUMSTANCES, FOUND A STATUTORY GROUND WHICH ALLOWS US TO WALK IN THE COURTHOUSE DOOR TO SEEK THE PETITION.

SO WHAT CAN THE DEFENSE DO? WHAT CAN THE PARENT DO, ABOUT THAT PARTICULAR GROUND? I MEAN, IS THERE ANYTHING THAT A PARENT COULD DEMONSTRATE THAT WOULD NEGATE THAT PARTICULAR GROUND?

WE WOULD SUBMIT THERE IS LOTS OF THINGS THE PARENT COULD DEMONSTRATE, NOT TO NEGATE THE GROUNDS IN THE SENSE THAT IT EXISTS BUT THE QUESTION AS TO WHETHER OR NOT THE GROUND IS SUFFICIENT UPON WHICH TO BASE A TERMINATION OF A PARENT'S RIGHTS. WHAT WE ARGUE AS THE VARIOUS DISTRICT COURTS OF APPEALS WHO HAVE ALSO RULED ON THIS PARTICULAR GROUND AND DETERMINED IT TO BE CONSTITUTIONAL, HELD THAT ALL THIS DOES IS SHIFT THE BURDEN OF GOING FORWARD TO EXPLAIN THINGS HAVE NOW CHANGED, TO --

THE BURDEN OF PROOF OR SHIFT THE BURDEN OF PRODUCTION?

WE THINK IT IS A SHIFT OF THE BURDEN OF PRODUCTION.

SO IN OTHER WORDS IF THE MOM SAYS, THEN, SO YOU ARE SAYING IT IS A PERMISSIVE INFERENCE, REALLY, THAT IF YOU SHOW THAT THE RIGHT TO SEVERAL CHILDREN OR ONE CHILD HAS BEEN TERMINATED, THE PARENT HAS TO SAY, LOOK, I AM BETTER NOW, AND JUST SAY THAT, AND THEN IT GOES BACK IN THE END, AND IT IS UP TO THE STATE OR THE DEPARTMENT TO SHOW THAT REUNIFICATION WOULD POSE A SUBSTANTIAL RISK OF HARM TO THE CHILD, UNDER PADGETT?

THAT IS INCUMBENT UPON THE STATE, ONCE THE PARENT COMES FORWARD WITH SOME PROBATIVE EVIDENCE OF THE FACT THAT THINGS HAVE CHANGED, IT IS THEN THE BURDEN OF THE STATE TO SHOW, BY CLEAR AND CONVINCING EVIDENCE, THAT WHAT HAS BEEN PRESENTED BY THE MOM OR THE DAD, IS NOT.

IN FACT, HAVEN'T YOU, BY GIVING US THIS, WHICH SOUNDS LIKE A VERY REASONABLE CONCEPT HERE, REALLY, ENGRAFTED A WHOLE LOT OF THINGS ONTO THIS STATUTORY PROVISION, AND AREN'T YOU READING THE STATUTE CONTRARY TO A PLAIN READING OF THE STATUTE, WHICH SAYS ALL THAT HAS TO BE ESTABLISHED IS THAT THERE HAVE BEEN A PRIOR TERMINATION IN ANOTHER CASE, AND THAT IS SUFFICIENT GROUNDS, THEN, FOR THE COURT TO TERMINATE IN THE PARTICULAR CASE BEFORE THE COURT. THAT, IN OTHER WORDS, I ASK YOU WHAT THE STATUTE SAID, AND IT SEEMS LIKE THAT IS WHAT YOU TOLD ME IT SAID. THAT THAT IS SUFFICIENT TO TERMINATE, AND IN THE PRESENT CASE, IF THERE HAS BEEN A PRIOR TERMINATION. ISN'T THAT WHAT THE STATUTE SAYS?

AND IT DOES, YOUR HONOR, BUT --

WHY CAN'T A TRIAL JUDGE SAY, HEY, I READ THE STATUTE. IT IS UNDISPUTED THAT THERE WAS A PRIOR TERM -- UNDISPUTED THAT THERE WAS A PRIOR TERMINATION AND I FOUND THAT THERE BE A TERMINATION IN THIS CASE. NOW LET'S GO ON TO THE OTHER PART OF IT ABOUT THE BEST INTEREST OF THE CHILD, SO I AM HAVING DIFFICULTY ON A PLAIN READING OF WHAT THE LEGISLATURE PROVIDED HERE, THAT IT PROVIDES ANYTHING BUT AN ABSOLUTE GROUND FOR THE STATE, NOW, TO TERMINATE.

WELL, I THINK WE HAVE TO LOOK AT WHAT THE LEGISLATURE DID WHEN IT ENACTED THE STATUTE.

WHY DO WE NEED TO DO ANY OF THAT, IF A PLAIN READING OF THIS STATUTE, YOU KNOW, WE HAVE ALWAYS DO HAVE TROUBLE WITH LOTS OF STATUTES, AS WE SAY, WELL, THIS PART OF THE STATUTE SAYS THIS BUT THEN THIS PART SAYS THIS. BUT THIS THING IS VERY PLAIN AND EASY TO READ, AND DON'T WE ORDINARILY SAY, IF IT IS SIMPLE AND PLAIN AND EASY TO READ, WE STOP RIGHT THERE AND ASSUME THE LEGISLATURE MEANT WHAT IT SAID. WE DON'T GO AND LOOK AT OTHER THINGS. DO WE?

WELL, I THINK WE DO WHEN WE ARE TALKING ABOUT DETERMINING WHETHER OR NOT THE STATUTE IS CONSTITUTIONAL OR NOT, AS OPPOSED TO DETERMINING WHETHER, THIS COURT HAS SAID --

WHAT IF THE PROVISION, INSTEAD, SAID, IF THE PARENT HAS BEEN CONVICTED OF A VIOLENT FELONY, OKAY, NOW, WOULD WE HAVE TO GO AND LOOK ANYWHERE ELSE, AND WOULD YOU SAY IN THAT CASE, THAT THE PARENT COULD COME IN, THEN, AND SAY, YOU KNOW, I HAVE BEEN REHABILITATED, AND YOU KNOW, ALL OF THAT KIND OF STUFF?

WELL, I THINK WE DO, IF WE ARE ENDEAVORING TO DETERMINE WHETHER OR NOT THE LEGISLATURE WAS TRYING TO, WHEN THIS COURT, IN PADGETT, SETS FORTH WHAT THE STANDARDS WERE IN CIRCUMSTANCES WITH REGARD TO PRIOR TERMINATION OF PARENTAL RIGHTS, AND THAT IT COULD BE A BASIS FOR TERMINATION OF RIGHTS TO A PRESENT CHILD, THE

COURT SET FORTH THIS CONSTITUTIONAL STANDARD, AND AS OPPOSED TO A STATUTORY STANDARD. WHEN THE STATUTE IS PURSUANT TO A FEDERAL MANDATE WHICH ENACTED, TO GET FUNDS FOR PROVIDE SERVICES TO KIDS, INTENDED TO IN SOME WAY ADDRESS THIS COURT'S CONSTITUTIONAL DETERMINATION --

SO IS THAT WHAT YOU ARE ASKING US TO DO, REALLY, IS TO SORT OF ENGRAFT THESE OTHER THINGS ONTO THIS PROVISION, IN ORDER TO MAKE IT CONSTITUTIONAL, UNDER PASSAGEET?

