ADOPTIONS: PROVING ABANDONMENT BY A NATURAL PARENT WHO FAILS OR REFUSES TO CONSENT TO AN ADOPTION

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by Cynthia Stump Swanson

Adoption is a purely statutory cause of action, and thus the validity of the proceeding and of the final judgment of adoption depends upon substantial compliance with the adoption statutes. The purpose of an adoption proceeding is to sever ties between a child and her natural parents, to terminate completely the rights of the natural parents and to establish such rights in the adopting parents.

Chapter 63 of the Florida Statutes provides the statutory basis for adoption actions. F.S. §63.062 requires the consent of the mother of a minor child. The father must also consent if the minor was conceived or born while the father was married to the mother, if the father has previously adopted the child, if the father has been adjudged to be the father of child, if the father has acknowledged to the Department of Health and Rehabilitative Services that he is the child's father, or if he has provided regular support for the child. Such consent must be executed after the birth of the child. The statute also provides that consent *may* be required from other persons in certain situations.[1] F.S. §63.072 provides that the court may waive or excuse the consent required by §63.062 of natural parents in the following situations:

> (1) A parent who has deserted a child without affording means of identification or who has abandoned a child;
>
> (2) A parent whose parental rights have been terminated by order of a court of competent jurisdiction;[2]
>
> (3) A parent judicially declared incompetent for whom restoration of competency is medically improbable;[3]
>
> * * *

This article will specifically consider the situation in which a natural parent, who exhibits symptoms of mental illness, fails or refuses to consent to the adoption of a minor child, and the petition for adoption requests that the trial court

excuse such consent pursuant to F.S. §63.072(1).

In such a situation where a natural parent appears to be mentally ill or incompetent and fails or refuses to consent to an adoption, the court must first determine whether the nonconsenting natural parent has been judicially declared incompetent and that medical evidence shows that a restoration of competency is improbable. In the grey area where a natural parent has not been judicially declared incompetent, but exhibits symptoms of mental illness, the court must then determine whether the evidence shows that the natural parent has *abandoned* the child. The natural parent's mental problems may have a direct bearing on the capacity to form an intent to abandon the child.

There is considerable case law in Florida and in other states with similar statutes as to what may or may not constitute abandonment. For example, the following cases discuss what does not, by itself, constitute abandonment:[4]

(a) Failure to contribute to the support of a child over a period of four years despite a court order to do so and the financial ability to contribute. *Roy v. Holmes*, 111 So.2d 468 (Fla. 1959); *Strode v. Silverman*, 209 S.W.2d 415 (Texas Civ. App. 1948);

(b) Blameworthy neglect, indifference and irresponsibility for the child's welfare. *Roy v. Holmes*, 111 So.2d 468 (Fla. 1959);

(c) Leaving the child with others and failing to provide support for the child, even though able to do so, and never seeing or visiting the child. *Solomon v. McLucas*, 382 So.2d 339 (Fla. 2d DCA 1980) *cert. den.* 389 So.2d 1112 (Fla. 1980); *Durden v. Henry*, 343 So.2d 1361 (Fla. 1st DCA 1977);

(d) Neglect or disinterest of natural mother who had voluntarily given custody of child to others and who admitted she was unable to cope with parental obligations herself. *Matter of Adoption of Noble*, 349 So.2d 1215 (Fla. 4th DCA 1977);

(e) Failure of divorced father to pay child support as retaliation for mother's actions in concealing child's whereabouts and interfering with father's visitation rights. *Hinkle v. Lindsey*, 424 So.2d 983 (Fla. 5th DCA 1983);

(f) Incarceration, a chronic drinking problem and previous consent to an adjudication of dependency. *Matter of Adoption of Cottrill*, 388 So.2d 302 (Fla. 3d DCA 1980). See also *Harden v. Thomas*, 329 So.2d 389 (Fla. 1st DCA 1976).

(g) Leaving child temporarily in care of another or giving up custody of child pursuant to an agreement. *Solomon v. McLucas*, 382 So.2d 339 (Fla. 2d DCA 1980), *cert. den.* 389 So.2d 1112 (Fla. 1980).

