SUPREME COURT OF NEW JERSEY
DOCKET NO. 55,099

NEW JERSEY DIVISION OF
YOUTH AND FAMILY SERVICES

Plaintiff-Respondent

-v-

A.R.G.

Defendant-Petitioner,

Civil Action

Sat Below:
Hon. Howard H. Kestin, J.A.D.
Hon. Robert A. Fall, J.A.D.
Hon. Naomi G. Eichen, J.A.D.

BRIEF of AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

Legal Services of New Jersey
Melville D. Miller, Jr., President
100 Metroplex Drive, Suite 402
P.O. Box 1357
Edison, New Jersey 08818-1357
Phone Number: (732) 572-9100
Fax Number: (732) 572-0066

BY: Nancy Goldhill
Melville D. Miller, Jr.

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Introduction

This case raises important issues about when courts can excuse the Division of Youth and Family Services (DYFS) from its constitutional and statutory mandate to make reasonable efforts to keep families together and reunify them after children are removed from their parents. This issue is one of first impression in New Jersey, based on recent federal and state statutory exceptions to the reasonable efforts requirement.

In considering this case, we urge the Court to keep in mind that the principles and guidance in its opinion will affect the rights of all parents with children in out-of-home placements, an effect far beyond the parent and children in this case. The great and disproportionate majority of families involved with DYFS, and of those with children in foster care, are in poverty. Virtually all need considerable outside support and help: perhaps therapy and counseling, or housing and income assistance, or substance abuse treatment, or any of dozens of other services and support. Very few have such supports available from their extended family and friends. Almost none can afford to obtain any of it on their own. If these families have any hope of succeeding and staying in tact, they must receive the necessary assistance from the state.

Such assistance, termed "reasonable efforts", is frequently the only way to prevent the permanent breakup of families and loss of parental rights.

In a placement context, if the requirement on DYFS to provide reasonable efforts to reunify families is terminated ("waived") by a court order, a "permanency" hearing must be held within 30 days, in most cases an impossibly short time for troubled parents to resolve difficult issues on their own. If, at the permanency hearing, the court determines that the children cannot yet return home, a termination of parental rights proceeding usually follows quickly (in this case two months). Thus the perhaps innocuous-sounding "waiver of reasonable efforts" in fact starts an inexorable domino roll toward complete loss of one's children. It cannot be taken lightly, or treated with procedural laxity, as it was in this case.

The allegations concerning the defendant father's conduct in this case are unquestionably disturbing. He appears to be a person who is troubled and needs help. Nonetheless, he and all others with children in placement are entitled to certain protections under the law. Given the dire consequences that flow quickly and almost inevitably from a court's determination to release DYFS

from its reasonable efforts obligations, it is imperative for this Court to look both at and then beyond the particular facts of this case as it clarifies the applicable substantive and procedural standards. With adequate support and assistance, many parents in crisis can be helped and can resume full care and custody of their children with positive outcomes. It is this affirmative reality, not just that some parents cannot be helped in any reasonable time frame, that compels strong guidance to trial courts to proceed with great care and procedural strictness in reasonable efforts waiver cases.

In this case, the trial court, without adequate notice and based in large part on hearsay evidence, found that the defendant, Mr. G., abused one of his children, and that the abuse constituted "aggravated circumstances". Because aggravated circumstances of abuse and cruelty constitute one of the statutory grounds to waive the reasonable efforts requirement, the court relieved DYFS of its obligation to help Mr. G. reunify his family.

Due process and fundamental fairness require a court to consider whether services and assistance in fact could help the family reunify within a reasonable period of time, before waiving the reasonable efforts requirement. Such a determination must be based on substantial competent

evidence. By failing to consider the possibility of reunification, abiding the lack of notice and relying primarily on hearsay testimony, the court violated Mr. G.'s substantive and procedural due process rights.