I THINK IT IS APPROPRIATE TO DO SO IN THIS CIRCUMSTANCE.

OKAY.

OKAY. SOMETHING THAT YOU HAD SAID AT THE BEGINNING. MY OTHER CONCERN WITH THIS PROVISION, BESIDES WHAT IT CLEARLY SAYS AND YOU ARE SAYING IT REALLY NEEDS TO BE INTERPRETED TO MAKE IT A SHIFT, MAYBE, OF THE BURDEN OF PRODUCTION BUT NOT THE BURDEN OF PROOF, IS THAT NORMAL, IN MOST SITUATIONS, YOU, EXCEPT FOR A FEW EXEMPT SITUATIONS, THE DEPARTMENT IS REQUIRED TO GIVE A CASE PLAN AND OFFER SERVICES, AS YOU SAY. IF A PARENT, LIKE IN THIS SITUATION OF THE F.L., HAD DONE POORLYLY OR TERRIBLY WITH THE PRIOR CHILDREN BUT NOW SOMETHING HAS HAPPENED AND NOW SHE IS TRYING, BUT IF THE DEPARTMENT, THEN, ISN'T REQUIRED TO OFFER SERVICES OR A CASE PLAN, DOESN'T IT BECOME SORT OF A SELF-FULFILLING PROPHECY, THAT IS THAT YOU KNOW, THE MOM NOW SAYS, LOOK, I GOT DRUG TREATMENT, I KNOW I WAS BAD WITH THESE OTHER CHILDREN BUT I LEFT THE GUY HE WAS WITH. I HAVE TRIED TO GET DRUG TREATMENT, BUT IF THE STATUTE IS WRITTEN SO AS THE DEPARTMENT CAN GO AHEAD RIGHT AWAY AND SEEK TERMINATION AND NOT OFFER SERVICES OR A CASE PLAN, THE PARENT IS ALREADY AT A TERRIBLE DISADVANTAGE, IN TERMS OF WHAT THEY ARE ABLE TO ESTABLISH, ESPECIALLY IF THEY ARE POOR AND WITHOUT FUNDS. HOW DOES THAT, HOW DOES THE DEPARTMENT INTERPRET THOSE TWO, TOGETHER, IN OTHER WORDS, YOU ARE SAYING, WELL, YEAH, THEY CAN COME UP WITH SOME EVIDENCE BUT WE REALLY DON'T HAVE TO DO ANYTHING TO HELP THIS PARENT, IF WE TRY TO HELP THAT PARENT ON PREVIOUS OCCASIONS AND IT HASN'T WORKED?

WELL, IT SEEMS TO ME, UNDER THE CIRCUMSTANCES, ONCE AGAIN, IF THE PARENT HAS MADE AN EFFORT OF SOME SORT, TO SHOW THAT TIME HAS PASSED OR THINGS HAVE OCCURRED THAT WOULD ALLOW THE PARENT TO SHOW SOME PROBATIVE EVIDENCE THAT THINGS HAVE CHANGED, THAT IS SOMETHING THE TRIER OF FACT HAS TO DETERMINE.

BUT YOU ARE SAYING NORMALLY, IN A SITUATION, THE, BEFORE THERE IS TERMINATION, THERE HAS GOT TO BE A CASE PLAN WITH SOME DECISION AS TO WHAT IS GOING TO HAPPEN, AND IF THIS WAS APPARENTLY, AT LEAST ACCORDING TO JUDGE WARNER'S OPINION, THIS MOTHER HAD MADE, SHE WAS MAKING EFFORTS ON HER OWN TO TRY TO GET CERTAIN SERVICES OR ATTEND CLASSES, MAYBE SHE WASN'T DOING, SHE WASN'T GETTING AN "A" RATING BUT SHE WASN'T A "E", EITHER, BUT THE DEPARTMENT'S POSITION WAS WE DON'T HAVE TO DO ANYTHING TO HELP, BECAUSE WE HAVE GOT SUBSECTION I THAT ALLOWS US TO SEEK TERMINATION. HOW DO YOU RECONCILE THOSE PARTS OF THE STATUTE, TO SAY WE ARE REALLY PROTECTING THE PARENTS FUNDAMENTAL INTEREST TO SAY RAISE THE CHILD?

THE STATUTE SAYS THAT THE DEPARTMENT IS NOT REQUIRED TO OFFER SERVICES IN ORDER TO UTILIZE THESE PROVISION TO SAY BRING --

BUT THAT IS A PRETTY BIG THING, BECAUSE HE HAVE HEN IN ABANDONMENT AND NEGLECT SITUATION, THEY ARE REQUIRED, EVEN THOUGH, TO TAKE A LOOK AND COME UP WITH A CASE PLAN, SO TO SAY, LET'S JUST ASSUME INSTEAD OF THIS BEING FIVE PRIOR CHILDREN, IT WAS ONE PRIOR CHILD. IT DOESN'T SAY HOW MANY, RIGHT? ONE PRIOR CHILD, AND NOW THERE IS EVIDENCE THAT SHE WAS REALLY, SHE LEFT THE GUY, AND SHE IS NOW GETTING DRUG TREATMENT. STILL, THIS STATUTE, THE WAY IT IS WRITTEN, STILL DOESN'T REQUIRE THE

DEPARTMENT TO PROVE THAT THERE IS A SUBSTANTIAL RISK OF HARM IN REUNIFICATION, AND THEY DON'T HAVE TO OFFER SERVICES. DON'T YOU SEE A PROBLEM WITH THAT?

WELL, I ONLY SEE THE PROBLEM OCCURRING, IF THE EVIDENCE PRESENTED BY THE MOM OF WHAT SHE HAS ENDEAVORED TO DO, IS INSUFFICIENT TO SHOW THAT THERE IS SOME BASIS UPON WHICH THE TRIER OF FACT SHOULD NOW SAY, DEPARTMENT, EXPLAIN TO ME WHY YOU DID NOT OFFER THESE SERVICES, WHY WAS IT NOT APPROPRIATE FOR THESE TO HAPPEN?

AND BACK TO JUSTICE ANSTEAD, WHERE DOES IT SAY THAT THE TRIAL JUDGE WOULD KNOW THAT, AFTER "I" IS, I CAN'T TELL, BECAUSE THE MOTHER DOESN'T HAVE ANY MONEY TO GET THESE SERVICES, SO WHERE DOES IT SAY THAT THE JUDGE IF THEY REALLY DON'T KNOW, NOW GOES AND SAYS TO THE DCF, NOW SAYS NOW PLEASE PROVIDE THESE SERVICES. HOW DOES THE JUDGE KNOW TO DO THAT?

WE COULD, OF COURSE, GET TO BEST INTEREST AND THE ULTIMATE DISPOSITION REQUIREMENTS IN 39.811, ALL OF WHICH WOULD ALLOW A JUDGE, IF THE JUDGE WAS CONVINCED, BASED UPON, PERHAPS, THE MOTHER'S OWN ALLOCUTION AT TRIAL THAT, YES, JUDGE, I HAVE NO MONEY.

