IN THE SUPREME COURT OF FLORIDA

MARY K. BURK

Petitioner,

vs. CASE NO. 65,790

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.

_____/

BRIEF OF AMICUS CURIAE FLORIDA LEGAL SERVICES, INC.

On a question certified by the Fifth District Court of Appeal.

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STATEMENT OF THE CASE AND OF THE FACTS

AMICUS adopts the Petitioner's Statement of the Case.

The only facts relevant to this Court's review of this case are these: 1.) the mother was never accorded the benefit of a performance agreement; and 2.) the child remained in the temporary custody of HRS from May 12, 1982 until April 12, 1983, a period of eleven months, also without the benefit of a performance agreement.

AMICUS asserts that the other facts are unimportant because this case raises a purely legal issue. The trial and appellate courts applied an incorrect principle of law and thus departed from the law's essential requirements.

STATEMENT OF INTEREST OF AMICUS CURIAE FLORIDA LEGAL SERVICES, INC.

By consent of the parties and leave of the Court, Florida Legal Services (FLS) has been allowed to appear as amicus curiae. FLS is a non-profit, state support center for the low income legal assistance programs located throughout the state of Florida. These legal assistance offices provide general civil legal services to low-income persons. The Board of Directors of FLS consists of individuals whose professional and public activities impact upon youth and families; it includes educators, attorneys, social workers, and clergy. FLS' interest in this cause stems from its role as a statewide legal advocacy organization concerned with the problems and needs of Florida's poor children and families.

FLS has a particular interest in this Court's granting certiorari to review the question certified by the Fifth District Court of Appeal as one of great public importance. The programs associated with and supported by FLS have been active in state and federal appellate litigation involving issues faced by Florida's poor children and families, such as the removal of children from their homes and their placement in the care of HRS on both a temporary and a permanent basis. Such litigation has included: Davis v. Page, 442 F. Supp 258 (S.D. Fla 1977), aff'd in part and remanded, 618 F. 2d 374 (5th Cir 1980), aff'd in part and rev'd in part on reh'g en banc, 640 F. 2d 599 (5th Cir. 1981), vacated and

remanded, 458 U.S. 118, 102 S. Ct 3504, 73 L. Ed. 2d 1380 (1982), rev'd and remanded 714 F. 2d 512 (5th Cir 1983), cert. den. 104 S. Ct. 735 (1984); Johnson v. Page, Civ. Action No. 78-569 CIV-J-M (M.D. Fla., 1984); In re A. B., 444 So. 2d 981 (Fla. 1st DCA 1983); In re K. H., 444 So. 2d 547 (Fla. 1st DCA 1984); Quaintance v. Pingree, 394 So. 2d 161 (Fla. 1st DCA 1981); In re V. M. C., 369 So. 2d 660, (Fla. 1st DCA 1979); In re A. Z., 383 So. 2d 934 (Fla.5th DCA 1980); Fruh v. HRS, 430 So. 2d 581 (Fla. 5th DCA 1983); In re C. L. C., 440 So. 2d 647 (Fla. 5th DCA, (1983);and In re C. T. G., __ So. 2d ___, 9 FLW 2569 (Fla. 1st DCA 1984). In re C. T. G. raises essentially the same issues posed by the facts in the Burks case.

In addition to appellate litigation, associated program staff attorneys appear regularly in circuit court dependency hearings throughout the state. They are the only consistent source of counsel for indigent families and children in these proceedings. They routinely represent those families who will be at risk of permanent commitment at initial disposition, should the lower tribunal's decision be upheld. They assist indigent parents in the negotiation of performance agreements and regularly witness the reunification of children with parents who have substantially complied with the agreement's terms.

Between 1982 and 1984, by invitation of the Chair of the House Committee on Health and Rehabilitative Services, FLS has assisted in drafting the various proposals for legislative reform that resulted in the passage of Ch. 84-311, Laws of Florida. This

major revision of Chapter 39, Florida Statutes, and Section 409.168, Florida Statutes, had as its effective date October 1, 1984. FLS has also, by invitation, presented testimony before the legislature in matters concerning the removal of children from their homes, foster care, dependency and performance agreements.

Staff attorneys from programs supported by FLS have served on various state and local bar sponsored committees, most significantly the Juvenile Rules Committee of the Florida Bar, which, in 1984, proposed to this Court a complete revision of the Florida Rules of Juvenile Procedure, which has been adopted. 10 FLW 1 (Fla. 1985). Program attorneys also serve on the Florida Bar's Special Committee on the Needs of Children and on numerous local boards and committees impacting on child welfare issues.

FLS, through its associated attorneys, has delivered statewide training to educators, medical professionals, guardians ad litem, social workers, HRS caseworkers, and CLE-sponsored training to attorneys and bar associations regarding juvenile law and procedure. FLS supported attorneys have contributed articles to publications of the Florida Bar, see FLORIDA JUVENILE LAW AND PRACTICE (1980), and recently to the Nova Law Journal's special feature: PROFESSIONALS SERVING CHILDREN SUGGEST NEW DIRECTIONS FOR LEGISLATORS AND ADMINISTRATORS, 3 Nova Law Journal (1984).

POSITION OF AMICUS

AMICUS, FLS, takes the position that a performance agreement is required in all cases in which a child has been committed temporarily to the custody of HRS, after adjudication, even for a day. This is the narrow issue presented by the facts.of the Burks case.

AMICUS further submits that Florida law does not allow any child to be permanently committed without the benefit of a performance agreement. This is the question of greatest concern to HRS and to the public, for it is an issue raised with increasing frequency both in the appellate courts and at the trial level, with differing results.

