

THE SUPREME COURT OF FLORIDA

**FILED**  
SID J. VINTE  
OCT 15 1999

MARY K. BURK

Petitioner,

vs.

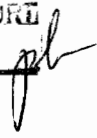
DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES,

Respondent.

CASE NO. 65,790 By \_\_\_\_\_

CLERK, SUPREME COURT

Chief Deputy Clerk



Certified Question from the Fifth District Court of Appeal

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT\*

Respondent, Department of Health and Rehabilitative Services, will be referred to as "Department" or "HRS". Petitioner, Mary Burk, will be referred to as "Burk" or "Mother." The record on appeal will be designated (R-\_\_) with reference to appropriate item or page number. The transcript of the hearing will be designated (T-\_\_) with reference to the appropriate page number(s). Reference to the child, will be made "C.B." References to the Appendix will be designated (Ap.).

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\* The parties are incorrectly designated in the argument of Mary Burk's brief.

TABLE OF CITATIONS

<u>Case</u>	<u>Page (s)</u>
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<u>In re Camm</u> , 294 So.2d 318 (Fla. 1974)	8
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§39.409(3), Florida Statutes	5
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Chapter 409, Florida Statutes	5, 6, 7, 9
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§409.165(1), Florida Statutes	7
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STATEMENT OF THE CASE

This is an appeal by the mother, Mary Burk, from an Order entered on April 12, 1983 (Ap.-1) severing parental rights and permanently committing the minor child, C.B., to the Department for adoption.

On July 26, 1984, the Fifth District Court of Appeal affirmed the Order. It certified as a question of great public importance:

WHETHER EITHER A PERFORMANCE AGREEMENT  
OR A PERFORMANCE PLAN AS PRESCRIBED BY  
SECTION 409.168 IS A PREREQUISITE TO  
PERMANENT COMMITMENT PROCEEDINGS  
PURSUANT TO SECTION 39.41(1)(f)1.a.

STATEMENT OF FACTS

C.B. was born to Mary Burk and a father unknown to Burk (T-131, 166) in December 15, 1976, in Wisconsin. During the first year of C.B.'s life Mary, her husband John, and C.B. moved in the States of Indiana and Massachusetts. Mary and John Burk separated for approximately two months. John Burk took C.B. back to Indiana. Mary Burk followed. They attempted reconciliation which failed. Mary Burk moved to the Lighthouse Mission at which time the Indiana Department of Public Welfare requested surrender of C.B. Burk surrendered custody of the child for almost two years. (T-141-152)

When C.B. was returned to her by the Department of Public Welfare Mary Burk was living in Indiana with a third man. They remained there until December, 1980, when they moved to Brevard County, Florida. (T-155)

On February 1, 1982, the HRS received a report of abuse of C.B. This was the first HRS contact with C.B. It was reported C.B. had multiple bruises on her buttocks and scratches and bruises on her "right front area." A counselor investigated and confirmed the injuries and the mother was counseled. (T-83-84) Later, April 8, 1982, it was reported the child had been put out of her home and slept in a car. This was investigated. (T-84-85) On April 27, 1982, HRS received another report of abuse of C.B. C.B. was found at a neighbor's home. The Department's

counselor and a police officer observed multiple bruises on C.B. (T-85) The counselor and the officer spoke to Burk but she would not discuss the bruises and left the premises in her car. (T-86-88) C.B. was taken to the police station where photographs were taken of the battered child. (State's Exhibits 11, 13, 14 and 17) C.B. was placed in emergency shelter. (T-89-90) She was subsequently treated and evaluated by child abuse specialists. (T-6-76) She has been in HRS custody since. (T-202)

On April 28, 1982, an Order for Detention of C.B. was entered by the Juvenile Division of the Circuit Court in Brevard County. (R-115) On May 5, 1982, a Petition alleging dependency was filed. (Ap.-2) On May 12, 1982, a Hearing was held on the dependency Petition. An Order Adjudicating Dependency was entered the same day. (Ap.-3) On October 11, 1982, a Petition for Permanent Commitment was filed by the Department. (Ap.-4) Counsel was appointed for Burk on November 30, 1982. The Disposition Hearing was held on January 6, 1983, and February 4, 1983. The Court entered its Order terminating parental rights on April 12, 1983. (Ap.-1) From that order this appeal was taken.

A Chapter 409 performance agreement was never offered to Burk as HRS and the Child Protection Team initially pursued permanent commitment. (T-203, 271)

ISSUE ON REVIEW

WHETHER EITHER A PERFORMANCE AGREEMENT  
OR A PERFORMANCE 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

A PERFORMANCE AGREEMENT OR PLAN AS  
PRESCRIBED BY SECTION 409.168 IS NOT A  
PREREQUISITE TO PERMANENT COMMITMENT  
PROCEEDING PURSUANT TO SECTION  
39.41(1)(f)1.a.

Burk's argument is premised on the applicability of Chapter 409, Florida Statutes which pertains to Foster Care. The agreement ignores the four mutually exclusive provisions of §39.41(1)(f)1 which may result in permanent commitment and the best interests of this abused child.