BUT THIS IS ALL SHIFTING THE BURDEN AWAY FROM WHERE A NORMAL TERMINATION IS, THAT, AGAIN, THE IDEA IS TO GET PERMANENCY WITHIN A SHORT TIME, BUT WITH THE DEPARTMENT HAVING TO SAY COME UP WITH A CASE PLAN, SO THAT WE CAN HELP ACHIEVE THIS, AND THEN, OF COURSE, IF THE, IF THE MOM FAILS, THEN YOU GO TO, OKAY, NOW YOU CAN GO TO 810, BUT YOU DON'T GET TO 810, UNLESS YOU HAVE AN ESTABLISHED GROUND WHICH HAS A SUBSTANTIAL RISK OF HARM UNDER 801.

CHIEF JUSTICE: I WANT TO YOU RESPOND TO THAT BUT COMING BACK TO YOUR APPARENT GAMEPLAN ABOUT HOW YOU WERE DIVIDING YOUR TIME, YOU ARE ALREADY IN SUBSTANTIAL DEVIATION FROM THAT. THERE SHOULD BE A CLOCK THERE IN FRONT OF YOU, AND SO IF YOU WANT TO ADJUST THAT, SO IT MAY RUN SHORT --

I THINK THE STATUTORY FRAMEWORK REFLECTS WHAT THIS COURT DETERMINED IN PADGETT, WHICH INSERT CIRCUMSTANCE, WHICH HELD VERY SPECIFICALLY THAT, A PRIOR DETERMINATION CAN FORM THE BASIS AFTER PRESENT DETERMINATION. THERE IS NO FINDING, IN THAT OPINION FROM A CONSTITUTIONAL STANDPOINT, WHICH REQUIRES THAT AN OFFER OF SERVICES BE A PRECURSOR TO MAKE THAT DETERMINATION. WHAT HAS OCCURRED HERE, IS, IN RESPONSE TO FEDERAL LEGISLATION, THE STATE IS NOT REQUIRED TO OFFER THOSE SERVICES. IT MAY WELL BE IN A CIRCUMSTANCE WHERE THE TRIAL, TRIER OF FACT SAYS, AFTER HEARING THE MOM'S EVIDENCE OR ALLOCUTION OR WHATEVER SHE CAN PRESENT, THAT IT IS THE DEPARTMENT'S DETERMINATION NOT TO OFFER A TREATMENT OR A PLAN OF CIRCUMSTANCES IN A PARTICULAR CIRCUMSTANCE, IS IN FACT AN ERROR, THAT IN FACT THE DEPARTMENT SHOULD HAVE OFFERED A PLAN OF SERVICES. THAT IS BASED UPON WHATEVER COMES BEFORE THE JUDGE, AND IN FACT IN THIS CASE THE DEPARTMENT OFFERED SOME SERVICES, AND THE MOM, WHO FAILED CONSISTENTLY IN THE PAST, FAILED AGAIN, AND IN THIS CASE THE CHILD WAS SHELTERED AND THE DPR PROCEEDING WENT FORWARD, SO I THINK IT IS POTENTIALLY POSSIBLE THAT A CIRCUMSTANCE COULD ARISE, WHERE WHAT JUSTICE PARIENTE SAID IS HAPPENING, BUT ALSO WHERE COUNSEL IS NOT MAKING ANY EFFORT TO SHOW THAT THINGS HAVE CHANGED. I DON'T THINK IT IS A GREAT BURDEN TO PUT ON THE MOM OR THE DAD TO SHOW THAT WHAT HAS HAPPENED IN THE PAST IS NO LONGER PROLOGUE, THAT WE HAVE SHOWN SOMETHING THAT REQUIRES THE DEPARTMENT TO SHOW THAT TO GO FORWARD AND EXPLAIN WHY IT IS IN THIS PARTICULAR CASE, WHAT I HAVE DONE TO BETTER MYSELF IS NOT SUFFICIENT.

I HAVE A QUESTION. I CAN, MAYBE YOUR COLLEAGUE CAN ANSWER IT, BUT WHOSE BURDEN IS IT, UNDER 810, REGARDING MANIFEST BEST INTEREST OF A CHILD? IS IT THE DEPARTMENT'S BURDEN TO SHOW THAT THE MANIFEST BEST INTEREST REQUIRE TERMINATION, OR IS IT THE PARENTS', TO

SHOW THAT THE MANIFEST BEST INTEREST DO NOT CALL FOR TERMINATION?

IT IS ALWAYS THE DEPARTMENT'S BURDEN, TO SHOW THAT THE ACTION WHICH IS REQUESTED IS TERMINATION.

WHAT IS THE STANDARD OR BURDEN OF PROOF? CLEAR AND CONVINCING?

CLEAR AND CONVINCING.

CHIEF JUSTICE: GOOD MORNING. GOOD MORNING. MAY IT PLEASE THE COURT. DENNIS MOORE FOR THE GUARDIAN AD LITEM. JUSTICE ANSTEAD, WE AGREED THAT THE PLAIN READING OF THE STATUTE AS A WHOLE, REQUIRES THE BURDEN TO BE ON THE PETITIONER, WHOEVER THAT MAY BE, TO PROOF BY CLEAR AND CONVINCING EVIDENCE, THAT TERMINATION OF PARENTAL RIGHTS IS APPROPRIATE.

WOULD YOU AGREE THAT A PLAIN READING OF THIS 806 IS THAT THE DEPARTMENT MAY PETITION FOR THE TERMINATION OF RIGHTS, AND THAT PETITION MAY BE BASED ON SECTION 9, IS THAT A FAIR READING OF IT?

IT HAS TO BE BASED ON ALL OF THE ELEMENTS, JUSTICE WELLS, AND NINE --

WE ARE NOT TALKING ABOUT THE PROOF. WE ARE TALKING ABOUT THE PETITION. IT THAT A FAIR READING OF THIS STATUTE?

I BELIEVE UNDER 39.802 SUBSECTION 4, YOU NEED NINE, YOU NEED 10, AND I BELIEVE THERE IS A RIGHT TO COUNSEL PORTION AS WELL. IF ALL OF THOSE ELEMENTS ARE PROVEN AND ONLY IF ALL OF THOSE ELEMENTS ARE PROVEN, CAN YOU THEN TERMINATE PARENTAL RIGHTS.

OKAY.

IN THIS PARTICULAR SITUATION, OUR POSITION IS THAT THE FUNDAMENTAL LIBERTY INTEREST IS PROTECTED UNDER THE 39.810 PORTION THAT REQUIRES AN ANALYSIS OF, AMONG OTHER THINGS, THE PARENT'S ABILITY TO CURRENTLY PARENT THEIR CHILD. IF THIS ANALYSIS OCCURS PRIOR TO THE FILING OF A PETITION, THE SITUATION, REALLY, SHOULDN'T BE IN THE COURT SYSTEM IN THE FIRST PLACE. IN OTHER WORDS, IF YOU HAVE A PRIOR TERMINATION OF PARENTAL RIGHTS, THAT IS GOING TO BE HIGHLY PROBATIVE, UNDER 39.810, AS TO WHETHER OR NOT A PARENT CAN CURRENTLY PARENT. THAT IS JUDGE IRVIN, I BELIEVE, DISSENT IN CW, WHERE ELICITED A VARIETY OF FACTS FOR THAT PARTICULAR PARENT. THAT PARTICULAR PARENT HAD BEEN DILIGENT IN COMPLYING WITH HER SERVICES, HAD NOT MISSED ANY POINTS, HAD A PSYCHOLOGICAL CONSULTATION, WHICH SAID THAT THAT PARENT COULD CORRECT HER PRESENTING SKILLS. THE ONLY ISSUE THERE COULD POSSIBLY BE HOW MUCH TIME IT WOULD TAKE HER THAT WOULD FACTOR INTO THE MANIFEST BEST INTEREST PORTION AS WELL.