There is no landmark Florida case setting out what abandonment *is*, however, the most definitive statement in Florida as to what constitutes abandonment is found in *Solomon v. McLucas*:

> This court has stated the rule to be that abandonment in the field of jurisprudence deal-

ing with adoption consists of conduct which manifests a settled purpose to permanently forego all parental rights and the shirking of the responsibilities cast by law and nature so as to relinquish all parental claims to the child.

Virtually every adoption case concerned with the issue of abandonment contains this or similar language. See, *Matter of Adoption of Noble*, 349 So.2d 1215 (Fla. 4th DCA 1977); *In re Adoption of Sorenson*, 385 So.2d 1057 (Fla. 4th DCA 1980); *Hinkel v. Lindsey*, 424 So.2d 983 (Fla. 5th DCA 1983).

Temporary v. Permanent Deprivation

The court must further find something more than mere temporary failures or derelictions of parents (that) may justify temporary deprivation of the custody of their children but (that) will not support permanent loss of parental rights. *In Interest of D.A.H.*, 390 So.2d 379 (Fla. 5th DCA 1980). The Florida Supreme Court has stated, "Conditions which might justify relieving a parent temporarily of the custody of his child would not necessarily support absolute and permanent transfer of the child to a stranger or even other near-kin." *Torres v. Van Eepoel*, 98 So.2d 735, 737 (Fla. 1957). See also *Matter of Adoption of Serpe*, 395 So.2d 1240 (Fla. 4th DCA 1981). Also widely cited is the proposition that "parents are by no means required to face a stranger to their blood on equal terms in contention for the parental rights to their children." *In Re Adoption of Prangley*, 122 So.2d 423, 430 (Fla. 2d DCA 1960) *citing Roy v. Holmes*. Thus, courts are required to overlook many parental transgressions in determining whether to terminate parental rights.

Further guidance as to what constitutes abandonment may be found within F.S. Ch. 39 relating to juvenile dependency actions. That chapter also authorizes the court, under certain conditions, to terminate parental rights. The term "abandoned" is defined in F.S. §39.01(1) as follows:

(1) "Abandoned" means a situation in which the parent or legal custodian of a child . . . while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If the efforts of such parent or legal custodian . . . to support and communicate with the child are in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. . . .

Although this definition would not be binding on an adoption court, what is clear is that the burden of proof is on the petitioners in an adoption proceeding to show that a natural parent has abandoned the child and that the parent's consent should be excused by the court. *In Re Adoption of Lewis*, 340 So.2d 126 (Fla. 1st DCA 1976), *cert. den.* 346 So.2d 1248; *Durden v. Henry*, 343 So.2d 136 (Fla. 1st DCA 1977). Further, the petitioner's standard of proof must be "clear and convincing." *Torres v. Van Eepoel*, 98 So.2d 735 (Fla. 1957), *citing In Re Whetstone*, 137 Fla. 712, 188 So. 576. See also, *In Re Adoption of Prangley*, 122 So.2d 423, (Fla. 2d DCA 1960). This same standard of proof is required in juvenile dependency proceedings which might result in a termination of parental rights. *In Interest of W.D.N.*, 443 So.2d 493 (Fla. 2d DCA 1984).

Although in the passage quoted above from *Solomon v. McLucas*, the court used the phrase, "settled purpose" (to forego parental rights and duties), the *Southern Reporter* editors used the word "intentional" in their headnote 11 for the case. So, too, did the editors of *Florida Statutes Annotated* in their Note 1 to F.S. §63.072. If the two phrases are synonymous, then a trial court must find that the nonconsenting natural parent *intended* to abandon the child and, more basically, that the parent was capable of forming such intent. Other than these editorial comments, however, there is no law in Florida as to whether the trial court, in an adoption proceeding, must determine the capacity of a nonconsenting parent to form an intent to abandon the child. However, in its definition of the word "abandoned" in F.S. §39.01(1), the legislature used both the terms "willful" and "settled purpose," indicating that the legislature considers the two terms to be interchangeable.

