O/a 5-9-85

IN THE SUPREME COURT OF FLORIDA

MARY K. BURK,

Petitioner,

vs. CASE NO. 65,790

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.

_____/

RESPONDENT'S ANSWER TO BRIEF OF AMICUS CURIAE FLORIDA LEGAL SERVICES, INC.

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

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INTRODUCTION

Pursuant to Order dated January 25, 1985, Respondent Department of Health and Rehabilitative Services submits its Answer Brief to the Brief filed out of time by Amicus Curiae Florida Legal Services. The contents of this brief are restricted to legal argument concerning Florida Legal Services' assertion that statutory amendments effective October 1, 1984, should be retroactively applied to the 1982 facts of this case so as to require a performance agreement.

The Department does not herein respond to Amicus' Argument III and IV. That argument is beyond the issue decided by the Trial Court and the Fifth District Court of Appeal and is beyond the issue certified by the Fifth District Court of Appeal, i.e., whether either a performance agreement or a performance plan as prescribed by §409.168 is a prerequisite to permanent commitment proceedings pursuant to §39.41(1)(f)1.a.

Legal Services' Arguments III and IV, based on porported constitutional, legal, and social considerations are more properly directed to the legislative branch which enacted the statutory scheme of Chs. 39 and 409 of the Florida Statutes.

ARGUMENT

CERTIFIED QUESTION

> A PERFORMANCE AGREEMENT OR A PERFORMANCE PLAN AS PRESCRIBED BY §409.168 IS NOT A PREREQUISITE TO ALL PERMANENT COMMITMENT PROCEEDINGS PURSUANT TO §39.41(1)(f)1.a.

Statutory amendments effective October 1, 1984 may not be retroactively applied to child abuse and related legal proceedings years prior so as to require a performance agreement.

Florida Legal Services asserts that the amendment to §39.41, F.S., by Ch. 84-311, Laws of Florida, "is completely dispositive" of the question presented here. Amicus' assertion ignores the established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively and not retrospectively. Walker and LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977). The rule is succinctly stated in Thayer v. State, 335 So.2d 815, 817 (Fla. 1976).

> A statute operates prospectively unless the intent that it operate retrospectively is clearly expressed. Indeed, an act should never be construed retrospectively unless this was clearly the intention of the Legislature. This is especially so where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction. The presumption is that it was intended to operate prospectively, unless its language requires that it be given a retroactive

> operation. The basis for retrospective interpretation must be unequivocal and leave no doubt as to the legislative intent.

In Fleeman v. Case, 342 So.2d 815, 817 (Fla. 1976), this Court declined to speculate as to legislative intent on retroactive operation of a statute. It declared that it would restrict debate on intent for retroactivity to the floor of the legislative chambers. It did this to avoid judicial intrusion into the legislative domain.

> By this means the forward or backward reach of proposed laws is irrevocably assigned in the forum best suited to determine that issue, and the judiciary is limited only to determining in appropriate cases whether the expressed retroactive application of the law collides with any overriding constitutional provision.

This Court may take judicial notice that Ch. 84-311, Laws of Florida, contains no express statement that the Legislature intended a retroactive application. Nowhere do the passages of the chapter even suggest that a clarification of the then existent law at §39.41, F.S. was intended. Indeed, §22 of Ch. 84-311 provides that the act shall take effect on October 1, 1984.

That date is three (3) years after C.B. was abused by Petitioner and is thirty (30) months after C.B.'s dependency petition was heard and adjudicated. Necessarily Legal Services'

contention for retroactivity is contrary to the rule against implied retroactive applications. Legal Services would create a new liability or obligation on state officials and courts charged with curtailing child abuse. Their argument for retroactivity would also interfere with and disrupt C.B.'s right to a nonabusive safe home in which she need no longer suffer from the beatings described at pages 2 through 5 of her November 19, 1984 Answer Brief.

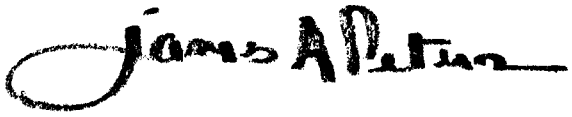
Even in its post October 1, 1984 form, §39.41 continues to recognize that what is "manifestly in the best interests of the child" is the paramount purpose of the commitment proceedings. Only a cold academic and unrealistic construction of this statute could permit an interpretation that the best interests of this battered child could require that her abusive parent be offered a performance agreement so as to entitle her again to injure C.B. In cases as this, where severe and chronic child abuse is evidenced, or in cases where the abusive parent is incarcerated or awaiting prosecution for criminal abuse it cannot be reasonably concluded that a remedial performance agreement is statutorily or constitutionally required.

CONCLUSION

The certified question should be answered in the negative. Controlling statutory law in effect until four (4) months ago did not require a performance agreement for C.B.'s abusive mother. Nor may subsequent amendments be retroactively applied, absent express legislative intent, to impose such a requirement to the detriment of this child.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing has been furnished by United States Mail to Joan Bickerstaff, 1811 South Riverview Drive, Melbourne, Florida 32901, Charles Roberts, 261 Merritt Square, Merritt Island, Florida 32952 and Jeffrey Barker, Florida Legal Services, 226 West Pensacola Street, Tallahassee, Florida 32301, this 13 day of February, 1985.

James A. Peters