YOUR COLLEAGUE SAYS THAT THIS IS NOT TRANSFERRING THE BURDEN OF PROOF BUT THE BURDEN OF PRODUCTION. DO YOU, THEN, DO YOU DISAGREE WITH THE FIFTH DISTRICT'S DECISION IN AB, AND DO YOU AGREE WITH SUCH SOYOYAZ'S CONCURRING POSITION IN TP THAT, ESSENTIALLY SAYS, 810 IS KIND OF LIKE CODIFICATION OF PADGETT. THE STATUTE WAS REWRITTEN AFTER PADGETT, AND IT EASY ESSENTIALLY REQUIRES NOT ONLY THAT OTHER CHILDREN'S, THAT PARENTAL RIGHTS HAVE BEEN TERMINATED IN OTHER CHILDREN, WHICH BRINGS YOU IN THE DOOR, BUT THEN THE DEPARTMENT HAS TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT, AS TO THIS CHILD, THE CHILD WOULD NOT BE SAFE WITH THE PARENT OR SOME OF THE OTHER FACTORS AND 810 WOULD APPLY?

YES. I DISAGREE WITH HOW THEY REACHED ABD, REBUTTABLE PRESUMPTION PORTION. I DO AGREE WITH JUDGE SOUYAZ'S PARTICULAR POINT, WHERE HE IS DESCRIBING IN THAT

PARTICULAR CASE THE LEAST RESTRICTIVE MEANS ANALYSIS, AND HE MAKES THE STATEMENT THAT IT IS NO LONGER NECESSARY. THE POSITION THAT WE ARE TAKING IS NOT THAT IT IS NO LONGER NECESSARY. IT IS THAT IT IS SUBSUMED WITHIN 39.810.

SO HOW DO YOU PRACTICALLY GET TO THIS? ONCE THE DEPARTMENT OR WHOM EVER THE MOVING PARTY IS, MAKES A PRESENTATION THAT THERE HAS BEEN A PRIOR TERMINATION, WHAT, THEN, PRACTICALLY HAPPENS? DOES THE DEPARTMENT, THEN, IS IT THEN INCUMBENT UPON THE DEPARTMENT TO DO THE MANIFEST BEST INTEREST OR IS IT THEN INCUMBENT UPON THE PARENT TO DO SOMETHING?

IN TERMS OF THE JUDICIAL PROCEEDINGS?

YES.

OKAY. IT IS INCUMBENT UPON THE PETITIONER, WHOEVER THAT MAY BE, TO PROVE IN THERE, THAT THERE, IN THIS PARTICULAR INSTANCE, HAS BEEN NOTHING THAT WOULD CHANGE THE CIRCUMSTANCES FROM THE, YOU HAVE TO LOOK AT WHAT WENT ON IN THE TPR. YOU HAVE TO LOOK AT THE REASONS BEHIND IT. I THINK THIS COURT --

YOU HAVE TO LOOK AT THE REASONS BEHIND THIS ORIGINAL, THE TERMINATION OF THE PREVIOUS CHILDREN.

CORRECT.

UNDER 806 OR 810?

UNDER 810.

SO YOU DO GO IMMEDIATELY INTO, ONCE YOU HAVE SHOWN THE BARE FACTS OF 806, YOU GO IMMEDIATELY INTO 810?

THAT'S CORRECT, AND THAT SHOULD BE APPARENT TO WHOM EVER FROM THE STAFF IS DOING THE LEGAL SERVICES WORK THAT IS DONE.

MAYBE, GOING BACK TO PADGETT IN ALL OF THESE OTHER CASES, IS THERE IS A TWO PRONG SITUATION. MANIFEST BEST INTEREST IS ALWAYS A FACTOR, BUT MANIFEST BEST INTEREST CANNOT BE THE REASON FOR TERMINATION, THAT UNDER THE TERMINATION, UNDER 806, THAT THE GROUNDS HAS TO INCLUDE SOMETHING PRESENTLY THAT IS A SUBSTANTIAL RISK OF HARM. NOW, I CAN UNDERSTAND THAT, AND PADGETT SAID IT, THAT THE FACT THAT THERE HAS BEEN TERMINATION OF FIVE OTHER CHILDREN, IN SOME CASES UNDER TERRIBLE CIRCUMSTANCES, SOME WOULD SAY YOU DON'T GET A FRESH START. YOU ARE NOT STARTING -- BUT STILL, WITHOUT READING IT IN, DOESN'T THERE STILL WITHIN THE PAST, GOT TO BE THE FINDING, JUDICIAL FINDING THAT THE PRESENT POSES A SUBSTANTIAL RISK OF HARM TO THE CHILD, BEFORE YOU GET TO 810?

WELL, THE PRIOR TERMINATION WHICH WE ARE USING HERE, WHEN YOU HAVE A PRIOR TERMINATION THAT, IS DEFINITELY A CLEAR INDICATOR OF HOW YOU ARE GOING TO TREAT FUTURE CHILDREN, SO IN THAT SENSE IT IS NARROWLY TAILORED TO THOSE PEOPLE WHO HAVE HAD THAT, HAVE A COURT FINDING SAY THAT --

EVEN THOUGH THAT OCCURRED 15 YEARS BEFORE AND IN ANOTHER MARRIAGE AND NOW, FOR 15 YEARS, THIS PERSON HAS BEEN IN A SECOND MARRIAGE AND IS NOW THE PRESIDENT OF FLORIDA STATE UNIVERSITY AND HAS THE, YOU KNOW, I AM HAVING DIFFICULTY AS TO HOW THAT LOGICALLY FOLLOWS.

THAT IS WHY YOU NEED THAT CATCH-ALL UNDER 39.810. WHAT JUSTICE PARIENTE, I THINK, IS SAYING IS DON'T WE NEED TO ESTABLISH UNDER GROUNDS THAT, THERE IS SOME CONNECTION TO THE PRESENT.

WHAT PADGETT SAYS THAT?

WELL, NOT, I DON'T KNOW THAT PADGETT DIRECTLY SAID YOU HAD, UNDER WHAT PART OF THE STATUTORY SCHEME THE LEGISLATURE HAD TO DO THAT ANALYSIS.

THE ESSENTIAL KEY TO TERMINATION HAD TO BE THAT THE PARENT WAS DOING SOMETHING DETRIMENTAL TO THE WELFARE OF THE CHILD.

THE CHILD IS CURRENTLY AT-RISK. AND IS GOING BACK AND LOOKING AT WHAT WENT ON THERE, AND NOW, WITH YOUR SCENARIO, JUSTICE ANSTEAD, YOU COULD HAVE A SITUATION WHERE, 15 YEARS DOWN THE ROAD, YES, THEY STILL CAN'T PARENT A CHILD, AND ON THE OTHER HAND, THAT COULD NOT BE THE SCENARIO. THERE IS NO WAY TO GET A BRIGHT LINE IN THERE. I DON'T BELIEVE.