Other states do require such a finding of intention. In *In Re Watson*, 238 Mo.App. 1104, 195 S.W. 2d 331, 336 (1946), the court stated that a finding of abandonment would require either, a "voluntary and intentional relinquishment of the custody of the child to another, with the intent to never again claim the rights . . . or perform the duties of a parent; or . . . an intentional with-

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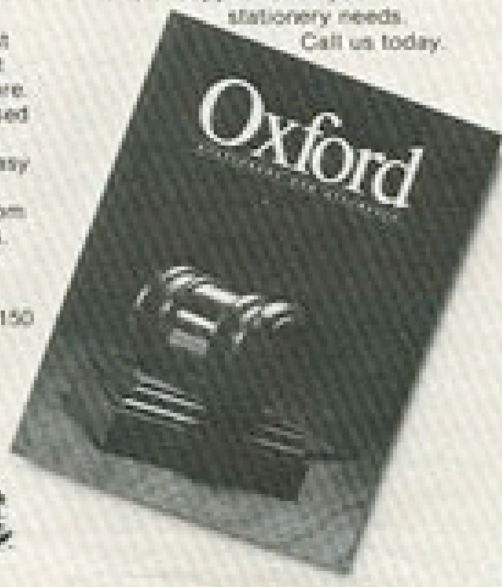

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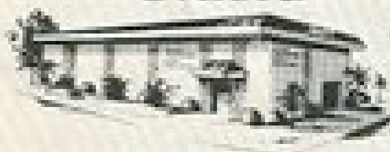

holding from the child, without just cause or excuse," of the parent's presence, care, love, protection, maintenance, and affection. In *Strode v. Silverman*, a Texas court stated that voluntary abandonment contemplates a willful act or course of conduct, such as would imply a conscious disregard of or indifference to the child. In some states, the adoption statute itself requires that the abandonment be "willful" or "intentional." In Arizona, one court has held that the word "willfully" in its statute means "intentionally or voluntarily." *Shumway v. Farley*, 68 Ariz. 159, 203 P.2d 507 (1949).

Florida Statute Leaves Intent Open

However, in Florida, the statute contains no reference to either a settled purpose, or a willful, intentional or voluntary abandonment. It seems unlikely though, that the legislature intends that a juvenile court proceeding under F.S. Ch. 39 to terminate parental rights in a permanent commitment to the Department of Health and Rehabilitative Services or another child-placing agency would be required to meet a higher burden than a court asked to terminate parental rights in an adoption proceeding under F.S. Ch. 63. Both actions have the same final effect on a natural parent.

If by the widespread use and approval of the phrase "settled purpose" in the case law pertaining to adoption, the Florida courts mean that an abandonment must be an intentional one, a further issue regarding the capacity of the natural parent to form an intent is raised. Thus, if a parent exhibits symptoms of mental illness or incapacity, the court should have a duty to inquire as to whether he or she may be unable, mentally or legally, to actually form the intention to abandon a child. Even a parent who may have been temporarily hospitalized or ordered committed to a mental health treatment facility pursuant to the Baker Act, F.S. 394.451, may never have been judicially declared incompetent, so that F.S. §63.072(3) would excuse his or her consent to an adoption. But that same parent often will be in and out of touch with reality to such an extent that his or her actions will look like abandonment, but are not a result of a "settled purpose" on the part of that parent to abandon the child.

Consider the situation in which a natural parent suffers from a mental disorder which may be successfully treated by medication. While taking the medication, such parent would likely be found to be able to form an intent; in fact, during that period, the parent may decide not to continue taking the medication, thus eventually lapsing back to the former disordered, abandoning behavior. Can that parent be said to have formed an intent to abandon his or her child?

Thus, when faced with a fact situation in which a parent does exhibit symptoms of incompetence or incapacity, but who has not been judicially declared incompetent, the court must decide whether such actions which may be caused by mental illness constitute abandonment, or whether the mental illness itself may prevent the parent from forming any intent to abandon the child and thus prohibit a finding of abandonment, no matter how egregious the parent's action may be.

In the grey area where a natural parent has not been judicially declared incompetent, but exhibits symptoms of mental illness, the court must then determine whether the evidence shows that the natural parent has abandoned the child.

A helpful analogy may be made to those crimes which require intent as one of their elements. A criminal defendant who actually committed an act which constitutes a crime, but who was insane at the time and so unable to formulate the intent to commit the crime, cannot be found guilty of the crime. By the same token, a natural parent who suffers from a mental incapacity such that he or she is incapable of forming an intent to abandon a child should not have his or her parental rights terminated under F.S. §63.072(1), and not at all unless as contemplated in F.S. §63.072(3), there has been a judicial determination of incompetency and a finding that the restoration of competency is medically improbable.