The position taken by the respondents, simply stated, is this: that a performance agreement is not mandated by §409.168 and is not required prior to permanent commitment <u>when the child, once adjudicated dependent, is not placed in foster care</u>. They argue that since the court here did not specifically place the child in "foster care" but in the "temporary custody of HRS", that the Department was relieved of any statutory obligation to enter into a performance agreement with the natural parent.

AMICUS will establish that the lower court's order placing the child in the "temporary custody of HRS" was, by operation of law, a placement in foster care regardless of the nomenclature adopted by the trial court in its May 12, 1982 order of dependency. Any other interpretation of that order serves merely to circumvent the clear requirements and laudatory purposes of the law.

AMICUS will also make evident that the legislature in its recent enactment of Ch. 84-311, Laws of Florida, has resolved the

question certified and has erased any doubt that every child who is not placed with natural parents is entitled to a performance agreement. AMICUS will present to this Court the vast legislative history, social research, and public policy surrounding the enactment of the laws at issue, so that the decision in this case will be made in that broad context.

ISSUE PRESENTED

The certified issue on appeal is:

Whether either a performance agreement or a permanent plan as prescribed by Section 409.168 is a prerequisite to permanent commitment proceedings pursuant to Section 39.41 (1)(f) 1.a.

ARGUMENT

I.

INTRODUCTION

That the use of a performance agreement is mandatory as a prerequisite to permanent commitment in every case in which a child has been placed in the temporary custody of HRS after an adjudication of dependency is the principle of law that AMICUS urges upon this Court. This principle is compelled by these factors: 1) the technical language of Chapter 39 and Section 409.168, the rules of statutory construction, and the interpretive case law; 2) the

constitutional, legal, social, historical, and congressional framework which predated the enactment of Florida's laws; and 3) and the practical necessity of assuring clear standards and certainty throughout the dependency process.

AMICUS has chosen to discuss each of these factors in the separate parts which follow. Part II will discuss the technical requirements of Florida law, its legislative history, and its judicial interpretations. Part III will develop the constitutional roots that prompted the Florida legislature to adopt those technical requirements. AMICUS will survey the social work and legal debate which motivated the state legislature to reform Florida's law. It will discuss the historical patchwork nature of old child welfare laws which seriously needed legislative modernization. It will present the federal reform effort, which encouraged states through financial incentives to change their dependency laws . Part IV will analyze the ways in which Florida's technical requirements assure clear standards and certainty in decision making and offer practical advantages to parent, child, caseworker and courts in achieving family preservation and reunification.

A simple reading of the language of Chapter 39 and Section 409.168 and the interpretive case law discussed in Part II is not adequate to address the issue raised by the facts of the Burk case, because the question of extreme public importance to the citizens of the State of Florida is much broader. It is the age old question of when and under what circumstances the State may interfere in the privacy of family life. The challenge is to set standards

clarifying when that interference is allowed to take place and when that interference must end.

The current Florida statutes are a reflection of an extensive, often uncertain, past. Collective wisdom, searching analyses, boundless labor, and sincere concern for the welfare of children resulted in Florida's very practical dependency statute. By accepting jurisdiction in this case, this Court is faced with the task of assimilating this background and with interpreting the state's laws consistently with it.

II.

FLORIDA STATUTE 409.168 REQUIRES A PERFORMANCE AGREEMENT WHENEVER A CHILD IS PLACED IN THE TEMPORARY CUSTODY OF H.R.S. AFTER ADJUDICATION OF DEPENDENCY

A. Analysis of statute, legislative history and judicial interpretations requires conclusion that performance agreement is mandatory.

Florida enacted its first foster care judicial review law in 1977, requiring regular judicial review hearings and mandating dispositional alternatives for all children in foster care. §409.168, Fla. Stat. (1977). Foster care review statutes had already been passed in several other states because of the belief that regular judicial review of children in foster care would address systemic weaknesses such as "foster care drift" and facilitate more rapid return of children to their own homes.

In 1980, a legislative study by the House Health and

Rehabilitative Services Committee of children in foster care found that, despite this noble intent, Florida still had 7,800 children who would remain in foster care over thirty months, an increase of two months over the 1979 figures. Comm. on Health and Rehab Serv., Fla. House of Rep., H.B.-1648, Foster Care: Identified Problems (1980). Attached as Appendix 1980. The same study found that adequate foster care case plans were essential to the judicial review process. The study commented: "[t]he need for foster care case plans within a tight time frame is necessary if foster care is, in fact, ever to become truly a 'temporary' placement for children. The utilization of a contract approach to foster care has proven to be very workable in some states." Id. at 22. In 1980 the legislature revised Sections 409.168 and 39.41(6)(b), Florida Statutes, to require written performance agreements as well as judicial reviews.

A performance agreement is a document that is prepared by the social service agency in conference with the natural parents. §409.168(3)(a)2, Fla. Stat. The agreement delineates what is expected of all parties and what must be accomplished before a child can be returned to the parent. If the parent fails to substantially comply with the provisions of the performance agreement, permanent commitment proceedings are to be initiated. §409.168(3)(g)1., Fla. Stat.

In the event the parent cannot or will not participate in the preparation of a performance agreement, HRS is required to submit a full explanation of the circumstances and to submit to the

court a permanent plan in substitution for the performance agreement. The only difference between a performance agreement and a permanent plan is that the latter is written without parental participation. All other requirements as to content are identical for either document. §409.168(3)(a)3, Fla. Stat.

If a performance agreement cannot be prepared, a permanent plan can provide for exploration of other alternatives to permanent commitment for the child. For example the permanent plan can provide for location of relatives who might be able to care for the child. The plan can also set forth ways in which the agency can assist such relatives in overcoming obstacles to assuming custody of the child. The plan can require the department to make efforts to locate the parents.

