NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

In the Interest of T.C. and A.C., children.

N.C.,

Petitioner,

v.

DEPARTMENT OF CHILDREN and FAMILIES and GUARDIAN AD LITEM PROGRAM,

Respondents.

Case No. 2D19-2542

Opinion filed January 31, 2020.

Petition for Writ of Certiorari to the Circuit Court for Collier County; Christine Greider, Judge.

Ita M. Neymotin, Regional Counsel, Second District, and Pamela J. Montgomery, Assistant Regional Counsel, Office of Criminal Conflict and Civil Regional Counsel, Fort Myers, for Petitioner.

Meredith K. Hall of Children's Legal Services, Bradenton, for Respondent Department of Children and Families.

Thomasina Moore, Statewide Director of Appeals, and Sara Elizabeth Goldfarb, Senior Attorney, Appellate Division,

Tallahassee, for Respondent Guardian ad Litem Program.

SILBERMAN, Judge.

The Mother petitions this court for a writ of certiorari to quash the trial court's order authorizing "all medically required immunizations" of her two sheltered children over her objection. We conclude that the court failed to follow the governing statute, which was a departure from the essential requirements of the law that results in material injury for the remainder of this dependency proceeding that cannot be corrected on appeal at a later stage. We therefore grant the petition.

Case history

The Mother's two children, aged four and two, were sheltered from her on May 7, 2019, and placed in a foster home. On May 23 the Department of Children and Families filed a "motion for authorization of medical procedure" requesting court approval for the Department to provide the children with "their necessary immunizations." The Department asserted that they had not been given the routine vaccinations[1] for children of their ages and that immunization was necessary for their medical care and treatment, to allow them to enroll in daycare, and to remain in licensed foster care. The motion alleged that no daycare providers or pediatricians in the area would take children without immunizations and that the foster family could lose its license by having unvaccinated children in the home. In support of the motion the

[1]We use the words "immunize" and "vaccinate," and their various forms, interchangeably throughout this opinion.

Department cited several statutes in chapter 39 but relied primarily on section 39.407(2)(c), Florida Statutes (2018).

At the motion hearing held a week after the children were sheltered, the Mother testified that she did not want her children vaccinated because of her religious beliefs. The children had been seeing a physician and attending a daycare facility in LaBelle without any problem; both were aware that the children were not immunized. The Mother had recently moved from LaBelle to Naples, where she had contacted five pediatricians who, she said, would see the children without immunizations. She had made an appointment with one of them, but the children were sheltered before she could follow through with the appointment. She had completed immunization exemption forms and offered to provide copies to the foster mother, who declined because she had found copies in the records on her own.[2]

The child protective investigator (CPI) testified that she could not get an "early periodic screen diagnosis and testing," or EPSDT,[3] for the children because several local pediatricians would not see the children due to their immunization status. An EPSDT is essentially a health care provider's summary of the children's current physical and mental status and needed services. For the same reason, the CPI could not get a physician to examine the four-year-old boy, who was "not well" when he was sheltered; the CPI had to advise the foster mother to use the emergency room if medical care were to become necessary. The CPI was also unable to enroll the children in daycare because they had not been immunized.

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[2]Copies of these forms were not received into evidence.

[3]See § 39.4085(23).

The case manager, who had been on the case for about a week as of the date of the hearing, similarly testified that she was unable to find a pediatrician (and thus obtain an EPSDT) or a daycare provider for the children in the area where they currently resided in foster care. The case manager had not yet obtained the children's medical records or contacted their prior physician in LaBelle. She acknowledged that she had not yet contacted the pediatrician in Naples with whom the Mother had already arranged to see the children.

The four-year-old boy had a runny nose and ear problems when he arrived at the foster home. The foster mother was able to quickly get him an appointment with the pediatrician who usually treated her foster children, but that doctor ultimately refused to see the child because he was not current on his immunizations. The child's symptoms eased on their own, and after a few weeks the foster mother was able to get an appointment with another pediatrician who would see the child for his current condition but would not perform a physical for school due to the child's immunization status. The foster mother contacted three other physicians, none of whom would see the children unless they were up to date on their immunizations.