Statement of Facts

Mr. G.'s three children were removed from him in May 2002 following his abuse of one child after the child received a bad report card. Da2-6. On June 26, 2002 the trial court held a fact-finding hearing to determine whether Mr. G. had abused his child. Two days prior to the scheduled hearing, the Deputy Attorney General (DAG) sent an evidence packet to the father's attorney, who had just entered the case. New Jersey Div. of Youth and Family Services v. A.R.G., 361 N.J.Super. 46, 84 (App.Div. 2003); T3-9 to 14. Along with the evidence, the DAG sent a short cover letter stating that DYFS would seek "a finding pursuant to N.J.S.A. 30:4C-11.3(a)." A.R.G., 361 N.J.Super. at 84. The letter did not specify that DYFS was seeking a waiver of its reasonable efforts obligation. Id.

At the fact-finding hearing, when Mr. G.'s attorney attempted to address the issue of reasonable efforts, the court refused to entertain testimony on the issue, stating that the hearing was solely a fact-finding hearing to determine whether Mr. G. abused his child. T73-18 to T74-

1. After the hearing, the court determined that Mr. G. had abused his child and that the abuse constituted aggravated circumstances. T82-5 to 9; 23 to 25. The court noted that this was a "serious beating," T83-1 to 4, and, without further findings, relieved DYFS of the obligation to provide reunification services to Mr. G. T83-16 to 18. The court then approved the placement of all three children with their maternal grandparents in Florida, and subsequently ordered DYFS to file promptly to terminate Mr. G.'s parental rights. Da193.

Mr. G. filed a motion for reconsideration of the reasonable efforts decision. With no advance notice and over defendant's objection, the court simply tacked a hearing on the reconsideration motion onto the already scheduled July 17 permanency hearing, without requiring a formal response from the DAG. The court then reiterated its determination to eliminate DYFS' duty to provide reasonable efforts. The children had already moved to Florida and, two months later, DYFS filed a complaint seeking to terminate Mr. G.'s parental rights. That action is pending until this appeal is resolved.

POINT ONE

PARENTS HAVE A CONSTITUTIONAL RIGHT TO REASONABLE EFFORTS BEFORE BEING SEPARATED FROM THEIR CHILDREN AND REASONABLE EFFORTS MUST NOT BE ELIMINATED WITHOUT FAIR STANDARDS.

The United States Supreme Court has consistently affirmed that parents have a "fundamental constitutionally protected right to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 65 (2000). Citing the 1923 case of Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923), the Court recognized that this right "is perhaps the oldest of the fundamental liberty interests recognized by the Court." 530 U.S. at 65. Reviewing the "extensive precedent" in this area, the Court stated: "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects [this] fundamental right of parents. Id. at 66. See also, Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

The critical need for fair protections is even further heightened when parents are faced with the permanent destruction of family ties. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982). As then Justice Rehnquist recognized in Santosky, while dissenting to the imposition of a federal standard of proof in state parental rights actions,

> few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members. Id. at 787, cited in N.J.

Div. of Youth and Family Services v. A.W., 103 N.J. 591, 600 (1986).

The New Jersey Supreme Court has similarly upheld the fundamental nature of parental rights, stating:

> We emphasize the inviolability of the family unit, noting that '[t]he rights to conceive and to raise one's children have been deemed 'essential'* * * 'basic civil rights of man,' * * * and '[r]ights far more precious * * * than property rights.' N.J. Div. of Youth and Family Services v. A.W., 103 N.J. 591, 599 (1986); quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Further, "[p]arents have a constitutionally-protected fundamental liberty interest in raising their biological children, even if those children have been placed in foster care." Matter of Guardianship of J.C., 129 N.J. 1, 9 (1992). See also, Matter of Guardianship of K.H.O., 161 N.J. 337 (1999).

Parents also have a right, under federal and state law, to get assistance from the State to help them keep their families together. Since 1980, federal law has conditional federal funding to states on a requirement that they make "reasonable efforts" in order to avoid the need for placement and, if placement is made, to reunify the family. 42 U.S.C. 671(a)(15). New Jersey's original statement of this obligation required DYFS to "provide necessary welfare services …'so far as practicable'" in

order to preserve and strengthen families and allow children to live in their own homes. N.J.S.A. 30:4C-3.