A. The May 12, 1982 Order of Adjudication gave the court "full authority under (Chapter 39) to provide for the child as adjudicated." §39.409(3).<sup>1</sup> The alternatives leading to permanent commitment are stated at §39.41(1)(f)1.a,b,c, and d. As demonstrated by the Legislature's multiple use of the disjunctive word "or," the alternatives are mutually exclusive. The agreement requirement need not be triggered if (a) there is finding of abandonment, abuse or neglect or (b) the parent failed to respond to the notice to seek commitment or (c) the parents

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<sup>1</sup> In contrast, the introductory text of Chapter 409 at §409.026(7) provides "nothing in the chapter shall be construed to limit, abrogate or abridge the power of any other state agency." The court's authority to order permanent commitment without a prior Chapter 409 performance agreement cannot be said to be limited, abrogated or abridged by that chapter.

have voluntarily surrendered the child. Only the last, d, requires a performance agreement.

Section 39.41(6)(b) further contemplates that all children involved in Chapter 39 proceedings are not subject to the performance agreement:

With respect to a child who is the subject of performance agreement under §409.168, the court shall return the child ... upon expiration of the agreement. . . ."

Clearly, Chapter 409 was not applicable to the proceedings for this battered child. If the Legislature intended that all cases required a performance agreement, §39.41(6)(b) would be unnecessary.

B. Contrary to Burk's argument, the limitation of definitions in Chapter 39 and Chapter 409 support the conclusion that "emergency shelter" is not synonymous with Chapter 409 "foster care" in these statutory schemes.

"Shelter" is defined at §39.01(31):

(31) "Shelter" means a place for the care of a child who is alleged to be or who is found to be dependent, pending court disposition before or after adjudication or after execution of an order. "Shelter" may include a facility which provides 24-hour continual supervision for the temporary care of a child who is placed pursuant to 39.402(4).

The definition does not expressly include "foster care." Consistently, §409.165(1) identifies both "emergency shelters" and "foster homes" as distinct entities. Likewise, the definition of "foster care" at §409.168(2)(d) does not include "shelter" in its definition. Expressio unius est exclusio alterius. It is apparent the Legislature intended for these words to have different connotations.

The Court of Appeal properly rejected Burke's argument that placing a child in "emergency shelter" is synonymous with placing a child in "foster care" so as to trigger Chapter 409. The court acknowledged that

Section 409.608 contemplates [performance] agreements only upon a circuit court order committing a child to HRS custody at a disposition hearing as provided by Section 39.41; that is, when a circuit court, presented with various statutory methods of disposition<sup>2</sup> chooses to temporarily commit the dependent child to HRS rather than to return the child to his own home or to permanently commit the child to HRS.

In a clear case of chronic child abuse, as here, the inevitable consequence must be commitment for subsequent adoption. A child should not be used as bait in a performance agreement and placed in jeopardy by possible return to an abusive parent. If a performance agreement was required as a

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<sup>2</sup> The methods are those stated at §39.41(1)(f)1.a. through f.

prerequisite, C.B. would be at risk for the duration of the agreement. The inherent delays would result in other emotional trauma to the child.

That risk and trauma is contrary to the long-recognized principle that the welfare and best interests of the child are the dominant and controlling considerations overriding even the natural right of the parent in custody and dependency proceedings. In re R.J.C., 300 So.2d 54 (Fla. 1st DCA 1974). That standard guides all dependency proceedings. See, e.g., Division of Family Services v. State of Florida, 319 So.2d 72, 76 (Fla. 1st DCA 1975); In re Camm, 294 So.2d 318 (Fla. 1974); Prince v. Carrington, 62 So.2d 77 (Fla. 1953); In re J.L.P., 416 So.2d 1250, 1252 (Fla. 4th DCA 1982); Potvin v. Keller, 313 So.2d 703 (Fla. 1975). Conspicuously §39.001(2)(b) declares the purpose fo the chapter is to

"to assure to all children brought to the attention of the courts . . . . the care, guidance and control . . . . which will best serve the moral emotional, mental and physical welfare of the child. . . ."

It cannot be argued that statutory law has diluted the long standing "best interest of the child" standard.

At the time of the May 12 hearing, the welfare and best interests of C.B. required that she not again be placed at risk in her abusive mother's custody. Rather, C.B.'s safety required emergency shelter on May 12, her permanent commitment, and her

placement for adoption. That course is consistent with the statutory scheme which guided these dependency proceedings. More important, it is consistent with sound public policy to curtail child abuse and to best serve the welfare of the child.

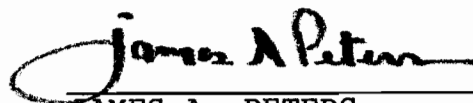
It is too late in the day for the abusive mother to demand a performance agreement under her contrived constructions of Chapters 39 and 409.

CONCLUSION

The trial court, based on the independent authority of Chapter 39 and the chronic abuse of C.B., properly directed the proceedings to C.B.'s permanent commitment for subsequent adoption on May 12, 1982. The best interests of the child and the language of these chapters require that disposition. The certified question must be answered in the negative.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Douglas E. Whitney, Esquire, Department of HRS, 400 W. Robinson Street, Suite 911, Orlando, Florida 32801; Joan Bickerstaff, 1811 South Riverview Drive, Melbourne, Florida 32901; Stepahnnie Dacosta, 1980 N. Atlantic Avenue, Suite 602, Cocoa Beach, Florida 32931; and Charles J. Roberts, Holcomb, Ennis, Theriac, Amari and Roberts, 261 Merritt Square, Merritt Island, Florida 32952, this 15 day of October, 1984.

  
James A. Peters