The foster mother had enrolled the children in a daycare facility, which, as far as she could tell, only accepted them as a kind of favor. The foster mother testified that she was personally fine with keeping the children at home but that it was her understanding that the Department required children in foster care to be enrolled in daycare. The foster mother's main concerns were the status of her foster care license given that she had unvaccinated children in the home and how to handle the situation if

one of the Mother's two children were to become infected with a disease for which the other children in her care were too young to be vaccinated against.

The court granted the Department's motion, authorizing the Department "to seek and obtain all medically required immunizations for the children." At the parties' stipulation, the court stayed the order pending review of the Mother's petition.

Jurisdiction

To be granted certiorari relief, a petitioner must establish three elements: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal." Parkway Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646, 648 (Fla. 2d DCA 1995). The second and third elements are jurisdictional and should be addressed before an evaluation of the first element is performed. Id. at 649 ("[A] petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before this court has power to determine whether the order departs from the essential requirements of the law.").

As explained later in this opinion, we do not reach the issue of whether the Mother has a right under the federal or Florida constitutions to keep her children from being immunized. However, Florida law recognizes a parent's ability, on religious grounds, to have his or her children exempt from immunization for various purposes. See, e.g., § 1003.22(5)(a), Fla. Stat. (2018) (allowing for an exemption to the requirement that a child be immunized for school enrollment when the parent "objects in writing that the administration of immunizing agents conflicts with his or her religious tenets or practices"); Fla. Admin. Code R. 65C-22.001(7)(p) (incorporating by reference form DH 681, "Religious Exemption From Immunization," as a general requirement for

operation of a child care facility). In this light, we conclude that the Mother has established the jurisdictional elements for certiorari relief. To the extent that a parent has a right to keep her children from being vaccinated, even when they are temporarily in the custody of the Department and a foster family, there would be material injury to the parent if the children were to be vaccinated because the vaccinations cannot be undone. Cf. A.D. v. Dep't of Children & Family Servs., 870 So. 2d 235, 237 (Fla. 2d DCA 2004) ("This court has held that interlocutory orders that improperly require mental examinations cause material injury to the petitioner that cannot be remedied on direct appeal.").

Discussion

The Mother asks this court to provide "guidance" on her asserted "constitutional right" to exercise the religious beliefs that compel her to prevent her children from being immunized. We decline that invitation for two reasons: First, in her petition the Mother develops at best a minimal argument on this admittedly controversial issue. See, e.g., Polyglycoat Corp. v. Hirsch Distribs., Inc., 442 So. 2d 958, 960 (Fla. 4th DCA 1983) ("It is the duty of counsel to prepare appellate briefs so as to acquaint the [c]ourt with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy." (citations omitted)). Second, to the extent the asserted right of a parent to refuse to have her children vaccinated represents a constitutional issue, we consider it a "settled principle of constitutional law" that courts should avoid constitutional issues unnecessary to a

decision of a case. State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995). The petition can be resolved on the statutes relied on by the parties and the trial court.[4]

The Department cited several statutory provisions in its request for authorization to have the children immunized, both for the importance of immunization itself as well as for several additional purposes for which, the Department asserted, prior immunization is required. Our conclusion that the trial court departed from the essential requirements of the law derives primarily from an analysis of section 39.407, asserted by the Department as the basis for requiring immunization. We also address two additional statutory provisions relied on by the Department and court and, for ease in presentation, begin with one of these.[5]

The Department sought authorization to have the children immunized in order to obtain an overdue initial health screening. In its order the court wrote:

> The Department of Children and Families is required to obtain an "Early Periodic Screening Diagnosis and Testing Service" (EPSDT) within 72 hours of taking a child into care, as more particularly set forth in [section] 39.4085(23), Fla. Stat. (2018).

The court noted that the CPI was unable to comply with "the statutory EPSDT requirement" because she could not find a local pediatrician who would screen the children without immunization records.

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[4]Based on the record before us, we observe that this dispute may have been avoided had there been better communication among all involved, as well as follow up with the pediatricians and daycare facilities that the Mother claimed would take children without immunizations.

[5]Because the parties and trial court do not go beyond merely mentioning the need for immunization to ensure that the foster mother can maintain her foster care license, we do not discuss that issue further.