Nearly twenty years ago, DYFS' obligation to help keep families together was incorporated into this Court's seminal formulation of a constitutionally sufficient termination of parental rights standard. A.W., 103 N.J. at 608-10. At the time of A.W., the termination statute provided only that decisions about terminating parental rights were governed by the "best interests of the child," an undefined term. Recognizing the constitutional infirmity of such vague language, the Court articulated a more specific and complete test, defining "best interests" consistent with "the constitutional significance of the interest being protected." 103 N.J. at 601, 603. In doing so, the Court sought to balance parental rights with the state's need to "protect children from serious physical or emotional harm." Id. at 599.

The third prong of the Court's four-prong A.W. test required judges to consider "alternatives to termination." Id. at 608. This portion of the test specifically focused on the State's obligation to provide services to assist families in staying together or reuniting.

> Legislative and judicial policy have dictated that the child's 'best interests' be protected 'so far as practicable' by providing welfare services to support

> and maintain the integrity of the biological family as a living unit. Id. at 608, citing New Jersey Div. of Youth and Family Services. v. B.W., 157 N.J. Super. 301,308 (Camden County Ct. 1977) and N.J.S.A. 30:4C-1 to -65.

It also required the court to consider other alternatives, such as placement with relatives. 103 N.J. at 608.

In 1991, the statute for terminating parental rights on the ground of "best interests," the most commonly used termination ground, was amended to require "that the four standards articulated in A.W. have been met *** consistent with constitutional doctrine." J.C., 129 N.J. at 9. The third prong of the statutory standard captured the Court's full explanation of alternatives to termination, specifically adding the requirement that DYFS make "diligent efforts to provide services to help the parents correct the circumstances which led to the child's placement outside the home". P.L. 1991, c. 275, section 7. In 1999, the statute was amended to change the term "diligent efforts" to "reasonable efforts." P.L. 1999, c. 53, section 7; N.J.S.A. 30:4C-15.1. Parents' rights to reasonable efforts are therefore a critical component of their constitutional right to keep their families together.

In 1997, the federal Adoption and Safe Families Act amended the reasonable efforts law, creating the first

exceptions to the reasonable efforts requirement. 42 U.S.C. 671(a)(15)(D)(i). To remain qualified for federal funding assistance, states were required to adopt parallel laws allowing courts to relieve DYFS of the obligation to make reasonable efforts under certain limited circumstances. New Jersey's law, adopted in 1999, allows a bypass of reasonable efforts only when a court determines that:

1) the parent "has subjected the child to *aggravated circumstances* of abuse, neglect, cruelty or abandonment."
2) the parent has been convicted of a serious crime against a child, or
3) the parent's rights to another child have been terminated involuntarily. N.J.S.A. 30:4C-11.3. (emphasis added)

As noted above, once DYFS is excused from the requirement of making reasonable efforts to help families or ceases to provide them, it is unlikely that parents will be successful in reuniting their families. The waiver eliminates the assistance necessary to enable parents to overcome the complex problems that prevent them from caring for their children.[1] As recently recognized by the Nebraska

[1] For example, it is widely recognized that a substantial percentage of parents with children in foster care struggle with substance abuse. Yet, in Legal Services' experience, as confirmed by conversations with treatment centers, there are not enough treatment centers to help them all, and sometimes parents must wait weeks or months to get the care they need. See also, LSNJ, "Protecting and Preserving Children: A New

Supreme Court, "dispensing with reasonable efforts at reunification frequently amounts to a substantial step toward termination of parental rights." In re Interest of Jac'Quez N., 669 N.W. 2d 429, 435 (Neb. 2003). Families who have lost their right to reasonable efforts are also left with little time to address impediments to reunification. Permanency hearings to decide whether a child can return home must be held within 30 days of the reasonable efforts determination. In all other cases, families have twelve months to correct their problems before a decision is made about whether or not they can resume care of their children.