The legislature showed its foresight by requiring a plan and a period of time to explore alternatives even in the most clearcut cases of parental abandonment or in cases where the parents are dead. This legislative choice accomodates both the HRS department policy favoring placement with relatives over permanent commitment and the provision that living relatives of the child are entitled to notice of the permanent commitment proceedings when the parents are dead or unknown. §39.41(3)(a)4., Fla. Stat. In all cases governed by Section 409.168 the performance agreement or plan must be submitted to the Court within 30 days after placement, unless the placement is for less than 30 days. If the placement is for less than 30 days, a performance agreement is still required, but need not be submitted to the Court. §409.168(3)(a), Fla. Stat.

Respondents argue that a performance agreement was not required because C.B. was placed in the "temporary custody of HRS" rather than in "foster care". Nevertheless, the placement was ordered after adjudication of dependency and lasted for approximately eleven months before the permanent commitment order was entered. The position asserted by the respondents would result in a construction of various provisions of Chapters 39 and 409 which makes the statutes both internally inconsistent and incompatible with the legislature's intent and purpose in enacting them. A meaningful review of the applicable statutes, however, clearly leads to the conclusion that the circuit court's order of May 12, 1982 placing the child in the temporary care, custody and control of H.R.S. mandated the preparation of a performance agreement.

The argument that a performance agreement is required only for children in "foster care", but not those who are in the temporary custody of HRS, is mistaken for three reasons. First, it creates two classes of dependent children: one class, in the temporary "foster care" custody of HRS and entitled to reunification services and performance agreements; and the other class in the temporary custody of HRS, but not in "foster care", and not entitled to performance agreements. The First District Court of Appeal held that from a harmonious reading of Sections 39.001 et seq and Section 409.145, Florida Statutes:

> ..."it is clear that the legislature did not intend to differentiate between classifications of dependent children...to hold otherwise would prevent equal treatment between classifications of dependent children, without any logical reasons related

to the goals and objectives of F.S.39.001, 409.145 F.S."

In the Interest of K.H., 444 So.2d 547, 550 (Fla. 1st DCA 1984).

Secondly, a narrow reading of the requirements of Section 409.168, Florida Statutes as applicable only when the magic words "foster care" are used, ignores the rehabilitative goal consistently espoused by statute and case law for all dependent children. Underlying the entire statutory scheme governing dependent children is the legislative policy that every reasonable effort be made to reunify the child with his or her family. This policy is codified in Chapters 39 and 409, Florida Statutes and has been approved by appellate courts throughout the state. As succinctly stated in K.H.."...so long as a child occupies the status of a dependent child under Chapter 39 there should be a definite plan or effort to reunite the child with its parent(s)." 444 So. 2d at 549. See also In the Interest of A.B., 444 So. 2d. 981 (Fla. 1st DCA 1983), and the discussion of constitutional law, infra at pp 18-23.

Thirdly the position of the respondents assumes that C. B. was not placed in foster care by the circuit court on May 12, 1982. This is significant because there is absolutely nothing in the record to support the assumption that the child was not in foster care. In fact, foster care was the only type of care available to HRS by law once the court adjudicated the child dependent and placed her in the temporary custody of H.R.S. Both detention and shelter care, the only other alternatives permitted by statute, are narrowly defined by law to encompass only temporary, short-term care facilities to house children awaiting hearings which will decide the

issue of temporary custody. §§39.01(14) and (31), Fla. Stat. Once the court has entered an order placing the child in the temporary custody of H.R.S., the child is removed from the shelter home and placed in a foster home. Thus, the circuit court's order of May 12, 1982 placing C.B. in the temporary custody of H.R.S. resulted in a foster care placement by operation of law regardless of the trial court's failure to specify the type of foster care setting.

This conclusion is supported by the broad definition of foster care contained in the statute:

> ..."Foster care" means care provided a child in a foster family or boarding home, group home, child care institution, or any combination of the above. §409.168 (2)(d), Fla. Stat.

By interpreting the words "foster care" to mean the whole range of placement alternatives available when a child is committed to the temporary custody of HRS, the various provisions of Chapters 39 and 409 can be reconciled and the legislature's clearly articulated goal of family reunification effectuated as to all dependent children. Such an interpretation is consistent with the liberal interpretation required by Section 39.001(3), Florida Statutes. It furthers the public policies set forth in the purpose clauses of Chapters 39 and 409 and harmonizes the various provisions of these statutes.

This interpretation is supported by the applicable rules of statutory construction alluded to in the discussion above. Those rules require courts to construe statutory provisions so as to harmonize and reconcile them with other provisions of the same act, if

possible. Woodgate Develop. v. Hamilton Inv. Trust 351 So.2d 14 (Fla. 1977). District School Board of Lake County v. Talmadge, 381 So.2d 698 (Fla.1980). When the provisions of a statute are so inconsistent that they cannot be reconciled, they must be construed so as to give effect to the purpose of the statute and the legislative intent, the legislative history, and other factors inducing their enactment. Weiss v. Leonardy, 160 Fla. 570, 36 So.2d 184 (1948). Moreover, statutes which effectuate the public policy of the state, the general welfare, or some humane purpose should receive a liberal construction so that their beneficial results may be felt to the fullest extent compatible with their terms. District School Board of Lake County, supra, and Abood v. City of Jacksonville, 80 So.2d 443 (Fla. 1955).

