IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA **CIVIL ACTION**

C. R. and V. R.,
Petitioners,
vs. **Case No. 00 DR 000 N**
J. A. and S. G.,
Respondent,

ORDER DENYING MOTHER'S MOTION WITHOUT PREJUDICE

This matter having come before the court today on the mother's "Motion to Dismiss for Failure to Prosecute/ Motion to Vacate Order/Motion to Establish Parenting Time" filed 12/20/2010, it is ordered:

1. Findings

This is a Chapter 751 case. The child is D. A., born (*Date omitted*). The petitioners are the child's paternal aunt and uncle. The respondents are the child's parents. The petitioners filed the initial petition for temporary custody of the child on 10/15/2009. That petition alleged that the parents consented to the petition. The parents' written consents were filed with the petition. The petition did not allege that either parent had abused, abandoned or neglected the child or that either parent was an unfit parent. It also did not ask for a visitation schedule for the parents, as allowed by §751.05(4)(b), and it did not ask for child support from the parents to the petitioners, as allowed by §751.05(5)(a). The father resides with the petitioners. The mother does not reside with the petitioners.

The mother and father are parties in another case, a paternity case, 0 DR 0000 N, (*number omitted*) and a Final Judgment of Paternity was entered in that case on 1/28/2009. That judgment ordered shared parental responsibility and a time-sharing schedule between the parents. That judgment has not been modified.

On 11/12/2009 in this case the court entered an "Order," which granted the petitioners temporary custody of the child. That Order did not address visitation with the parents or child support because those issues were not raised in the petition.

The mother's motion says the clerk filed a notice to dismiss this action for lack of prosecution and she joins in that request. She also says that the petitioners and the father "have prevented" her from making contact with the child. Her motion does not say whether she is requesting termination of the Order of 11/12/2009 or modification of that Order, but at the hearing the mother asks the court to modify the Order to provide for a visitation schedule between the mother and the child. She says that the Order of 11/12/2009 is temporary so it can be modified by a motion and she says that it can be modified by a motion because it was entered with her written consent.

2. Ruling

2.1 The Order of 11/12/2009 is a final order The Order dated 11/12/2009 awarding temporary custody of the child to the petitioners is the final order in this case. It should have been titled "Final Judgment" and not simply "Order." It is the final order because after it was entered there was no more work for the trial judge to do on the initial petition. That order was the end of the proceeding on the initial petition.

An order of temporary custody under Chapter 751 is final whether it is entered after a trial on contested pleadings, that is, pursuant to allegations of abuse, abandonment, or neglect under §751.03(9), or whether it is entered with the consent of the parents, as it was in this case.

The fact that the Order of 11/12/2009 granted temporary custody of a child to the petitioners did not make it a temporary order that can be modified by a motion. Like any other final order it can be modified only by a proceeding on a supplemental petition to modify. For this reason, §751.05(6) requires the parents to "petition" for termination or modification of "the order granting temporary custody" if the parties cannot agree to termination or modification of the order. A petition is a pleading that asks for relief. Fla.R.Civ.P. 1.100(a) & 1.110(b). A pleading asserting "new or additional claims" must be served "in the manner provided for service of a summons." Fla.R.Civ.P. 1.080(a).

A supplemental petition to terminate or modify an order of temporary custody to extended family members under Chapter 751 must allege new or additional facts, that is, the parent who formerly consented no longer consents and the parent is a fit parent, if termination is requested, or the best interest of the child, if modification is sought. §751.05(6). The best interest of the child is not an issue when a supplemental petition requests termination of the order; rather, the issue is whether the parent is "a fit parent." Best interest is an issue only if the supplemental petition asks to modify the order, say, to provide for visitation with the parents or to require child support. *Id.*

The term "fit parent" is not defined in the statute. Under the case law a "fit parent" is a parent who is able to take care of the child. *See, e.g., D.B. v. W.J.P.*,962 So.2d 949 (Fla. 5th DCA 2007):

> "...Chapter 751 is a codification of the common law rule of parental preference, which provides that where the custody dispute is between the parents and a third person, the rights of the parents are paramount unless there is a showing that the parents are unfit or that, for some substantial reason, custody in either or both of the parents would be detrimental to the child's welfare. *Hammond v. Howard*, 828 So.2d 476, 478 (Fla. 5th DCA 2002) (quoting *Daugharty v. Daugharty*, 571 So.2d 85, 86 (Fla. 5th DCA 1990)).

In *Richardson v. Richardson,* 766 So.2d 1036 (Fla.2000), the Florida Supreme Court stated:

> "When a custody dispute is between two parents, where both are fit and have equal rights to custody, the test involves only the determination of the best interests of the child. When

> the custody dispute is between a natural parent and a third party, however, the test must include consideration of the right of a natural parent "to enjoy the custody, fellowship and companionship of his offspring.... This is a rule older than the common law itself." *State ex rel. Sparks v. Reeves,* 97 So.2d 18, 20 (Fla.1957). In *Reeves* we held that in such a circumstnace (*sic),* custody should be denied to the natural parent only when such an award will, in fact, be detrimental to the welfare of the child. We explained what would constitute detriment to the child and approved a temporary grant of custody to the grandparents because of the father's temporary inability to care for the children after the mother's death. We cautioned, however, that the father would be entitled to custody once his ability to care for the children was established." *Id.* at 20-21.*Richardson,* 766 So.2d at 1039 (quoting *In re Guardianship of D.A. McW.,* 460 So.2d 368 (Fla.1984)).

So, if a petition to terminate is filed, the issue is whether the parent is able to take care of the child, and the best interest of the child is not a consideration. The factor for the court's consideration is detriment to the child. If a petition to modify is filed, the issue is the best interest of the child, which would require a consideration of the factors in §61.13(3).

2.2 Motion to terminate denied So, to the extent that the mother's motion seeks to terminate the Order of 11/12/2009, it is denied. It is not a petition under §751.05(6) that alleges the mother is a fit parent, that is, a parent who is able to care for the child.

2.3 Motion to modify is denied Likewise, to the extent that the mother's motion requests a modification to the Order of 11/12/2009, it is denied. It is not a petition under §751.05(6) that alleges a modification in the child's best interest.

2.4 Motion to dismiss for lack of prosecution is denied For the foregoing reasons, the clerk's notice and the mother's motion to dismiss this action for lack of prosecution are improper. This action was concluded with a final order on 11/12/2009 so a motion to dismiss under Fla.R.Civ.P. 1.420(e) is improper and must be denied.

2.5 Without prejudice This order denying the mother's motion is without prejudice to the mother filing a petition to terminate or to modify the Order of 11/12/2009, pursuant to §751.05(6).

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
, Esq., and , Esq.