A number of states have recognized the constitutional dimensions of parents' rights to reasonable efforts. Maine's highest court declared that parents have "a fundamental and important right to reunification services at state expense." In re Heather C., 751 A.2d 448, 455 (Me 2000). See also, In re Christmas C., 721 A.2d 629, 631 (Maine 1998) ("[t]here is no dispute that ceasing rehabilitation and reunification efforts affects an important liberty interest that implicates due process"). Indiana similarly concluded that the reasonable efforts

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Vision for Child Welfare Services," available at http://www.lsnj.org/pdfs/protect.pdf.

exceptions infringe on the "fundamental right to family integrity", and are subject to review under the strict scrutiny standard. G.B. v. Dearborn County Div. of Family and Children, 754 N.E. 2d 1027 (Ind. Ct. App. 2001). Other states, as well as the Appellate Division in this case, have recognized that constitutional protections must be provided in reasonable efforts waiver proceedings by applying the clear and convincing evidentiary standard, the standard required under the federal constitution for all parental rights termination actions. See, In re Joshua M., 66 Cal. App. 4th 458, 477, 78 Cal. Rptr. 2d 110 (Cal. Ct. App. 1998); S.D. Code. Ann. 20-7-763 c(1) (Law.Co-op 2003); Conn. Gen. Stat. Ann. 17a-111b(a) (West 2003); Santosky, 455 U.S. 745.

The statutory standards for waiving the reasonable efforts exception must be measured against the constitutional rights involved. The exception to the reasonable efforts requirement at issue in this case authorizes a court to eliminate DYFS' obligation to provide services based on a finding that a parent "has subjected the child to aggravated circumstances..." N.J.S.A. 30:4C-11.3(a). The federal reasonable efforts law explicitly left states to define the term "aggravated circumstances" on their own, simply stating that the definition "may

include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse." 42 U.S.C. 671(a)(15)(D)(i). There is no further guidance to the meaning of this term under the state statute or regulation. The New Jersey Legislature did not provide a definition of aggravated circumstances, just repeating the phrase. DYFS' regulations under the statute then simply parrot, with two modifications, the federal authorizing language: "Aggravated circumstances may include, but are not limited to, torture and chronic or severe abuse." N.J.A.C. 10:133I-4.3. The state regulations omit the federal example of abandonment, and include "severe abuse" rather than "sexual abuse." The dissenting judge below states that "the majority has not articulated a useful standard for determining when 'serious abuse' or 'aggravated circumstances' has occurred", and further that if the evidence in this case supports a finding of aggravated circumstances, "many other cases alleging child abuse . . . could arguably fit within" that definition. 361 N.J.Super. at 88, (J. Eichen, dissenting).

In this case, the trial court determined that Mr. G. abused his son under what it held to be aggravated circumstances. In making its determination that Mr. G.'s actions constituted aggravated circumstances, the trial

court simply stated "this is a serious beating." T83-2. After that summary determination, the court relieved DYFS of its obligation to make reasonable efforts without any further explanation or justification.

The court declined to examine whether services from DYFS might enable Mr. G. to safely resume caring for his children. In fact, the Appellate Division stated that while courts "may" consider "whether the offer or receipt of services would correct the conditions that led to the abuse or neglect within a reasonable time," A.R.G., 361 N.J. Super. at 77, this consideration is not required.

Although the court amplified its findings on defendant's motion for reconsideration, it still failed to consider Mr. G.'s potential to change. Nonetheless, the court ordered Mr. G. to comply with DYFS' "referral for parenting, anger management, along with any referrals made as a result of the psychological evaluation." T83-9 to 12. Mr. G. also expressed to DYFS that he would accept services immediately and participate in any additional services or other requirements DYFS requested. T33-18 to 25. He then enrolled in both anger management and parenting classes. 2T25-18 to 19. DYFS' provision of these services suggests it believed that Mr. G. might be capable of correcting his problems and safely caring for his children again.