DO YOU SUPPORT YOUR CO-COUNSEL'S OR COUNSEL FOR DCF'S POSITION THAT WE SHOULD JUST INTERPRET THIS AS A REQUIREMENT THAT THE PARENT GO FORWARD WITH PROOF?

WE DON'T BELIEVE THAT IS NECESSARY. WE --

SO YOU JUST READ THE TWO PROVISIONS TOGETHER, AND SAY, WHEN YOU READ TEN WITH THIS PROVISION, THEN THAT TAKES CARE OF IT.

THAT WOULD BE A FAIR STATEMENT.

CHIEF JUSTICE: OKAY. WE HAVE USED UP YOUR TIME, WITH THE HELP OF OUR QUESTIONS. THANK YOU. COUNSEL. GOOD MORNING.

GOOD MORNING.

LET ME ASK YOU A QUESTION. CAN YOU DESCRIBE TO ME THE DIFFERENCE IN THE STATUTORY STRUCTURE, PARTICULARLY AS IT RELATES TO THE REQUIREMENT TO SEEK REUNIFICATION, AS IT EXISTED WHEN PADGETT WAS DECIDED, AND AS IT EXISTED POST THE '97 FEDERAL ACT, THE ADOPTION OF THE "SAFE FAMILIES" ACT.

CHIEF JUSTICE: I WANT TO YOU ANSWER THAT QUESTION, BUT BEFORE YOU DO, IF YOU WOULD PUT YOUR NAME AND REPRESENTATION ON THE RECORD FOR US HERE.

MAY IT PLEASE THE COURT. MY NAME IS FELICIA SHAMAN, COUNSEL FOR F.L., THE MOTHER AND THE APPELLEE. WHEN PADGETT WAS DECIDED, CHAPTER 39.806-C, WHICH DEALS WITH IRRESPECTIVE OF THE PROVISION OF SERVICES, WAS A PART OF STATUTE THAT THEY WERE LOOKING AT. THEY DID NOT HAVE 38.806-1-I.

WERE THE OTHER ELEMENTS IN, PRIOR VIOLENT FELONIES, ENUMERATED, E-THROUGH-I IN THE EXISTING, WERE THEY PRESENT OTHERWISE?

I BELIEVE THAT THEY WERE NOT.

AND WERE THEY NOT, THOSE CHANGES, WERE THEY OR WERE THEY NOT MANDATED BY THE FEDERAL ACT, AND WAS THERE SOMEWHAT OF A SHIFT IN POLICY? I AM ASKING BECAUSE I HAVEN'T DEALT IN THIS.

THE FEDERAL ACT REQUIRED THE STATES TO HAVE A PLAN IN ESSENCE WHERE REASONABLE

EFFORTS WERE GOING TO AND WASTE OF TIME THAT, THEY HAVE A PLAN TO DEAL WITH THOSE TYPES OF CASES, BUT THE FEDERAL ACT SPECIFICALLY PROVIDED THAT, WHEN THE STATES ENACTED THESE STATUTES, THEY COULD NOT INTERFERE WITH WHAT WAS ALREADY REQUIRED OF THE STATE TO PROVE. THEY COULD NOT INTERFERE WITH THE CONSTITUTIONAL RIGHTS OF THE PARENT AND THE CHILD, AND THAT THEY HAD TO BE IN ACCORDANCE WITH WHAT THE STATE'S REQUIREMENTS ALREADY WERE. IT IS OUR POSITION THAT THE PLAIN READING OF THE STATUTE IS UNCONSTITUTIONAL. HOWEVER, THE ONLY WAY THAT THIS COURT CAN SAVE THE CONSTITUTIONALITY OF THE STATUTE, IS TO REQUIRE THE STATE TO PROVE, BY CLEAR AND CONVINCING EVIDENCE, THAT REUNIFICATION WITH THE CURRENT CHILD, POSES A SUBSTANTIAL RISK OF SIGNIFICANT HARM TO THAT CHILD.

THAT WAS WHAT DCF COUNSEL HAS STATED? DO YOU AGREE WITH THE IDEA THAT REQUIRING A PERMISSIVE INFERENCE, AT THE VERY LEAST, THAT THERE HAS BEEN TEN PRIOR TERMINATIONS, THAT THE PARENT HAS TO DO SOMETHING?

NO. I DON'T THINK THE PARENT HAS TO PROVE ANYTHING, BECAUSE THE STATE IS SEEKING TO INTERFERE IN THAT PARENT'S FUNDAMENTAL RIGHT TO RAISE THEIR CHILD. THE STATE HAS TO PROVE AND PADGETT CLEARLY SAYS, I THINK IT IS INTERESTING THAT THE STATE, IN THE GUARDIAN AD LITEM PROGRAM, IN THE AB CASE, AGREE THAT PADGETT APPLIES, BUT THEY FAIL TO RECOGNIZE THAT PADGETT REQUIRES THE STATE, PADGETT IS SAYING, IF YOU ARE NOT GOING TO OFFER A CASE PLAN, ORDINARILY YOU NEED TO OFFER A CASE PLAN, BUT IF YOU ARE NOT GOING TO OFFER A CASE PLAN, THEN YOU, STATE, NEED TO PROVE WHAT IS THIS CURRENT RISK? WHAT IS SO SERIOUSLY WRONG WITH THIS PARENT THAT --

THEN IF YOU DO THAT, AND I UNDERSTAND THAT THAT IS WHAT PADGETT SAYS, BUT IF YOU DO THAT, WHEN YOU LOOK AT THE STATUTE, AREN'T YOU, IN FACT, GOING BACK TO A QUESTION JUSTICE ANSTEAD HAD EARLIER, AREN'T YOU ENGRAFTING SOME OTHER REQUIREMENTS ON 39.806-1? IT SAYS PLAINLY THAT THE GROUND IS SIMPLY THAT THE PARENT HAS HAD OTHER CHILDREN TAKEN AWAY INVOLUNTARILY.

YES. I BELIEVE THAT IT WOULD BE ENGRAFTING LANGUAGE, BUT I THINK THAT IS THE ONLY WAY THE, TO SAVE THE CONSTITUTIONALITY OF THE STATUTE. THE WAY IT IS WRITTEN, IT APPEARS TO BE A PER SE RULE THAT, IF THIS PARENT HAS PRIOR INVOLUNTARY TERMINATION, THE STATE CAN GO FORWARD AND NOT OFFER SERVICES TO THAT PARENT, AND NOT, BEFORE YOU GET TO THE BEST INTEREST, YOU NEED TO PROVE THE GROUND FOR TERMINATION BY CLEAR AND CONVINCING EVIDENCE. THE WAY THE STATUTE IS WRITTEN, IT ALLOWS THE STATE TO REST ON THAT, AND THEN, WHEN YOU LOOK AT THE BEST INTEREST, THE COURT DOES HAVE TO CONSIDER THE BEST INTERESTS OF THE CHILD. BUT --

BUT DIDN'T THE OLD STATUTE USED TO BE YOU DID, YOU HAD TO PROVE THE GROUNDS FIRST, THEN YOU HAD A SEPARATE HEARING ON THAT, AND THEN, IF THE STATE PROVED THAT, THEN YOU WOULD GO TO THE MANIFEST BEST INTEREST, BUT NOW YOU HAVE ONE HEARING. YOU HAVE ONE PETITION, AND TO GET INTO THE DOOR, AS JUSTICE WELLS WAS ASKING, YOU HAVE TO PROVE A GROUND AND YOU HAVE TO PROVE AT THE SAME HEARING, THE MANIFEST BEST INTEREST.

