

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

**J. P. H. and C. J. H.,
Petitioners,**

vs.

Case No. 10 DR XXXX N

**J. L. W. and J. P. H., Jr.,
and F. V. and A. S.,
Respondents,**

ORDER ON FOUR MOTIONS

This matter having come before the court today on four motions, identified below, filed and noticed in this case, it is ordered:

1. Findings

This case and Case No. 10 DR YYYY are suits under Chapter 751 for an order of temporary custody to an extended family member. The petitions in these cases allege the minor child at issue is M. F. H., born (*Date omitted*), in Lee County, Florida. They also allege that the mother of the child is J. L. W. and the father is J. P. H., Jr.

In Case No. 10 DR YYYY N, the *pro se* petition was filed 2/11/2010 and it alleges that V. and S. are the maternal great aunts of the child. The petitioners V. and S. allege that the child has been living “full time” with F. V. and her husband “[s]ince December 3, 2009.” However, V.’s husband is not a petitioner. In many words, the petition of these maternal great aunts alleges that F. V. has been caring “full time” for the child in the role of a substitute parent since 12/3/2009 and that the child was living with F. V. when the petition was filed. It alleges that F. V. lives in Lee County. The petition also alleges that the child has “visited and spent extensive time” with the other petitioner, A. S., who lives in New Jersey. The petition asks, in many words, for an order of temporary custody to V. and S. jointly as extended family members of the child. The petition in 10 DR YYYY N was sworn, as required by §751.03, which provides that “[e]ach petition ... must be verified by the petitioner ...”

The petition of V. and S. alleges that the mother consents to the petition. The mother filed an “Answer and Waiver”, in which she says that she consents to an “Order for Change in Temporary Custody in accordance with the testimony presented by the Petitioner without the presence of the Respondent at a Final Hearing.”

In many words, the petition of V. and S. alleges that the father and the mother have

neglected the child. It does not allege that the father consents to their petition. The father filed a *pro se* answer on 3/4/2010, in which he denied the essential allegations of the petition. So, Case No. 10 DR YYYY N is at issue.

In this case, Case No. 10 DR XXXX N, the original petition was filed by the H.s on 3/17/2010. A proposed first amended petition was filed by them on 8/6/2010 and a proposed second amended petition was filed by them 10/29/2010. Both of those petitions reallege essentially the same facts, with some additions and changes, so the first amended petition supersedes and replaces their original petition and their second amended petition supersedes and replaces their first amended petition. The petitioners H. have filed a motion to amend to allow them to file the second amended petition. No motion was filed for leave to amend the first amended petition.

On 9/24/2010 the mother filed a motion to dismiss the H.s' first proposed amended petition. On 11/18/2010 the mother filed a motion to dismiss the H.s' second proposed petition. The mother's motions to dismiss are consents by her to the filing of the two amended petitions because the mother's motions address the substance of the allegations in their petitions. Because the H.s have filed three petitions with the last two amending the prior petition, only the "Second Amended Petition" filed 10/29/2010 is their operative petition, and the mother's motion to dismiss their first amended petition is moot. The mother's motion to dismiss their "Second Amended Petition" is her only operative motion.

The H.'s operative petition alleges that they are the paternal grandparents of the child. It alleges that the father consents to their petition. His consent to their petition is filed. They allege that both parents have "abused, neglected and abandoned" the child. They allege that the father "at the present time ... is unable to provide for his child ..." However, they do not allege that they are "caring full time for the child in the role of a substitute parent" and that the child is "presently living" with them. In paragraph 6 the H.s aver that the child has resided with "the V.s", A. S., or J. W., the maternal grandmother, since "12/12/2009 - present."

The H.s' "Second Amended Petition" was sworn, as required by §751.03, which provides that "[e]ach petition ... must be verified by the petitioner ..."

The H.s have not served V. and S. with their "Second Amended Petition" by a process that is legally sufficient, and V. and S. have not made a voluntary appearance in this case.

2. Ruling

2.1 Mother's motion to dismiss the H.s' "Second Amended Petition"

The mother's first motion to dismiss was filed on 9/24/2010. It is moot because it is directed at the H.s' first amended petition, which was superseded and replaced by their "Second Amended Petition." **Therefore, the court makes no ruling on the mother's first motion to dismiss.**

Her second motion to dismiss was filed on 11/18/2010. Her second motion is her operative motion because it is directed at the H.s' "Second Amended Petition."

The mother's second motion to dismiss the H.s' "Second Amended Petition" is

granted because that petition does not allege that the petitioners are “caring full time for the child in the role of a substitute parent” and that the child “is presently living” with them. Without those allegations, the court does not have subject matter jurisdiction under §751.02(1)(b) and the petition does not state a cause of action. Fla.R.Civ.P. 1.140(b)(1) & (6).

The H.s do not allege that they have the mother’s consent to their petition. If they did, the court would have jurisdiction to consider their petition under §751.02(1)(a) and they would state a cause of action because they have the father’s consent.

Therefore, without both parents’ consents they must allege and prove that they are caring for the child “full time ... in the role of a substitute parent” and that the child “is presently living” with them, because those are the only other alternative facts sufficient for a finding of subject matter jurisdiction and a cause of action under Chapter 751.

Therefore, the H.s’ “Second Amended Petition” filed 10/29/2010 is hereby dismissed for lack of subject matter jurisdiction and a failure to state a cause of action under Chapter 751. The H.s are hereby granted 30 days leave to amend. If a sworn third amended petition is not filed in that time, then this dismissal is with prejudice, effective 30 days from today.

2.2 H.s’ “Motion to Amend Petition and Allow Petitioners’ ‘Second Amended Petition’”

This motion was filed 11/23/2010. It is moot because on 11/18/2010 the mother filed a motion to dismiss their proposed “Second Amended Petition” filed 10/29/2010. By filing a motion to dismiss that petition, the mother consented to the second amended petition being filed as the H.s’ operative pleading. **Therefore, this motion by the H.s for leave to file their second amended petition is moot and it is not ruled on.**

2.3 H.s’ “Motion to Dismiss” the petition of V. & S. in Case No. 10 DR YYYY

This motion was filed by the H.s in this case, Case No. 10 DR XXXX N, on 10/29/2010. The H.s have not filed a motion to intervene in Case No. 10 DR YYYY N, pursuant to Fla.R.Civ.P. 1.230. The petitioners V. and S. did not name the H.s as respondents in their petition in Case No. 10 DR YYYY N. V. and S. named only the mother and father as the respondents in Case No. 10 DR YYYY N. So, the H.s are not parties in that case.

As nonparties in Case No. 10DR YYYY N, the H.s have no standing to file a motion to dismiss the petition in Case No. 10 DR YYYY N. Therefore, their motion to dismiss the petition in Case No. 10 DR YYYY N is denied.

That said, the court notes that the petition in Case No. 10 DR YYYY N alleges that the child lives “full time” with F. V. Under §751.02(1)(b), in the absence of both parents’ consents, the court has jurisdiction to grant temporary custody only to an 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,” assuming the allegations against the father are proven in subsequent proceedings in that case. The petitioners cannot confer subject matter jurisdiction on the court. Only the legislature or the common law defines the court’s subject matter jurisdiction. Therefore, it appears the court has no jurisdiction to grant the petition in 10 DR YYYY N as to A. S.

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

R. Thomas Corbin, Circuit Judge

Copies provided to:

R. F., Esq., R. M., Esq., and A. H., Esq.