

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

JANUARY TERM 2012

P.B., MOTHER OF K.M., A CHILD,  
and K.H., FATHER OF K.M., A CHILD,

Appellants,

v.

Case Nos. 5D11-4425 and  
5D11-4599

DEPARTMENT OF CHILDREN  
AND FAMILIES,

Appellee.

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Opinion filed May 14, 2012

Appeal from the Circuit Court  
for Volusia County,  
Leah Case, Judge.

Ryan Thomas Truskoski and  
Jeffrey Deen, Office of Criminal and  
Civil Counsel, Casselberry, for  
Appellant, Father.

Eddie J. Bell, Daytona Beach, for  
Appellant, Mother.

Wendie Michelle Cooper, Tavares,  
Guardian Ad Litem.

Jeffrey Dana Gillen, Children's Legal  
Services, West Palm Beach, for Appellee.

JACOBUS, J.

P.B., the Mother, and K.H., the Father, appeal the order terminating their parental rights to their daughter, K.M. The lower court found grounds for terminating both

parents' rights pursuant to sections 39.806(1)(c), (1)(e), (1)(f), (1)(j), and (1)(l), Florida Statutes. We have reviewed the record on appeal and affirm the order terminating the Father's rights in its entirety. We also affirm without discussion the portion of the order terminating the Mother's rights pursuant to sections 39.806(1)(c), (1)(f), and (1)(l).<sup>1</sup>

We must remand, however, for correction of the order terminating the Mother's rights because the record does not support termination under sections 39.806(1)(e) and (1)(j). Therefore, on remand, the lower court is directed to delete the portion of the order terminating the Mother's rights pursuant to these subsections. In all other respects, the order is affirmed.

AFFIRMED and REMANDED with instructions.

ORFINGER, C.J. concurs.

GRIFFIN, J., concurs in part, dissents in part, with opinion.

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<sup>1</sup> We note that we have considered and rejected the Mother's arguments regarding terminating her rights pursuant to subsection (1)(l). See K.J. ex rel. A.J. v. Dep't of Children & Families, 33 So. 3d 88, 90 (Fla. 1st DCA 2010) (Hawkes, C.J., concurring).

I am unable to concur in the decision to remand for removal of the termination under Section 39.806(1)(j), Florida Statutes (2011). That section was added to the list of grounds for termination of parental rights in 2008, and, even though substance abuse is a primary cause of parental failure in this state, there have been no reported cases under this subsection. This is not surprising, given that it doesn't make a lot of sense. This ground for termination provides:

(j) The parent or parents have a history of extensive, abusive, and chronic use of alcohol or a controlled substance which renders them incapable of caring for the child, and have refused or failed to complete available treatment for such use during the 3-year period immediately preceding the filing of the petition for termination of parental rights.

So . . . looking backward for a period of three years from the date of filing the petition for termination of parental rights based on a parent's "extensive, abusive and chronic use of alcohol or a controlled substance that renders them incapable of caring for the child," this ground is not available unless, during that time period, the parent has either refused treatment or failed to complete "available" treatment. Seemingly, as the statute is written, if in May 2012 the Department of Children and Families files a termination of parental rights petition against a parent whose extensive, abusive and chronic drug abuse makes them incapable of caring for their child, the court is powerless to terminate parental rights if, at some point, in the preceding three years, the parent had "completed" an "available" treatment. It will not matter that the parent

relapsed and has remained a barely functioning addict and a failed parent ever since. The trial court thought this made no sense.

I think I will stand with the trial judge on this one. It is understandable that a parent should not face termination of their parental rights due to addiction to alcohol or drugs unless they have, in the recent past, been offered access to treatment, but why would it matter whether the treatment were refused, completed or left incomplete if the parent remains incapable of caring for their child? What matters is that treatment was made available, and the parent remains incapable of caring for their child.