IN PRACTICALITY.

SO THE SAME TESTIMONY IS COMING IN AT THE SAME HEARING, AND PART OF THE REASON TO DO THIS WAS TO SPEED UP THE PROCESS FOR THE CHILD'S INTEREST.

YES. GENERALLY IT HAPPENS IN ONE PROCEEDING. HOWEVER, THE COURT COULD NEVER LOOK AT WHAT WAS IN THE MANIFEST BEST INTEREST OF THE CHILD, UNTIL THE COURT DECIDED THAT THERE WAS A GROUND TO TERMINATE THE PARENT'S RIGHT.

THAT WAS WILL PREVIOUSLY, RIGHT?

I THINK THAT IS STILL THE CASE. THE COURT CASES SAY IT MAY BE IN THE MANIFEST BEST INTEREST OF A CHILD TO BE WITH A RICHER FAMILY OR BETTER FAMILY OR NICER FAMILY, BUT THAT IS NOT WHAT THE STATUTE IS TALKING.

BUT DIDN'T WE SAY IN PADGETT, AND PADGETT CONCERNED, I THINK, FOUR OR FIVE OTHER CHILDREN.

YES.

AND THEN THE NEXT CHILD, AND THERE WAS NO EVIDENCE, I DON'T THINK, IN PADGETT, THAT THIS PARTICULAR CHILD HAD BEEN ABUSED OR NEGLECTED, AND THE COURT SAID THE PUBLIC POLICY OF THE STATE IS WE SHOULD NOT HAVE TO WAIT, WHEN FIVE OTHER CHILDREN HAVE BEEN ABUSED AND PARENTAL RIGHTS TERMINATED BECAUSE OF ABUSE. WE SHOULD NOT HAVE TO WAIT UNTIL THE SIXTH CHILD IS ABUSED TO TERMINATE PARENTAL RIGHTS, AND THEREFORE THE COURTS SHOULD HAVE THE ABILITY, BASED UPON THAT PRIOR ABUSE, TO TERMINATE THE RIGHTS TO PROTECT THE CHILD AGAINST ABUSE IN THE FUTURE!

OF COURSE, AND WE AGREE THAT THE DEPARTMENT DOES NOT HAVE TO WAIT UNTIL A CHILD IS ABUSED. WE ARE NOT SUGGESTING THAT. BUT IN THE PADGETT CASE, IT WAS VERY, VERY CLEAR THAT THE STATE PROVED THAT THIS MOTHER WAS CHRONICALLY MENTALLY ILL. THEY HAD STATE EXPERTS TESTIFY. THE MOTHER WAS CONVICTED OF CHILD ABUSE DURING THE PENDENCY OF THESE ACTIONS.

THE WAY THAT I READ IT, THERE IS NO EVIDENCE THAT THE CURRENT CHILD HAD BEEN ABUSED OR NEGLECTED. THE ONLY EVIDENCE WAS ABOUT PRIOR CHILDREN, AND THIS COURT SAID WE SHOULD NOT HAVE TO WAIT UNTIL WE FIND EVIDENCE OF EVEN NEGLECT OF THIS CHILD, BECAUSE WE DON'T THINK THAT WE SHOULD SUBJECT THE CHILD TO THOSE CONDITIONS BEFORE BEING ABLE TO TERMINATE PARENTAL RIGHTS.

THAT'S CORRECT, BUT THE STATE DOES NOT HAVE TO WAIT UNTIL THE CHILD IS ACTUALLY HARMED BUT THEY STILL HAVE TO PROVE Y THEY HAVE TO PROVE WHAT IS THE, SO CHRONICALLY WRONG WITH THIS PARENT THAT THE SERVICES ARE FUTILE, THAT SHE IS BEYOND REASONABLE HOPE OF CODIFICAITON.

YOU ARE SAYING, NOT BECAUSE, YOUR ASSERTION IS BASED UPON A CONSTITUTIONAL RIGHT, THAT RIGHT?

YES.

NOT ON THE WAY THIS STATUTE IS DRAFTED.

CORRECT. BASED ON THE --

BECAUSE WOULDN'T YOU AGREE WITH ME, THAT THE STATUTE, AS IT IS DRAFTED, CAN BE READ TO MAKE REASONABLE SENSE. THEY ARE SAYING, IN 806, THIS IS WHAT HAS GOT TO BE IN THE PETITION. THEY ARE SAYING IN 810, THIS IS WHAT HAS GOT TO BE PROVEN. ISN'T THAT WHAT THE STATUTE IS SAYING?

THE STATUTE SAYS THAT, IN 39.806, THIS THE GROUND, THE PRIOR AND VOLUNTARY, THE STATE DOESN'T HAVE TO MAKE REASONABLE EFFORTS. HOWEVER, IN 39.810 --

ALL IT SAYS AS I READ IT, AND MAYBE I AM NOT READING IT CORRECTLY, THAT THE STATE HAS TO, IN ITS PETITION, STATE ONE OF THESE GROUNDS, AND ONE OF THE FOLLOWING GROUNDS, AND

"I" IS THAT OTHER CHILDREN HAVE BEEN TERMINATED. THAT THAT IS A SUFFICIENT PETITION TO GET IN THE DOOR. ISN'T THAT WHAT IT IS SAY SOMETHING.

IT IS SAYING THAT THAT IS A SUFFICIENT PETITION TO GET IN THE DOOR. THE PROBLEM WITH ALLOWING 39.810 TO SAVE THE CONSTITUTIONALITY OF THE STATUTE, IS THAT 39.810 PROVIDES A LIST OF FACTORS, AND IT SAYS THE COURT NEEDS TO CONSIDER THESE FACTORS, BUT NEEDS TO FIND THAT OVERALL, IT IS IN THE CHILD'S MANIFEST BEST INTEREST FOR THE PARENTS' RIGHTS TO BE TERMINATED. IT IS NOT REQUIRING NECESSARILY, THE STATE TO PROVE THAT THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE PARENT POSES THE SUBSTANTIAL RISK OF SIGNIFICANT HARM TO THE CHILD.

IN FACT, NONE OF, I WAS LOOKING AT THIS AGAIN. IF WE WERE TO TAKE THE POSITION THAT 806 IS JUST A PLEADING REQUIREMENT, AS OPPOSED TO A SUBSTANTIVE REQUIREMENT, WHICH I DON'T EVEN SEE DCF AS TAKING THAT POSITION, THERE IS NOTHING IN THERE THAT TALKS ABOUT JUST WHAT IS BEST FOR THEM, NOT WHETHER THERE IS A SUBSTANTIAL RISK OF HARM, IF THERE IS REUNIFICATION. THAT IS WHAT YOU ARE SAYING.

CORRECT.

PADGETT IS THE IDEA THAT WE DON'T READ INTO THIS FIRST "I", THAT REUNIFICATION WOULD POSE A SUBSTANTIAL RISK OF HARM, BUT, AGAIN, THE PLEADING REQUIREMENT IS THAT THERE WAS PRIOR TERMINATION.

RIGHT.