Consistent with the third prong of the Court's mandate in A.W., protection of the family unit mandates that courts be required to, not just permitted to, examine whether reasonable efforts might enable the parent to safely resume caring for his or her children in a reasonable time period, before allowing termination of a parent's right to state assistance. The court's cursory review in this case cannot sustain a decision of such magnitude.

Several state legislatures have recognized the importance of evaluating parent's current circumstances and the possibility that services might facilitate reunification in proceedings to determine whether to terminate reasonable efforts. Iowa's statute permits eliminating reasonable efforts based on serious abuse or neglect only where clear and convincing evidence establishes that "the offer or receipt of services would not correct the conditions which led to the abuse or neglect of the child within a reasonable time." Iowa Code 232.57 2b; 232.116(1)(i)(3). New York's statutory exceptions also require consideration of whether reasonable efforts "would likely result in the reunification of that parent and the child in the foreseeable future." N.Y. Fam. Ct. 1039-b(b). South Carolina requires the court to "consider whether initiation or continuation of reasonable

efforts to preserve or reunify the family is in the best interests of the child." S.C. Code Ann. 20-7-763(F). Amicus urges this court to interpret the reasonable efforts statute to require an examination of these additional factors.

POINT TWO

THE COURT ELIMINATED DEFENDANT'S RIGHTS TO REASONABLE EFFORTS WITHOUT PROVIDING ADEQUATE PROCEDURAL DUE PROCESS

The federal constitution protects individuals against the loss of interests "encompassed within the Fourteenth Amendment's protection" without reasonable notice and an opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67, 83 (1972).

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. Id. at 80.

See also, Goldberg v. Kelly, 397 U.S. 254 (1970). While procedural due process is not "fixed in form," the United States Supreme Court emphasizes that hearings must be meaningful. 407 U.S. at 82. Without adequate notification about the threatened loss of rights, the right to a hearing may well be meaningless. Id. at 80.

In order to balance parents' constitutional rights against the State's responsibility to protect children,

judicial authority to intrude into family life "must be exercised with scrupulous adherence to procedural safeguards." New Jersey Div. of Youth and Family Services v. J.Y., 352 N.J.Super. 245, 261 (App. Div. 2002). The notice and conduct of the hearing in this case fell far short of adequate procedural due process.

DYFS never filed a motion or made any formal request for a hearing to terminate its obligation. Instead, the decision to eliminate reasonable efforts was made in the context of the scheduled fact-finding hearing. When sending its packet of evidence to Mr. G.'s attorney two days before the hearing, DYFS added a sentence to its cover letter noting that it was seeking "a finding pursuant to N.J.S.A. 30:4C-11.3(a)." A.R.G., 361 N.J. Super at 84. No explanation was given as to what that meant, and the term reasonable efforts was not mentioned at all.

Most significantly, at the subsequent hearing, the court explicitly stated that it was not considering the issue of reasonable efforts and refused to entertain testimony on the subject of whether or not reasonable efforts were required.

> This is not a reasonable efforts case. It's a fact finding case to determine whether or not there was abuse...It's got nothing to do with reasonable effort. (sic) So, don't - consume time talking about reasonable efforts. T73-18 to T74-1.

After prohibiting testimony from the parties on the reasonable efforts requirement, the court proceeded to find that the father abused his child, that the abuse involved aggravated circumstances and that reasonable efforts were therefore not required.

Defendant filed a motion for reconsideration seeking an opportunity to specifically discuss reasonable efforts. Even then, the court denied defendant a fair opportunity to be heard. Mr. G.'s counsel filed for reconsideration just days prior to the scheduled permanency hearing, and plainly did not intend for the motion to be heard at the permanency hearing, before DYFS had filed a response. 2T4-16 to 25. Nonetheless, over the defense counsel's objection, the court permitted DYFS to oppose the motion orally, without having submitted responding papers. The court's process was flawed and defendant was denied procedural due process when he lost his right to reasonable efforts without receiving actual notice explaining the potential deprivation and without being allowed to address the loss and present evidence at the original court hearing. It is essential that this Court mandate that families' rights are adequately protected at hearings involving consequences of such magnitude.