In fact, however, section 39.4085 is the Legislature's "declaration of intent for goals for dependent children," specifically, "for children in shelter or foster care." § 39.4085 (emphasis added). Further, the statute states that "[t]he provisions of this section establish goals and not rights." Id. Subsection (23) defines the following as one such goal:

> To be afforded prompt access to all available state and federal programs, including, but not limited to: Early Periodic Screening, Diagnosis, and Testing (EPSDT) services, developmental services programs, Medicare and supplemental security income, Children's Medical Services, and programs for severely emotionally disturbed children.

§ 39.4085(23). Although the parties and the trial court refer to a seventy-two-hour requirement, the statute does not include a seventy-two-hour or any other deadline. In short, this statute does not provide the Department with authority to effect any required procedure and thus does not support obtaining immunizations for the children.

It would appear that the alleged seventy-two-hour requirement—repeated numerous times during the evidentiary hearing—comes from a repealed section of the Florida Administrative Code. See Fla. Admin. Code R. 65C-12.002(3), effective May 26, 1992; repealed Nov. 15, 2006 ("Every child entering emergency shelter care must obtain an initial health care assessment by a licensed health care provider, using the early and periodic screening, diagnosis and treatment procedures, within 72 hours after placement in shelter care.").[6] The following is the rule currently in force:

> (1) Unless a child is exhibiting signs or symptoms of illness, an initial health care assessment by a licensed health care professional shall be completed for every child placed with a

[6]Available for viewing at https://www.flrules.org/gateway/RuleNo.asp?title=EMERGENCY SHELTER CARE&ID=65C-12.002 (last visited on Dec. 19, 2019).

> relative, non-relative, or in licensed care within five (5) working days of the removal. A child who appears to be sick or in physical discomfort shall be examined by a licensed health care professional within 24 hours.
>
> (2) Whenever possible, the assessment should be conducted by the child's regular pediatrician, physician's assistant, or nurse practitioner. In instances when the child has not been regularly seen by a pediatrician, physician's assistant, or nurse practitioner, the assessment shall be completed by one of the following listed in preferential order:
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> (a) A physician, physician's assistant, or nurse practitioner selected by the parent or legal guardian, or
>
> (b) Medical staff from the Child Protection Team (CPT).

Fla. Admin. Code R. 65C-29.008(1), (2) (2006).

As the rule states, a child is to be assessed within five working days, not seventy-two hours, of removal. The child is to be assessed by his or her regular pediatrician whenever possible. Here, the Mother testified that the children did have a pediatrician, albeit at some distance away from their foster home (but within the judicial circuit), as well as a prospective pediatrician in Naples. Apparently due to a lack of communication, the Department did not seek an appointment with the children's existing or prospective physician; it was also unable to find an alternative physician. Therefore, for the initial assessment the Department should have used the failsafe provision of paragraph (2)(b) of the rule—a health care provider with the local CPT.[7]

Here, it would appear that neither the parties nor the court were aware of the current rule with its CPT option. The fact that this option is available and was not used undercuts the basis for the Department's motion. And although we do not

[7]A CPT must be established in each of the Department's service circuits. § 39.303(1).

primarily rely on rule 65C-29.008 for our disposition here, the Department's failure to follow the rule and the court's failure to enforce it supports the conclusion that the trial court departed from the essential requirements of the law.

Additionally, the Department sought immunization "as medically necessary to ensure the children are receiving appropriate medical care" so they may attend daycare and remain in licensed foster care. In its motion the Department cited section 39.407, in particular section 39.407(2)(c), as support. Although the order challenged by the Mother's petition does not mention this statute, section 39.407 is the only statute that the Department identified that would, if followed properly, allow the court to compel the children to be immunized over the Mother's objections. Section 39.407 provides in pertinent part that