DCF STILL HAS TO PROVE, IN ORDER NOT TO OFFER SERVICES, THAT REUNIFICATION WOULD POSE A SUBSTANTIAL RISK OF HARM, BUT, OF COURSE, THEY CAN USE WHAT HAPPENED IN THE PAST TO ESTABLISH. THAT DO YOU AGREE WITH THAT?

THEY CAN USE WHAT HAPPENED IN THE PAST, BUT THEY HAVE TO MAKE THE CONNECTION WITH WHAT HAPPENED IN THE PAST AND WHAT IS HAPPENING IN THE PRESENT, AND IN PADGETT THAT WAS CLEARLY, CLEARLY ESTABLISHED BY THE PSYCHIATRIST THAT TESTIFIED AND THE MENTAL HEALTH EXPERTS THAT TESTIFIED N THIS CASE WE HAVE A MOTHER WHO IS A VICTIM OF DOMESTIC VIOLENCE. SHE DID HER PARENTING PROGRAM. SHE COMPLIED WITH SERVICES. THE CHILD PROTECTIVE INVESTIGATOR THAT WENT OUT TO SEE HER --

YOU SAY SHE DID HER PARENTING PROGRAM. SHE WAS ORDERED TO DO A 36-WEEK, AND I DID THE DOMESTIC VIOLENCE COURT FOR A LOT OF TIMES, AND I HAD A LOT OF PERPETRATORS WHO WANTED TO DO 12-WEEK ANGER MANAGEMENT AS OPPOSED TO 36-WEEK DOMESTIC VIOLENCE. ISN'T THEIR RECORD THAT SHE DID NOT COMPLETE THE 36-WEEK PARENTING COURSE THAT WAS OFFERED?

SHE DID NOT COMPLETE THE 36-WEEK COURSE IN THE PAST. SHE COMPLETED AT LEAST 20 HOURS OF PARENTING AND THE ISSUE AS TO SUBSTANTIAL COMPLIANCE AND WHETHER SHE DID ENOUGH, WAS NOT WHETHER SHE COMPLETED EVERY SINGLE CLASS. THE ISSUE IS WHETHER SHE WAS STILL PRESENTING --

WHAT DID SHE COMPLETE OF THE NUMEROUS PLANS OFFERED. WHAT DID SHE COMPLETE?

SHE COMPLETED 20 HOURS MINIMUM. SHE COMPLETE ADD PARENTING PROGRAM, WHICH WAS A ONE-ON-ONE PARENTING PROGRAM. SHE DID --

BUT NOT THE ONE PREVIOUSLY ORDERED IN THE CASE PLAN, ONE SHE SELECTED, RIGHT?

ONE SHE SELECTED. RIGHT.

AND SUBSTANCE ABUSE?

SHE DID A SUBSTANCE ABUSE EVALUATION, WHICH RECOMMENDED NO TREATMENT. THE EVALUATOR DID SAY THAT SHE GOT NEW INFORMATION AND THAT SHE WANTED TO REEVALUATE.

THESE WERE ALL THINGS THAT SHE WAS DOING ON HER OWN AND NOTHING THAT THE DEPARTMENT OFFERED IN CONNECTION WITH THIS CHILD, CORRECT?

NOT AFTER THEY FILED A TERMINATION.

THERE WAS REALLY, IT SEEMS TO ME, FROM READING THE BRIEFS IN THE RECORD AND THE DISTRICT COURT'S OPINION, THERE WAS CONFLICTING EVIDENCE, REALLY, ABOUT WHETHER THE MOTHER HAD BEEN COMPLYING, WHETHER SHE HAD TAKEN THINGS, WHETHER SHE HAD ABUSED DRUGS, KIND OF CONFLICTING EVIDENCE ON BOTH SIDES, SO WHY SHOULDN'T WE SAY ON REVIEW OF THAT, WE JUST DON'T, WE DON'T REVIEW THAT DE NOVO, WHY CAN'T, WHY SHOULDN'T WE SAY THAT THERE WAS SUBSTANTIAL COMPETENT EVIDENCE FOR THE TRIAL COURT TO CONCLUDE THAT THE BEST INTERESTS OF THE CHILD REQUIRED TERMINATION?

BECAUSE I DON'T THINK THERE WAS CONFLICTING EVIDENCE REGARDING WHAT THE RISKS WERE TO THAT CHILD. THERE WAS ABSOLUTELY NO EVIDENCE THAT SHE EVER HAD A SUBSTANCE ABUSE OR ILLEGAL DRUG PROBLEM. THERE WAS, THE ONLY ALLEGATION THAT WAS MADE WAS THAT, IN 1997, SHE APPEARED INTOXICATED IN FRONT OF HER CHILDREN. THERE WAS ABSOLUTELY NO OTHER EVIDENCE THAT ESTABLISHED THAT SHE HAD A SUBSTANCE ABUSE PROBLEM, IN THE PAST OR CURRENTLY.

SHE DIDN'T TELL HER, I THINK IT WAS A PSYCHOLOGIST OR COUNSELOR, ABOUT PRIOR ALCOHOL ABUSE?

NO.

SHE DIDN'T SUBMIT A HAIR FOLLICLE WHEN SHE WAS REQUIRED TO FOR DRUG TEST SOMETHING.

SHE DID NOT SUBMIT THE HAIR FOLLICLE, BUT I DON'T RECALL ANYWHERE IN THE RECORD WHERE SHE TOLD ANYBODY SHE HAD A DRUG OR SUBSTANCE ABUSE PROBLEM. I DON'T RECALL ANY TESTIMONY WHERE SHE HAD A SUBSTANCE ABUSE PROBLEM.

WHAT ABOUT THE PREMATURENESS OF EVERYONE OF HER BABIES, WAS THAT FOUND THAT IT WAS ANYTHING OTHER THAN FAILURE TO CARE, AND I THINK IT IS COMMON KNOWLEDGE THAT LACK OF PRENATAL CARE HAS LIFELONG IMPACT ON CHILDREN, BUT ISN'T THERE EVIDENCE HERE THAT ALL OF THE CHILDREN, INCLUDING THIS ONE, WERE BORN LOW WEIGHT?

I DON'T RECALL THAT THIS CHILD HAD ANY BIRTH PROBLEMS, PROBLEMS AT BIRTH.

WHAT WAS THE WEIGHT OF THIS CHILD AT BIRTH?

I DON'T KNOW WHAT THE WEIGHT OF THIS CHILD WAS AT BIRTH, BUT HE WAS HEALTHY. HE WENT HOME. SHE COMPLIED WITH IN-HOME SERVICES. SHE WAS TAKING CARE OF THIS CHILD, AND THE EVIDENCE THAT THE CHILD --

WHAT WAS THE BASIS, WAS THERE NOT A PHONE CALL WHEN SHE LEFT THE HOSPITAL TO THE SHERIFFS THAT INSTIGATED ON THIS LAST CHILD?

WE DON'T KNOW WHO CALLED IN AN ABUSE REPORT, BUT SOMEBODY CALLED IN A REPORT.