Since a performance agreement mandated by Section 409.168, Florida Statutes, is the central strategy to accomplish the goals of family reunification, the only logical and consistent conclusion is that a performance agreement or plan is a prerequisite to permanent commitment proceedings. Case law provides elaboration as to the nature of Section 409.168 requirements. The First District Court of Appeal has previously found that these provisions are mandatory and not directive. In the Interest of V.M.C., 369 So. 2d 660 (Fla. 1st DCA 1979) and Quaintance v. Pingree, 394 So. 2d 161 (Fla. 1st DCA 1981). These cases, of course, are bolstered by the principle of statutory construction which holds that a statutory provision must be deemed mandatory if it is coupled with a penalty for failure to observe it. Dotty v. State, 197 So.2d 315 (Fla. 4th DCA 1967). Section 409.168(3)(g)2, provides the penalty of contempt for HRS's failure to

comply with its part in the performance agreement.

The parent's failure to substantially comply with the terms of a performance agreement is penalized by the severest sanction available in any civil proceeding. Non-compliance with a performance agreement is grounds for permanent commitment of the child. §39.41(1)(f)1.d., Fla. Stat. In re S.B.B., 379 So.2d 395 (Fla. 4th DCA 1980) upheld a permanent commitment order where the parents did not comply with conditions of a foster care contract. Parents who face this onerous consequence have every reason to insist that this drastic action strictly conforms to legislative guidelines. In re Smith, 299 So. 2d 127 (Fla. 3rd DCA 1974).

It is a cardinal rule of statutory construction that non-compliance with the strict terms of a mandatory provision renders illegal the proceeding to which it relates. 49 Fla. Jur., 2d Statutes §17; 73 Am Jur 2d, Statutes §16. Statutes imposing new liabilities, moreover, must be strictly construed. Nolan v. Moore, 81 Fla. 594, 88 So. 601 (1921). The absence of a performance agreement,therefore, renders illegal any permanent commitment proceeding.

The first case to analyze at length the legislative history and policy implications of the requirements of Section 409.168, Florida Statute was In re A.B., supra. This decision makes clear that the Florida legislature in enacting Chapter 39 and Section 409.168 created a specific set of statutory requirements designed for reconciliation of children with their natural parents whenever possible and permitting permanent commitment only after active

efforts at reunification have failed. The decision emphasizes that the legislative goal for Florida's foster children is permanence, and that "a meaningful performance agreement between the parent and HRS has become central to the strategy for securing each child a permanent home with his legally recognized parent." 444 So.2d at 991.

The footnote partially quoted in the Answer Brief of C.B., A Child, gives the misleading impression that the court in A.B. was construing the requirements of Chapters 39 and 409 to permit a freestanding inquiry into the "best interests of the child" and was creating exceptions to the requirement of a performance agreement. But, as the Court makes clear in the body of its opinion, the legislature chose to replace a "best interests" standard with the requirement of meaningful performance agreements and active reunification efforts. The underscored portion of the footnote which was not cited in C.B.'s Answer Brief goes on to say just that:

> In respect to children judged dependent but not placed in foster care, and so not subject to performance agreements, it may be possible, even conventional, to read the disjunctive "or" in present section 39.41(1)(f)1d as yielding the test stated by Judge Safer and by this court in C.M.H.: that the matter of abandonment, abuse or neglect is historical, and that a freestanding inquiry, what is manifestly in the "best interest of the child," determines the child's disposition, even by permanent commitment. Before 1980 the statutes were more obviously susceptible to that construction. (emphasis added).

444 So.2d at 994, fn. 2.

Recently, the First District Court of Appeal reviewed the same issue posed by the facts of this case and concluded that a performance

agreement is a prerequisite to permanent commitment proceedings. In the Interest of C.T.G. 9 FLW 2569, __So.2d__ (Fla. 1st DCA 1984). Although the trial court had ruled that performance agreements are mandatory pursuant to Section 409.168, the trial court found that the mother had waived her right to a performance agreement by failing to request one. In reversing the order of permanent commitment, the appellate court held that the only exceptions to the performance agreement requirements are those explicitly stated in the statute: the inability or unwillingness of the parent to participate in the preparation of an agreement. A performance agreement is required by Section 409.168 in order to safeguard the mother's rights as a natural parent. Id at 2570.

B. Chapter 84-311, Laws of Florida clarifies that a performance agreement is mandatory.

On October 1, 1984, Chapter 84-311, Laws of Florida became law. A pertinent section is completely dispositive of the certified question presented here. Pursuant to Section 39.41(1)(d) (1984), when any child is adjudicated by a court to be dependent,

> [a]fter the child is committed to the temporary custody of the department, all further proceedings under this section shall additionally be governed by s.409.168. [Emphasis added].

The addition of the foregoing paragraph now resolves any uncertainty that the legislature intended a performance agreement immediately upon any child being committed to the temporary custody of HRS after being adjudicated dependent. It is now crystal clear that HRS caseworkers or circuit court judges may not dispense with or unilaterally waive a parent's and child's right to a performance

agreement as mandated by Section 409.168, simply by using the words "temporary custody of HRS" instead of "foster care".

Thus the amendment to Section 39.41, Florida Statutes clearly resolves the certified question. It states that a performance agreement is mandatory every time a child is committed to the temporary custody of HRS after adjudication, even for a day. A performance agreement is a prerequisite to a valid cause of action for permanent commitment. See also Appendix 1984.

III.

MANDATORY NATURE OF PERFORMANCE AGREEMENT LAW IS SUPPORTED BY CONSTITUTIONAL, LEGAL SOCIAL, AND HISTORICAL BACKGROUND AND BY FEDERAL STATUTE

The technical legal requirements as explained in Part II, are the result of the legislature's study of constitutional law, legal and social commentary, and the historical background of this country's dependency laws. The fiscal incentives established by federal law provided an additional impetus to Florida's legislative choices. The merging forces which culminated in the legislation discussed in Part II will be addressed separately here.