> (1) [w]hen any child is removed from the home and maintained in an out-of-home placement, the department is authorized to have a medical screening performed on the child without authorization from the court and without consent from a parent or legal custodian. Such medical screening shall be performed by a licensed health care professional and shall be to examine the child for injury, illness, and communicable diseases and to determine the need for immunization. . . .
>
> (2) When the department has performed the medical screening authorized by subsection (1), or when it is otherwise determined by a licensed health care professional that a child who is in an out-of-home placement, but who has not been committed to the department, is in need of medical treatment, including the need for immunization, consent for medical treatment shall be obtained in the following manner:
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> (a)1. Consent to medical treatment shall be obtained from a parent or legal custodian of the child; or
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> 2. A court order for such treatment shall be obtained.
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> . . .
>
> (c) If a parent or legal custodian of the child is available but refuses to consent to the necessary treatment, including

> immunization, a court order shall be required unless the situation meets the definition of an emergency in s. 743.064 or the treatment needed is related to suspected abuse, abandonment, or neglect of the child by a parent, caregiver, or legal custodian. In such case, the department shall have the authority to consent to necessary medical treatment. . . .

Section 39.407(2)(c) authorizes the Department to obtain, against a parent's wishes, court consent for medical treatment—here, immunization—when either of two conditions are satisfied: when the Department has performed an authorized medical screening under section 39.407(1) or when a licensed health care professional determines that a child in an out-of-home placement but not committed to the Department needs the treatment. For the reasons described previously, the Department did not obtain initial medical screenings of the children, so the first option was not satisfied.[8] Neither did the Department obtain from a health care professional a determination that the children were "in need of medical treatment, including the need for immunization."[9] § 39.407(2). As such, there was no basis under the statute for the court to have granted the Department authorization to have the children immunized. The court therefore departed from the essential requirements of the law because it did not apply the correct law, section 39.407(2)(c). See, e.g., T.D.Z. v. Dep't of Health &

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[8]The foster mother's testimony indicated that she obtained "72 hour forms." These may have reflected an initial medical screening of the children. However, these were not entered into evidence and the court did not mention them in its order. We therefore conclude that the Department failed to satisfy the first option.

[9]The Department and the court were essentially operating under the assumption that the children, not having been immunized, needed to be. But to the extent that the first statutory option was not satisfied, the second one should have been. Furthermore, the second option is not a trivial requirement; a physician in a given case could, for example, have medical insight into why a child should not receive a specific immunization, such as a past allergic reaction resulting in an emergency room visit.

Rehab. Servs., 636 So. 2d 726, 727 (Fla. 2d DCA 1993) (granting a father and the GAL's joint petition as to two of three challenged orders "because the trial court failed to follow statutory procedures"); Palms W. Hosp. Ltd. P'ship v. Burns, 83 So. 3d 785, 788 (Fla. 4th DCA 2011) (ruling that "the trial court departed from the essential requirements of law when it did not dismiss the claims for failure of respondent to follow pre-suit procedures" of the Florida Medical Malpractice Act); Fla. Dep't of Children & Families v. S.D., 983 So. 2d 655, 656 (Fla. 3d DCA 2008) (granting petition and quashing custody release order because "[t]he trial court departed from the essential requirements of the law by failing to follow th[e] statutory requirement" of including a finding as to the child's best interest); State v. Sobie, 343 So. 2d 73, 74 (Fla. 3d DCA 1977) (granting petition because "the trial court departed from the essential requirements of law in that it failed to follow the explicit wording of the [expungement] statute").[10]

Finally, the Department sought authorization for immunization of the children to ensure that they could be enrolled in a daycare program. The Department's motion urged the court to allow the children to be immunized "to comply with the Rilya Wilson Act[, section] 39.604," a request that the court's order explicitly acknowledges.[11]

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[10]The Department also cited section 39.407 for having the children immunized in order to receive medical treatment going forward. We note simply that this statute does not require immunization as a condition for receiving such treatment.

[11]The Department's motion for authorization cited section 39.4085(23) as also requiring enrollment of the children in daycare. As noted previously, section 39.4085 sets goals, not requirements. It does not include a mandate that sheltered children attend a daycare program.

However, the court did not otherwise elaborate on the applicability of the statute.