SOMEBODY CALLED IN --

SAYING THAT SHE HAD A HISTORY, AND WHEN THE BROWARD SHERIFFS OFFICE CHILD PROTECTIVE INVESTIGATOR WENT OUT AND SAW HER, HE FOUND EVERYTHING TO BE FINE. HIS TESTIMONY WAS THAT THERE WAS NO EVIDENCE OF ANYTHING WRONG THAT, HE SPOKE WITH THE HOME HEALTH SERVICE PERSON WHO WAS PROVIDING THESE SERVICES, THAT SHE HAD NO CONCERNS, THAT SHE FOUND THE CHILD WAS BEING TAKEN CARE OF, AND THAT THE ONLY REASON HE REMOVED THE CHILD WAS BECAUSE HE WAS TOLD THAT IT WAS THE OFFICE POLICY TO REMOVE A CHILD, WHEN THERE WAS A PRIOR INVOLUNTARY TERMINATION. THERE WAS EVIDENCE THAT SHE WAS APPROPRIATE WITH THE CHILD, THAT SHE WAS LOVING WITH THE CHILD, THAT SHE WAS BONDED WITH THE CHILD. IN FACT, THE GUARDIAN AD LITEM REPORTED THAT, EVEN AFTER THE CHILD WAS REMOVED FROM HER CARE, HE SEEMED TO ENJOY HER AFFECTION AND ATTENTION MORE THAN THE FOSTER PARENT'S. THERE WAS NOT EVIDENCE THAT THERE WAS ANY MEDICAL NEGLECT AT ALL TO THIS CHILD.

HOW OLD WAS THE CHILD WHEN THE CHILD WAS TAKEN?

FIVE MONTHS.

FIVE MONTHS. CAN YOU SPEAK AS TO THE SECOND ISSUE, I MEAN THE SECOND GROUNDS AND THE ADEQUACY OF "C"?

YES. WITH REGARD TO THE PROVISION OF SERVICES, THERE MUST BE A FINDING THAT THERE MUST BE EVIDENCE TO SUPPORT A FINDING BY CLEAR AND CONVINCING EVIDENCE, THAT SERVICES WILL BE FUTILE, THAT, AGAIN, THIS PARENT IS BEYOND REASONABLE HOPE OF MODIFICATION THAT, THIS IS A PROBLEM THAT IS NOT GOING TO CHANGE, AS IN THE PADGETT CASE, WHERE SOMEBODY WAS CHRONICALLY MENTALLY ILL AND THE SERVICE PROVIDERS TESTIFIED THAT THIS PERSON WAS NOT GOING TO BE HELPED BY SERVICES, AND IN THIS CASE, THERE WAS EVIDENCE THAT, WITH THE SUPPORT AND SERVICES THAT SHE RECEIVED, THAT SHE WAS ABLE TO BE A BETTER PARENT, THAT SHE WAS BEING A GOOD PARENT. THAT THERE WAS NO EVIDENCE OF ANY CURRENT RISK TO THIS CHILD.

SO YOU ARE ALSO SAYING, NOW, "C" REQUIRES THIS FINDING THAT SERVICES WOULD BE FUTILE, THAT THEY, NOW, YOU ARE SAYING THAT, ALSO, THAT THAT SHOULD BE A PART OF "I". AS I UNDERSTAND YOUR ARGUMENT, YOU ARE SAYING THAT THAT REQUIREMENT SHOULD, ALSO, BE, WE SHOULD READ THAT INTO "I", ALSO?

IF THE STATUTE IS CONSTRUED TO BE CONSTITUTIONAL, I THINK THAT NEEDS TO BE.

UNLESS THERE IS SUBSTANTIAL RISK, AS YOU SAID, OF HARM.

SIGNIFICANT HARM TO THE CHILD.

HAS THE PARENT, WHEN WAS THE CHILD SHELTERED?

THE CHILD WAS ORIGINALLY REMOVED, I BELIEVE, IN MAY. IN APRIL. AND --

2002?

RIGHT. AND THE COURT INITIALLY RETURNED THE CHILD TO THE MOTHER. THEN THE CHILD WAS REMOVED IN MAY, AND THE DEPARTMENT DECIDED TO FILE EXPEDITED TERMINATION.

OKAY. SO SINCE THAT TIME, HAS THERE BEEN ANY SUPERVISED VISITATIONS?

YES, THERE HAS. SO LET ME SEE IF I UNDERSTAND YOUR BOTTOM LINE HERE, IS THAT THE

STATUTE IS UNCONSTITUTIONAL, UNLESS WE SAY, READ INTO THE STATUTE, THAT UNIFICATION WOULD PRESENT A SUBSTANTIAL RISK TO THE CHILD, AND THAT THE PROVISION OF SERVICES WOULD BE FUTILE, AND IS THAT YOUR POSITION ON THE CONSTITUTIONAL ISSUE?

YES, YOUR HONOR.

AND AS TO THE ISSUE OF WHETHER OR NOT SECTION, SUBSECTION C HAS BEEN DEMONSTRATED, IS THAT, WHAT? THAT SUBSECTION C HAS NOT --

THAT SUBSECTION C HAS NOT BEEN DEMONSTRATED. I THINK THE BASIS OF THIS COURT'S JURISDICTION IS REALLY THE CONSTITUTIONAL ISSUE, AND THIS COURT CAN ADDRESS THE CONSTITUTIONAL ISSUE AND STILL AFFIRM THE DECISION REVERSING THE TERMINATION OF F.L.'S PARENTAL RIGHTS.

THAT DOESN'T REALLY ANSWER THE QUESTION. SINCE WE HAVE IT HERE, THE ARGUMENT IS MADE AS TO "C", THAT THE TRIAL COURT'S FINDINGS AS TO "C", WERE, WHICH IS BASED ON CLEAR AND CONVINCING EVIDENCE, IS SUPPORTED, UNDER OUR STANDARD OF REVIEW, BY COMPETENT SUBSTANTIAL EVIDENCE, AND THAT THE FOURTH DISTRICT ERRONEOUSLY REWEIGHED THAT EVIDENCE. COULD YOU GIVE US YOUR POSITION ON THAT.

THE FOURTH DISTRICT DID NOT REWEIGH THE EVIDENCE. THE EVIDENCE WASN'T THERE. THERE WAS NO EVIDENCE, AS SERVICES WERE FUTILE. THERE WAS EVIDENCE THAT SHE WAS PARTICIPATING IN SERVICES. SHE WAS BENEFITTING FROM SERVICES. ALL OF THE WITNESSES THAT OBSERVED HER WITH HER CHILD, OBSERVED THAT SHE WAS APPROPRIATE, THAT SHE WAS BONDED, THAT SHE WAS NURTURING, THAT THE CHILD WAS WELL TAKEN CARE OF. SHE FOOD FOR HIM. SHE HAD CLOTHING, HER HOME WAS CLEAN. THERE WAS NOT EVIDENCE THAT SHE WOULD NOT BENEFIT FROM SERVICES, IF THOSE SERVICES WERE NEEDED. IT WASN'T SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE TRIAL COURT.

BUT YOU ARE URGING US NOT TO DECIDE THAT ISSUE AS ANOTHER LAYER OF APPELLATE REVIEW. THAT ISSUE.

YES.

CHIEF JUSTICE: ANYTHING FURTHER?

NO, YOUR HONOR. WE ASK THAT YOU AFFIRM THE DECISION REVERSING F.L.'S PARENTAL RIGHTS.

CHIEF JUSTICE: THANK YOU VERY MUCH. THANK YOU ALL, VERY MUCH. THE COURT WILL NOW STAND IN RECESS UNTIL 8:30 IN THE MORNING.

MARSHAL: PLEASE RISE.