A. Constitutional basis for family preservation standards.

1. Federal constitutional law.

The paramount importance of family preservation standards from a constitutional law viewpoint results from the recognition by the United States Supreme Court of the right to family integrity,

privacy, and autonomy. Finding its roots in the seminal case of Meyer v. Nebraska, 43 S. Ct. 615 (1923), where the Supreme Court held that the Fourteenth Amendment guaranteed an individual the liberty "to marry, establish a home and bring up children, "43 S. Ct. at 626, judicial recognition of the fundamental right to family integrity gained impetus in later court decisions. In Pierce v. Society of Sisters, 268 U.S. 510, 48 S. Ct. 571, 69 L. Ed. 1070 (1924), the court noted that parents have a right and a duty to direct the growth and development of their children free from unwarranted interference by the state. Later, in Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the court acknowledged that the right to family privacy and integrity were reciprocal rights of parents and children. The notion of family integrity was further developed by the court in Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. ED. 2d 531 (1977), when it stated the origins of the right to family integrity in these terms:

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our cherished values, moral and cultural"

97 S. Ct. at 1938.

Although the State may, in the interest of protecting children, interfere with family rights through the exercise of its police and parens patriae powers, courts will strictly scrutinize the manner and extent to which intervention occurs because the right

to family integrity is fundamental. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Even where circumstances justify State intervention to the extent of temporarily removing children from their parent's home, the parents and children still retain a fundamental right to family integrity. As the Supreme Court observed in Santosky v. Kramer, 455 U.S. 745, 102 S.Ct.1388, 71 L.Ed. 2d 599 (1982):

> "The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."

102 S. Ct. at 1394.

Not only did the Supreme Court in Santosky reiterate the origin of the right to family integrity, but the Court emphasized the significant duties placed on the State because of that right. The Court continued:

> "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."

102 S. Ct. at 1395.

In addition to the fundamental constitional rights at

stake, courts have been troubled by the weaknesses in state care of children. These systemic problems were recognized by the United States Supreme Court in 1977 in Smith v. Organization of Foster Families (OFFER), 431 U.S. 816 97 S.Ct. 2094, 53 L. Ed 2d 14, (1977). The Court found a disproportionate resort to foster care by the poor and victims of discrimination, due partly to the fact that middle and upper income families purchase private care for their children. The Court also noted the hostility of agencies to the efforts of natural parents to obtain the return of their children, due to cultural biases, lack of staff to provide social work services to enable family reunification, and agency policies which discourage reunification.

In OFFER the Supreme Court faced for the first time the issue of the right of natural parents to family integrity, contrasted with the interests of foster parents in continued custody of foster children and the state's interest in protecting the child. Even after the family has been separated, the liberty interest of natural parents in family privacy rests on a higher plane than the rights of any other individual because its contours are ordinarily to be sought, not in state law, but in intrinsic human rights. Any emotional ties that may develop between a foster parent and a child - or arguably between a legal custodian and a child - are of less constitutional significance than the ties between natural parents and children because the former are relationships created by the State and in which the State has been a partner from the outset. 97 S. Ct. at 2110.

The OFFER decision recognized that natural parents whose children have been removed from their homes have inchoate substantive due process rights to future custody. The distinction between family rights when the state is an intervenor as opposed to family rights when only private parties are involved was also reinforced .

2. Florida constitutional law.

The right to family integrity is protected under the due process clause of the Florida Constitution. Article I, Section 9, Florida Constitution. Moreover, this Court long ago acknowledged that the right to family integrity is older than the common law itself. State ex rel. Sparks v. Reeves, 97 So.2d 18 (Fla. 1957). In another context this Court observed that the natural rights of parents vis a vis their offspring must be respected and not be treated lightly, but rather must be accorded sanctity. Noeling v. State, 87 So.2d 593 (Fla. 1956). More recently this Court has noted that Florida has a strong public policy encouraging the establishment and protection of the family unit. It acknowledges the fundamental interest which parents have in the care, custody and management of their children. In re Guardianship of D.A.McW., 9 FLW 508, ___ So.2d ___(Fla. 1984). Lower appellate courts in Florida have likewise given a high regard to the family unit. In Foster v. Sharpe, 114 So.2d 373 (Fla. 3rd DCA 1957), the court stated that the right of parents to the custody, care and upbringing of their children is one of the most basic rights of our civilization. The First District has ruled that natural parents possess God-given

rights with respect to the custody and rearing of their children. Behn v. Timmons, 345 So.2d 388 (Fla. 1st DCA 1977)

Clearly, the lesson to be learned from these and other decisions is that there is an ancient and sacred tradition which protects the sanctity of the family unit, and that the court shall very carefully scrutinize any attempt by the state to intrude into that family unit. The legislation discussed in Part II was written and enacted against this background and must now be construed by this court in a similar context.

B. Legal and social work commentary.

The crisis in State care of children which the United States Supreme Court recognized in OFFER, supra had long since been of concern to legal and social work scholars. In order to place limits on state intervention in family life, they urged legislatures and courts to search for realistic standards that provide certainty to decision-makers, and at the same time produce more good than harm to children and families. Florida's present dependency laws, too, are a product of these concerns. Zawisza and Williams, "Florida's Dependent Child: The Continuing Search for Realistic Standards," 8 Nova L. J. 299 (1984).