Section 39.604 provides, in pertinent part, as follows:[12]

> **(2) Legislative intent.—**The Legislature recognizes that children who are in the care of the state due to abuse, neglect, or abandonment are at increased risk of poor school performance and other behavioral and social problems. It is the intent of the Legislature that children who are currently in the care of the state be provided with an age-appropriate education program to help ameliorate the negative consequences of abuse, neglect, or abandonment.
>
> **(3) Requirements.—**
>
> (a) A child from birth to the age of school entry, who is under court-ordered protective supervision or in out-of-home care and is enrolled in an early education or child care program must attend the program 5 days a week unless the court grants an exception due to the court determining it is in the best interest of a child from birth to age 3 years:
>
> 1. With a stay-at-home caregiver to remain at home.
>
> 2. With a caregiver who works less than full time to attend an early education or child care program fewer than 5 days a week.
>
> (b) . . . If a child is enrolled in an early education or child care program, the child's attendance in the program must be a required task in the safety plan or the case plan developed for the child pursuant to this chapter.
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> . . .
>
> **(5) Educational stability.** . . .
>
> (a) A child must be allowed to remain in the child care or early education setting that he or she attended before entry into out-of-home care, unless the program is not in the best interest of the child.
>
> (b) If it is not in the best interest of the child for him or her to remain in his or her child care or early education setting upon entry into out-of-home care, the caregiver must work

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[12]The statute uses the term "early education or child care program." E.g., § 39.604(3)(a). Throughout this opinion we have used the term "daycare" (and "daycare facility," etc.), as used by the parties and trial court as a synonym for the statutory term.

> with the case manager, guardian ad litem, child care and educational staff, and educational surrogate, if one has been appointed, to determine the best setting for the child.

Although the Legislature finds it desirable that sheltered children be enrolled in an "age-appropriate education program," § 39.604(2), the substantive remainder of the statute does not require enrollment; rather, the statute concerns children who are already enrolled. See, e.g., § 39.604(3)(a) ("A child . . . who is . . . in out-of-home care and is enrolled in an early education or child care program . . ."), (b) ("If a child is enrolled in an early education or child care program, . . ."). The statute appears to be more concerned with continuity of enrollment for children who were enrolled in daycare before they were sheltered. See § 39.604(5).

Statements of legislative intent can be interpreted to reinforce the substantive portions of a statute. See, e.g., Dep't of Health & Rehab. Servs. v. Yamuni, 529 So. 2d 258, 261 (Fla. 1988) ("This duty [to provide ongoing protective services to children] is reinforced by the statement of legislative intent that reports of abused or neglected children be made to HRS in order 'to prevent further harm to the child.' § 827.07(1)[, Fla. Stat. (1979)]."). But these statements do not substitute for the substantive language of the applicable statutes. See, e.g., Barati v. State, 198 So. 3d 69, 77 (Fla. 1st DCA 2016) ("But this statement of legislative intent [§ 68.091, Fla. Stat. (2009)] cannot authorize this court to insert new language into the statute not authorized by the Legislature."); Fla. Dep't of Health & Rehab. Servs. v. Doe, 659 So. 2d 697, 699 (Fla. 1st DCA 1995) ("The legislative statement contained in section 63.022(1)[, Florida Statutes (1993),] is a general statement of legislative intent to guide HRS and does not provide a basis for legal standing."). Although the primary basis for our conclusion that the trial court departed from the essential requirements of the law is its failure to follow

section 39.407, as described previously, the court's erroneous reliance on section 39.604 also supports this conclusion. A court cannot logically require immunization for the purpose of nonrequired enrollment in a daycare program.[13]

Because the trial court departed from the essential requirements of the law by issuing an order granting authorization to the Department to have the children immunized over the Mother's objections, we grant the Mother's petition for writ of certiorari and quash that order.

Petition granted; order quashed.

MORRIS and BADALAMENTI, JJ., Concur.

[13]Had the Department established and the court found that the children had been enrolled in daycare prior to being sheltered, there would have been a statutory basis for requiring ongoing enrollment in the program that they attended before entry into foster care. See § 39.604(5)(a). The Mother testified that the children had been enrolled in daycare in LaBelle but that after her recent move to Naples (after which the children were sheltered) they were no longer in a daycare program. Furthermore, the court's findings tended to defeat the applicability of section 39.604(5)(a): "The CPI was able to confirm that the children were registered at a daycare in LaBelle, but was never able to confirm that the children actually attended daycare at the facility."