Despite the severe consequences of this decision, the trial court's decision relied heavily on hearsay representations from the DYFS worker, the only witness at the hearing in this case. Although the court also relied on photographs to assess the severity of the incident that precipitated this legal action, there was no medical evidence. Its further determination that the incident was part of a pattern of abuse was based solely on hearsay. The court cited to determinations of two doctors that the child's body revealed evidence of old bruises. T78-1 to 10. Yet, no doctor testified or was subject to cross-examination on those findings.

In addition to the absence of medical testimony on the nature of the injuries to Mr. G.'s son, there were no psychological evaluations of the children and no information was provided about the children's emotional states, as pointed out by the dissent. A.R.G., 361 N.J.Super. at 87. Although the court ordered Mr. G. to participate in a psychological evaluation, it rendered its decision without waiting to hear expert testimony, which "might have revealed whether there is any likelihood that services would be able to correct the condition that led to the abuse." Id. The court did not even attempt to hear from the children, despite the fact that the Law Guardian

and defense counsel made conflicting representations about their wishes at trial. The children, ages 16, 11 and 9, Da2, were old enough to communicate their desires, and the court should have spoken with them directly or inquired further about their wishes and interests before taking the critical step of eliminating reasonable efforts.

When DYFS seeks a waiver of the reasonable efforts requirement, procedural due process must include, at a minimum, (1) adequate notice specifying the nature of the proceeding and the relief sought by DYFS; (2)a hearing at which all affected parties may provide competent testimony on whether the reasonable efforts requirement should be waived, and (3) findings of fact and conclusions of law based on clear and convincing competent evidence, not hearsay.

Finally, the consequences of the court's waiver of the reasonable efforts requirement highlights the critical importance of providing fair standards and procedures. After ruling that Mr. G. was not entitled to help from DYFS, the court determined that the children should move to Florida to live with their grandparents, and accelerated the proceedings by ordering DYFS to file rapidly to terminate Mr. G.'s rights to his children. These steps effectively precluded Mr. G. from taking the steps, let

alone getting the assistance, necessary to reunify the family.

Fundamental parental rights must not be terminated where there may be preferable or equally viable options that have not been explored. As stated in the dissenting opinion,

> The rush to judgment in this case essentially precludes consideration of a permanency alternative that arguably could be appropriate in a case of this nature, namely, a "kinship legal guardianship arrangement". ...Given the fact that these children are safely placed in a secure and familiar environment with their maternal grandparents in Florida, and that the criminal charges against their father have not as yet been resolved, the rush to achieve permanency for these children which is applicable to the foster placement of an abused child seems ill-advised under our system of justice. A.R.G., 361 N.J.Super. at 89 (J. Eichen, dissenting).

The trial court conceded that expediting the case toward termination of parental rights precluded other potential options: "the Division still could explore other options to termination...such as maybe long term foster care, but it doesn't look like you're going to have enough time for that." 2T41-3 to 10.

In addition to expounding upon the requisite standards and procedures for all cases involving waiver of reasonable effort, it is necessary to remand this case to ensure that defendant's rights to receive reunification assistance and to raise his children are not terminated without a fuller,

fairer proceeding. Given the importance of the rights at stake and the lack of a clear definition of aggravated circumstances, the trial court should not have cut Mr. G. off from his children without further consideration or more substantial evidence.

CONCLUSION

For all the reasons discussed in this brief, *amicus* urges this Court to reverse the decision below and clarify the procedures and standards applicable in actions to relieve DYFS of its obligation to provide reasonable efforts, consistent with due process of law.

Respectfully submitted,

Legal Services of New Jersey

By: 

Nancy Goldhill

Melville D. Miller, Jr.

Dated: November 17, 2003