A leading advocate of the need for realistic standards is Michael Wald, who in a pair of articles written in the 1970's set forth both his proposed standards and his rationale for their viability. Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev. 985, (1975) (hereinafter cited as Wald I); Wald, "State Intervention on

Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights," 28 Stan. L. Rev. 623,(1975) (hereinafter cited as Wald II). Wald articulated the need for the narrowing of child neglect laws, arguing that in a society which values individual and family autonomy and privacy, it is preferable to solve family problems through noncoercive intervention. The remedy of coercive intervention, Wald emphasized, will do more harm than good to children and families. Wald I, supra at 987-1005. In his second article, Wald developed a model rule-oriented dependency law, focusing on harm to children rather than on parental failures. He argued that specific value judgments about family intervention should be made at the legislative level, rather than in the courts. Wald urged such changes because of the same systemic weaknesses the Supreme Court noted in OFFER, supra. Wald II, supra at 649-52.

In elaborating on the weaknesses of the child welfare system, Wald pointed to substantial evidence that state intervention is harmful, not beneficial, to children and parents. Most children are strongly attached to their parents whether "fit" or "unfit." Wald II, supra at 644-45. He feared the massive reallocation of children to new parents under the 1970's standards. Wald II, supra at 651. As a more practical approach, Wald suggested an intervention system in which standards for final termination of parental rights are related to standards for initial removal of children from their homes and to standards for return of children to

their homes. Wald II, supra at 637-38.

Similarly, Robert Mnookin maintained that three principles should govern state intervention in family life and the removal of children from their homes: 1) removal should be a last resort, used only when the child cannot be protected within the home; 2) the decision to require foster care placement should be based on legal standards that can be applied in a consistent and even-handed way, and not be profoundly influenced by the values of the particular deciding judge; 3) the state should actively seek, when possible, to help the child's parents overcome the problems that led to removal so that the child can be returned home, or then placed for adoption . Mnookin, "Foster Care: In Whose Best Interests?," 43 Harv. Ed. Rev. 599, 602 (1973).

Mnookin was also concerned by the use of only the vague best interests standard when making decisions as to state intervention in family life. Society's knowledge of human behavior provides no reliable predictors of future abuse and neglect and thus courts lack substantial predictive information. Our pluralistic society lacks consensus about child-rearing strategies and values, and thus without clear legislative standards courts are left to rely on very personal values. The lack of consistent standards makes it too easy to ignore detriments to removing children such as the fact that children separated from natural parents suffer "separation trauma". Mnookin, supra at 615-23.

The need for narrower and more specific statutory standards has also been urged as a benefit to social workers.

Douglas Besharov has maintained that existing dependency laws are too broad to set the ground rules for appropriate decision making by social service agencies charged with the duties of investigation and treatment. Social workers are burdened with making sophisticated predictions of parental failure, when the predictive capacity of the social sciences makes it impossible to show with any degree of certainty whether a particular parent will abuse or neglect a child. Besharov, "Protecting Abused and Neglected Children: Can Law Help Social Work?," 9 Fam. L. Rep. 4029 (1983).

Ernest Kinnie and Mark Hardin reiterate the difficulty of predicting the likelihood of recurrent abuse or neglect. There may be considerable change in the parent's basic behavioral patterns, motivations, and attitudes due to the passage of time or to help given to the parent. Kinnie and Hardin, "Psychological Indications Whether a Neglected Child Should Be Removed or Returned to Parents," Foster Children in the Courts, 518, 526 (1984). Another aspect of permanency planning which has been frequently overlooked is the recognition of the important role of extended family placements in the lives of dependent children, a role which ends upon permanent commitment. Fein, et. al, "After Foster Care: Outcomes of Permanency Planning for Children," 63 Child Welfare 483, 552 (1983).

C. Historical origins of juvenile dependency system.

Initial efforts to change existing state dependency laws, whether prompted by a recognitition of constitutional law mandates

or by the convictions of social science research and analysis, were thwarted by the confusing, patchwork nature of previous dependency laws. This was true in Florida as well as in other states.

Dependency laws were in disarray because they attempted to serve two masters. The original statutory dependency framework in this country was established to provide work or training for poor children and to minimize welfare costs and fraud. It was a very direct descendant of the Elizabethan poor laws. Garrison, "Why Terminate Parental Rights?," 35 Stan. L. Rev. 423, 434 (1983). Much later, laws which controlled parental behavior were simply layered on top of the financial assistance laws which became the Aid to Families with Dependent Children (AFDC) program. Areen, "Intervention between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Georgetown L. J. 887, 917 (1975). The AFDC laws and the juvenile dependency laws, the direct descendants of the poor laws, have come to be known as "public family law." Their roots explain their nature: these laws have seldom deferred to the rights of natural parents.

Those laws which do recognize the rights of natural parents find their antecedents in the English common law of inheritance and property. Those laws were designed primarily to resolve private disputes. They have come to be known as "private family law." As a result of these separate roots, there has been an unfortunate dichotomy between private family law, in which courts have generally recognized superior parental rights to the custody and control of children, and public family law, in which courts have routinely

ordered parents to cede custody to the State without any showing of fault. Garrison, supra at 434. The First District Court of Appeal in In re A.B. analyzed the historical roots of Florida's child welfare laws and called the distinction between private family law and public family law an "appalling ambiguity in the lives of dependent children." 444 So. 2d. at 989.

Historical solutions to the problems of poor children, whether in England or in this country, mirrored these distinctions. Indenture of children as apprentices, poor houses and children's institutions were seen as the best alternatives, both to deal with children's poverty and to remove them from their contaminating environments. No effort was made at this time in history to encourage the maintenance of a rescued child's relationship with a natural family. Garrison, supra at 434-36.

