

In the Interest of B.R.F., 2015 WL 1432454

- Decided March 30, 2015
- Opinion: Phipps
- Concurring Opinions: McFadden, Ray
- Dissenting Opinion: McMillian, Andrews

Posture:

Mother filed an out of time appeal of the juvenile court's termination of parental rights order.

Issue(s):

Does the Court of Appeals have jurisdiction to grant an out-of-time application for discretionary appeal of a termination of parental rights order?

Was the evidence sufficient to support the juvenile court's order terminating the parental rights of the mother?

Holding:

Affirmed. The court first determined that a constitutional violation concerning the appeal occurred when the mother's right to file an application for discretionary appeal was frustrated because of ineffective assistance or denial of counsel. It then proceeded to review the merits of the case, which it found supported the juvenile court's order terminating the mother's parental rights.

Facts:

On procedure:

The mother was represented by a conflict defender during her termination of parental rights hearing who, at the conclusion of the hearing, sent the mother a letter in response to a call she made to his office stating that she is "not entitled to indigent defense for a discretionary appeal of a civil case" and advising that she could, instead, file a private appeal without counsel within 30 days from the entry of the final judgment. The mother timely filed a direct appeal from the termination of parental rights order *pro se*, which was dismissed by the juvenile court for failure to follow proper discretionary appeals procedure. Subsequently, the mother, through new counsel, filed an out-of-time application for discretionary appeal.

On the merits:

Based on concerns that B.R.F.'s needs were not being met by her 17 year-old mother, DFCS opened a family preservation case, but later the court entered a shelter care order finding that the mother had been "unable to demonstrate appropriate parenting abilities" and that there was not appropriate supervision of the mother and the child at home. B.R.F. was placed in the custody of Pike County DFCS, and the court ordered that the mother and grandfather (with whom the mother and child lived) comply with a prior safety plan. Approximately one month later, the court entered a "Consent Order for Shelter Care" that found that continuation in the grandfather's home would be contrary to

the mother's welfare and further, that it was necessary for the mother's protection that she be placed in shelter care.

All parties stipulated that the mother was deprived, and she and B.R.F. were placed together in a group home. The next month, based on the mother not wanting to be at the group home, the grandfather's continuing interference in the mother's care of the child, and lack of evidence that the mother could parent the child alone, the child was placed in a foster home.

The court adjudged the mother not deprived and released her from DFCS custody. A concurrent permanency plan of "reunification and non-reunification/live with fit and willing relatives" was adopted along with case plan goals for the mother and the father. At the review hearing, the mother testified that she did not believe she was capable to care for her child. She later surrendered her parental rights to the grandfather. DFCS filed a petition to terminate her rights, arguing that the mother surrendered only in an attempt to avoid the involuntary termination of her rights, with the hope that she would maintain control over B.R.F. through the grandfather, which the court ultimately granted.

On appeal, the mother argues that the evidence was insufficient to find that she was the cause of the child's deprivation, that the deprivation was likely to continue, and that the child was caused physical, mental or emotional harm.

Reasoning:

On procedure:

Pursuant to O.C.G.A. § 5-6-35(d), an application for discretionary appeal must be filed within 30 days of the entry of the order being appealed. Case law establishes that though a trial court has no authority to grant an out-of-time discretionary appeal application from a termination of parental rights, an appellate court may do so, at its discretion, when a constitutional right is at stake. The Supreme Court of Georgia had previously held that there is no constitutional right to counsel in filing or litigating a discretionary application to appeal; however, those cases are distinguishable from the present case because, in a termination of parental rights case, the discretionary appeal process is the one and only first appeal as of right. In Georgia, the right to court-appointed counsel for an indigent parent in a termination of parental rights case extends to the appellate process, and the entire procedure for final adjudication of parental rights must comport with the Due Process Clause. In the present case, the mother was forced, due to ineffective assistance of trial counsel, to pursue her only first right of appellate review without an attorney when the law entitled her to representation. As the remedy for this due process violation, the court found that it had jurisdiction of the discretionary appeal.

On the merits:

The court found that the evidence showing the mother's failure to complete her case plan and demonstrate interest in parenting supported the juvenile court's conclusion, and that termination was in the best interest of the child.

Special Concurrence

Justice McFadden joined the majority opinion and wrote separately to elaborate on the requirement of *Lassiter v. Dept. of Social Svcs. of Durham County*, 452 U.S. 18 (1981). *Lassiter* recognizes a presumption of appointed counsel for an indigent party when that party may be deprived of his physical liberty. That presumption may be overcome through a weighing of the private interests at stake, the government's interests, and the risk of an erroneous decision using the existing procedures. The concurrence observes that termination of parental rights proceedings in Georgia have increased in complexity to such a degree that due process, under *Lassiter*, mandates appointment of counsel for all appeals from termination of parental rights. Given the due process violation that occurred concerning this appeal, the court has the authority and duty to grant the out-of-time discretionary appeal and review the merits of the case.

Dissent

Judge McMillian dissents on the basis that the court lacks jurisdiction to consider the out-of-time appeal. He argues that a parent has no constitutional or statutory right to a direct appeal following the termination of her parental rights and no constitutional right to counsel in a parental rights termination case. By extension, the parent does not have a constitutional right to an attorney to file a discretionary application on her behalf. Accordingly, the court lacks the authority to grant the out-of-time appeal even when the appellant's attorney was ineffective.