In construing an Illinois statute that excuses the consent of a parent who has abandoned a child, a court held that an insane mother could not consent to an adoption and neither could she be guilty of abandonment, and further that insanity itself does not constitute abandonment within the meaning of the adoption statute. *Keal v. Rhydderck*, 317 Ill. 231, 148 N.E. 53 (1925). A later Illinois court held that a natural mother, being insane, could neither consent nor object to the adoption, nor could she be held to have committed any of the acts which would otherwise constitute abandonment. *Burstein v. Millikin Trust Co.*, 350 Ill. App. 462, 113 N.E.2d 339 (1953), *rev'd on other grounds* 118 N.E.2d 293.

Guardians Ad Litem

Several states require the appointment of a guardian ad litem in an adoption proceeding for a natural parent whose competency is questioned and for whom a legal guardian may or may not have been appointed. The Florida adoption statute has no such requirement for the appointment of a guardian ad litem to represent a natural parent whose competency has been raised as an issue in an adoption proceeding. However, two sections of the Rules of Civil Procedure should be applicable. Fla.R.Civ.P. 1.210(b) provides in part: "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." Fla.R.Civ.P. 1.500(e) provides, in part, that "no judgment may be entered against an infant or incompetent person unless represented in the action by a general guardian . . . who appeared in it or unless the court has made an order under Rule 1.210(b) providing that no representative is necessary for the infant or incompetent."

If a parent has already been adjudicated incompetent, a legal guardian will have been appointed and prospective adoptive parent(s) can proceed under F.S. §63.072(3). However, once again when a natural parent fails or refuses to consent to an adoption and appears to be incompetent so that he or she would be unable to form an intent to abandon a child (even though his or her actions would otherwise constitute abandonment), prospective adoptive parent(s) and a sympathetic court may be caught in a "Catch-22" situation. If a court attempts to cover

all bases and appoint an attorney-ad-litem, under Fla. Stat. §744.331(4) and a guardian-ad-litem under F.R.Civ.P. 1.210(b), there still could arise the serious question as to whether either of those representatives would have the power to consent to an adoption absent express statutory authority to do so.

Thus, two serious inadequacies exist in Florida's adoption statutes. First, it is unclear whether a court must find that an abandonment of a child as contemplated by F.S. §63.072(1) must be an intentional one. The second defect in the statute, if an abandonment must be intentional, is the lack of a directed procedure to provide for an appropriate representative for the natural parent who exhibits symptoms of mental illness but who has not been adjudicated incompetent. The legislature clearly intended in F.S. §63.072(3) to avoid terminating the parental rights of a person adjudged incompetent but for whom restoration of competency is not improbable. How can any less concern be shown for a parent who has not been adjudged incompetent?

Although such fact situations as are outlined herein may be rare, the termination of parental rights is an extremely serious matter, as both the legislature and the courts have recognized. Equally serious, also, is the anguish of adoptive parents who must suffer through later proceedings to set aside the adoption and perhaps eventually part with their adopted child. ▣

[1] Fla. Stat. §63.062 also requires the consent of the minor to be adopted if he or she is 13 years of age or older. The court may also require consent from any lawful custodian of the child, "the court having jurisdiction to determine custody of the minor," and from a licensed child-placing agency or the Department of Health and Rehabilitative Services if the child has been permanently committed to such agency or to the department.

[2] Fla. Stat. §63.072(4) provides that the court may excuse the consent of a legal guardian who fails to respond to a request for consent within 60 days, or who is found to be unreasonably withholding consent.

[3] F.S. Ch. 744 provides the procedure for a judicial declaration of incompetency and the appointment of a legal guardian of the person and property of an incompetent. Generally, such procedure requires the court to appoint an examining committee consisting of two practicing physicians and a layman who examine the alleged incompetent and report to the court. If proper notice is provided and an attorney appointed if necessary, after reviewing the examining committee's report and all other evidence submitted, the court may adjudge incompetency and appoint a guardian.

[4] For non-Florida cases, *see* cases collected at 35 A.L.R.2d 665 Adoption-Abandoned or Deserted Child.

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She writes this column on behalf of the Family Law Section, Lewis Kapner, chairman, and Sandy Karlan, editor.

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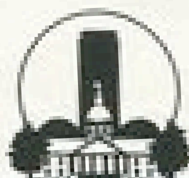

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