"Centuries of tradition die hard," Garrison has concluded, supra at 436. The historical standoff between those early forces committed to rescuing children by permanently removing them from their families and those more modern forces urging a more mature effort to rehabilitate and reunite families resulted in failure of legislatures and courts to address the inadequacies of this country's foster care system until the late 1970's.

D. The Federal Response: The Adoption Assistance and Child Welfare Act of 1980.

Before 1980 federal government participation in public child welfare systems serving dependent children was largely limited to funding provided through the AFDC foster care program under Title

IV-A of the Social Security Act. 42 U.S.C. §§ 601-10 (1976). This program provided federal funds to reimburse some of the costs of foster care for eligible children, primarily those from poor families. This form of federal financial assistance encouraged court-ordered placement in foster care and continued separation of parents and children. No uniform federal standard existed to encourage states to provide services to <u>prevent</u> removal of children and to aid in reunifying families with their children placed in foster care.

In response, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 (PL 96-272) to provide fiscal incentives to states to emphasize the goals of prevention of removal and reunification. This law imposes numerous legal requirements on states to ensure that preventive efforts are made to avoid separation of dependent children from their families, that states are accountable for the status of children in foster care, and that stays in foster care are as short as possible. 42 U.S.C. §675 (1980).

The most critical provisions are: (1) the requirement of a case plan that "assures that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home, or the permanent placement of the child." 42 U.S.C. §675(1); (2) regular judicial reviews to determine the extent to which all parties have complied with the case plan and "the extent of progress which has been made toward

alleviating or mitigating the causes necessitating placement in foster care," 42 U.S.C. §675(5)B; and (3) the requirement of a judicial determination that "reasonable efforts" have been made to prevent or eliminate the need for removal of the child from the home, prior to placement in foster care. 42 U.S.C. §672(a)(1).

The requirement that reasonable efforts be made to prevent the need for placement in foster care is a requirement which must be met, not only by the state plan, but also in each individual case in which federal funds are used. By focusing on "alleviation or mitigation" of the problems causing the placement in foster care, the Act departs from the more subjective standard of "the best interests of the child". As Wald and Mnookin had long advocated, it ties reasons for separation closely to conditions that need to be remedied in order to safely reunite parent and child.

The first judicial decision interpreting the requirements of the Adoption Assistance Act came in the case of Lynch v. King, 550 F. Supp. 325 (Mass. 1982), in which a federal district court issued a preliminary injunction directed to the Massachusetts Department of Social Services. The Court required, as of October 1, 1983, that reunification services be provided, that case plans be designed, and that social workers' caseloads be limited in size to allow for work with natural families. The settlement agreement reached in Lynch emphasizes the requirement of reasonable efforts by the child welfare agency to reunite the family prior to seeking any permanent separation. 6 Youth Law News 13 (1984).

The legislative history surrounding Florida's enactment of

Chapter 84-311, Laws of Florida, is replete with references to PL 96-272 . That history states that the requirements of Section 409.168, are similar to those contained in PL 96-272. In 1983 the federal government conducted a review of Florida's compliance with PL 96-272 and cited the lack of preventive services to the family prior to foster care placement as an area needing improvement. Committee Report, Committee on Health and Rehabilitative Services, 1984, (attached as Appendix 1984). Chapter 84-311 addresses these concerns. Any decision by this Court that falls short of requiring a performance agreement for every child separated from its parents may place the State of Florida in jeopardy of losing millions of dollars of federal financial assistance.

IV.

MANDATORY NATURE OF PERFORMANCE AGREEMENTS IS SUPPORTED BY PRACTICAL BENEFITS IN IMPLEMENTATION OF STATUTE

A. Assurance of Clear Standards and Certainty in Decision-making.

Legal and social work commentators and the United States Supreme Court have in their separate approaches identified the need to connect the statutory criteria for removal of children from their homes and placement in substitute care with the criteria for their return home or for permanent placement if they cannot go home. Prior to 1980 this problem represented a glaring flaw in Florida law because the criteria for disposition of dependent children was unclear. The First District Court of Appeal in 1958 broadly interpreted Florida's juvenile dependency law in Pendarvis

v. State, 104 So. 2d 651 (Fla. 1st DCA 1958). The court stated that once a child has lawfully been declared a dependent child, he becomes a ward of the state and broad discretion is vested in the juvenile court to do whatever it believes is in the best interests of the child. 104 So. 2d at 652. The practical problems with this interpretation have been described by Mnookin, supra. The legal problems become evident by comparing the language of Pendarvis to the constitutional limits imposed by OFFER, supra, and by Santosky, supra.

In 1980, as noted previously the Florida legislature attempted to make the connection between standards for removal and standards for reunification of families by designing the performance agreement. Prior to the 1984 revision by the legislature, the lines had once again been drawn between decision-makers committed to the concepts of family reunification and permanence for children and decision-makers determined to retreat to the vague best interest standard that allows a court to find "better parents" for dependent children. Thus, the 1970's debate was staged anew. Zawisza and Williams, supra at 320..

The legislature chose to resolve that debate in Ch. 84-311 by defining even more specifically the concept of substantial compliance with the terms of a performance agreement as: the remediation of the circumstances which caused the placement in foster care to the extent that the well being and safety of the child will not be endangered upon the child being returned to the parent or guardian. §409.168 (2)(j),Fla.Stat.(1984). This is precisely the choice that the commentators mentioned in Part III had

been proposing for so long. The standards discussed in the A.B. decision were essentially ratified by the legislature in Chapter 84-311.

The A.B. decision and the 1984 legislative revisions make clear that the "best interests of the child" standard has been replaced with a specific set of statutory requirements designed for reconciliation of children with their natural parents whenever possible and their permanent placement in adoptive homes when that is not possible. This reform eliminates the guesswork in attempting to predict at initial disposition whether a parent is capable of eliminating or mitigating the problems that resulted in removal of the child from the home. The substantial compliance standard prevents a myriad of subjective decisions based on an individual's evaluation of how egregious the facts are. This choice reconciles the ambiguities between private family law and public family law. It offers parents the opportunity, once and for all, to prove whether they can or will gain the necessary understanding in parenting through the provision of services . As the First District concluded:

> "In section 39.41 (6) (b) there is ample warrant to test a parent's increased sensitivity through actual experience with her child restored and with active assistance and oversight such as was ordered, in another but not dissimilar context in Hill v. State , 358 So.2d 190 2009 (Fla.1st DCA 1978)."

444 So.2d at 996.

Not only does a mandatory performance agreement eliminate

the social science risks of predicting whether a parent can improve, it eliminates the constitutionally impermissible risks of erroneous factfinding. The United States Supreme Court in Santosky, supra, recognized that permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to subjective values of a deciding judge.

An error in the decision to terminate parental rights and an error in the decision not to terminate parental rights do not equally balance each other, the Court ruled. The relative severity of the unnecessary destruction of the natural family unit requires a much higher degree of certainty than "a near-equal allocation of risk between the parents and the State." 102 S. Ct. at 1401-02. In order to impress upon the factfinder the importance of the termination decision, the court in Santosky established the requirement of a clear and convincing evidence standard of proof. But it left open the possibility that state courts and state legislatures might choose additional ways to more fairly apportion the risk of error. The Florida legislature has creatively devised the performance agreement as another way to avoid the risks of error inherent in subjective decisionmaking.

B. Advantages of performance agreements to parent, child, caseworker, and court.

Although the mandatory nature of performance agreements can be ascertained from the law discussed above, there are distinct

practical advantages to their use. Parent, child, caseworker and court each benefit in ways that were non-existent in the past. A look at the advantages a performance agreement would have offered to all parties in a case such as this one will illustrate the wisdom of mandatory performance agreements as a prerequisite to permanent commitment.

From the parent's point of view, Mary Burk would never have to ask "What must I do to have the child returned to me?" and be told "the legal answer is that the mother can do everything required of her and the child may still not be returned to her", In re A. B. at 996. With a performance agreement, the court and HRS could never circumvent the affirmative duty to identify to the parent the problems or conditions that resulted in removal of the child, to assist the parent in making a personal commitment to remediate these conditions, and to provide support services to the parent to make the accomplishment of the commitment a realistic possibility. If the parent had not kept her end of the bargain, then and only then would termination of parental rights be permissible. The above could be accomplished in a time period as short as six months, the same time period the legislature has established for permanent commitment based on abandonment. §39.41 (1)(f),Fla.Stat. (1984).

The advantages offered to the child are articulated in Santosky, supra. Permanent removal from her home will not necessarily improve the child's welfare. Nor does termination of parental rights necessarily ensure adoption. The child may spend

years moving between state institutions and temporary foster placements even after natural parent ties have been severed. 102 S. Ct, at 1401, fn. 15.

During the eleven months that C.B. was in a foster care setting, a performance agreement would have offered her safety while her mother demonstrated the strength of her commitment to improve her parenting ability, with the active assistance and oversight of HRS. Her relatives could have been scrutinized as possible placement alternatives. But the lower court's decision irrevocably deprives C. B. of a natural mother, who, with help, might grow to become a capable parent.

A performance agreement would have removed the guesswork by the HRS caseworker. Given the present state of the art of prediction, the counselor could not have accurately determined at adjudication whether Ms. Burk could be treated or rehabilitated. But the caseworker could have told Ms. Burk that she would be given a chance, that she would be told the situation that needs to be corrected, and that she would be given help in correcting it. If she had not substantially complied within a specified time frame, her parental rights would have then been terminated. The caseworker would have been spared the fear of civil liability for damages for an erroneous prediction.

Finally, for the courts, the performance agreement replaces the former passive system of relying on a judge's guess as to the child's best interest, a test requiring more wisdom than Solomon's, with an active strategy for reunification or termination, pursued

vigorously and with initiative. In re A. B., supra at 991.

V.

CONCLUSION AND RELIEF REQUESTED

AMICUS urges this Court to establish the principle of law that a performance agreement is a mandatory prerequisite to the permanent commitment of a child as soon as the child has been placed in the temporary custody of HRS, after adjudication. The language of Chapter 39 and Section 409.168 as interpreted by caselaw and by rules of statutory construction necessitates this result, as does the legislative clarification of the law in Chapter 84-311. This principle of law assures clear standards and practical advantages to parent, child, caseworker and court and it minimizes the risk of erroneous factfinding.

Any departure from this principle of law in order to address particularly troublesome factual situations will create bad precedent leading to substantial erosion of the laudatory purposes of this legislation. Florida would then regress to the vague and unworkable standards of pre-reform days.

AMICUS requests this Court to reverse the lower court decision and to remand for reconsideration in light of the above principle of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief and Appendix has been furnished by U.S. Mail to Joan H. Bickerstaff, 1811 South Riverview Drive, Melbourne, Fl 32901; James A. Peters, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Fl 32301; Charles J. Roberts, Esquire, Attorney for Petitioner, 261 Merritt Square, Merritt Island, Fl 32952; Stephannie DaCosta, Esquire, 1980 N. Atlantic Avenue, Suite 602, Cocoa Beach, Fl 32931; and Douglas E. Whitney, Esquire, Department of H.R.S., 400 W. Robinson Street, Suite 911, Orlando, Fl 32801 this 15th day of January, 1985.