

THE SUPREME COURT OF FLORIDA

MARY K. BURK,

CASE NO. 65,790

Petitioner,

FIFTH DCA Case No. 83-668

vs.

DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Respondent.

FILED

SID J. WHITE

NOV 21 1984

ANSWER BRIEF OF C.B., A CHILD

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

Joan H. Bickerstaff
Law Offices of Joan H. Bickerstaff
1811 South Riverview Drive
Melbourne, FL 32901
(305) 723-1009

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
PRELIMINARY STATEMENT	ii
CITATIONS OF AUTHORITY	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
CERTIFIED ISSUE ON APPEAL	8
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	9
CONCLUSION	15
CERTIFICATE OF SERVICE	16

PRELIMINARY STATEMENT

In this brief, Petitioner, MARY KAY BURK, shall be referred to as "Petitioner" or "Burk," and the Respondent, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, shall be referred to as the "Department" or as "H.R.S." The child, upon whose behalf the instant brief is filed, shall be referred to as "C.B." References to the record shall be designated by the letter R. References to the transcript of testimony taken at the final hearing before the Circuit Court shall be designated by the letter T. References to the child's appendix, filed simultaneously with this brief, shall be designated by the letter A.

CITATIONS OF AUTHORITY

<u>CASES:</u>	<u>PAGE:</u>
<u>In the Interest of A.B.</u> , 444 So.2d 981 (Fla. 1st DCA 1983)	9, 12, 13
<u>In the Interest of C.M.H.</u> , 413 So.2d 418 (Fla. 1st DCA 10982)	12
<u>In the Interest of R.W.H.</u> , 447 So.2d 341 (Fla. 4th DCA 1984)	14

<u>STATUTES:</u>	<u>PAGE:</u>
Section 39.01(31), <u>Florida Statutes</u>	10
Section 39.41(1), <u>Florida Statutes</u>	13
Section 39.41(1)(f)1., <u>Florida Statutes</u>	11
Section 39.41(1)(f)1a., <u>Florida Statutes</u>	8, 9, 11, 14
Section 39.41(6)(b), <u>Florida Statutes</u>	11
Section 409.168, <u>Florida Statutes</u>	8, 9, 11, 13
Section 409.168(2)(d), <u>Florida Statutes</u>	10, 11

STATEMENT OF THE CASE

The child, C.B., accepts the Statements of the Case contained in the Petitioner's Brief at pages iii - v and in the Answer Brief of Respondent, H.R.S., at page 1.

STATEMENT OF FACTS

The child, C.B., accepts the facts set forth in the Answer Brief of Respondent, but believes that additional testimony and evidence presented at the final hearing is pertinent to this Court's consideration of the certified question of the Fifth District Court of Appeal. The child, C.B., takes issue with the self-serving "facts" which appear at pages vii - viii of the Petitioner's Brief, which are based upon the testimony of Petitioner, regarding the manner in which C.B. came to the attention of H.R.S. in April 1982, and the extent of her injuries. Accordingly, the child offers the following Statement of Facts.

The attention of the Respondent, Department of Health and Rehabilitative Services, was last drawn to the mother of the minor child, Petitioner, MARY KAY BURK, on April 27, 1982, when a complaint was received by the Palm Bay Police Department regarding the child's condition (T 101-102). Examination of the child's body revealed "red marks" and "bruises" on her back and buttocks (T 85, 102). The then five and one-half (5 1/2) year old child (T 134) was found walking alone down the road and claimed that her mother had thrown her out of the house and told her never to come back (T 85).

C.B. was taken into shelter care as an abused, dependent child on the same date, and photographs of her were taken by the police (T 89; Exhibits XI, XIII, XIV and XVII), and under the direction of the Child Protection Team pediatrician (T 16-17; Exhibits I, II, III, IV, V, VI, VII and IX). A medical examination of the child, performed the next day, revealed "a variety of different bruises over her body." (T 9). The entire buttocks was covered by black and blue, confluent bruises so numerous as to preclude distinction of individual marks (T 10). Additionally, there was a one (1) centimeter bruise on the anterior chest, seven (7) distinct three-quarter (3/4) inch bruises on the back in the thoracic area, five (5) bruises in the lumbar area above the buttocks, a cross-shaped bruise on the right buttock, a bruise on the left hip, four (4) one (1) to one and one-quarter (1 1/4) inch bruises on the left anterior leg, two (2) bruises on the right upper thigh and right knee cap, three (3) linear bruises on the upper right thigh and an abrasion on the right leg (T 10-11). The child also had a thinning of her hair, and reported that her mother had pulled her hair out (T 16).

Dr. Thomas Philpot testified that the bruises looked as if they were made at different times, with some looking fresh and some looking old (T 20). The child told him that the bruises had been inflicted at various times by her mother, Petitioner, MARY KAY BURK, and her mother's

boyfriend (T 21-22), with some of them being caused by her mother within the prior twenty-four (24) hours (T 21-22). In the doctor's opinion, most of the bruises would have been visible for several days prior to the date of his examination and some were as old as ten (10) days to two (2) weeks (T 23, 29).

Dr. Philpot, who had been the head of Children's Medical Services for the Brevard County Child Protection Team for three (3) years, testified that he had examined in excess of fifty (50) abused children during that time, and was accepted by the trial court as an expert on child abuse. Dr. Philpot stated his opinion that the bruising of C.B. had been caused by "a strong force, a deliberate force and a repeated strong force," sufficient to cause serious bodily harm or death, such as rupture of the kidney, spleen or bowel (T 24). He testified that it was the location of the bruising, rather than the degree of force with which it was inflicted, which prevented such injury to C.B. (T 24), that some of her bruises had been caused by a linear object "such as a belt or strap or stick" or possibly a board (T 29-30), and that some could have been caused by a hand striking the child with a great deal of force (T 30). Dr. Philpot rejected the suggestion that the injuries could have been caused by an accidental event, such as a fall, or because the child bruised unusually easily (T 31, 37).

C.B. was also examined and treated by Howard

Bernstein, a clinical psychologist accepted by the trial court as an expert child psychologist, who testified that his psychological evaluation of C.B. on August 5, 1982, included the following findings (T 51-52). C.B. appeared fearful and emotionally insecure, exhibited ambivalent feelings with respect to her mother, MARY KAY BURK, and appeared to be experiencing anger, resentment and some separation fear and anxiety (T 54-55). Dr. Bernstein's recommendation at that time was to continue H.R.S. placement with the goal of permanent commitment, severance of parental rights and subsequent adoption (T 58). He continued therapy with C.B. through the date of trial, at which time the child was still suffering from psychological and emotional problems, although she had made "remarkable progress." (T 57-61). In Dr. Bernstein's opinion, the child's best interests would not be served by establishing contact with her natural mother, the Petitioner (T 67).

Earlier intervention by the Department of Health and Rehabilitative Services with respect to C.B. and MARY KAY BURK occurred on February 1, 1982, at which time it was reported that the child had bruises on her buttocks and scratches and bruises on her right front area (T 83). These injuries were observed by an H.R.S. counselor, to whom MARY KAY BURK admitted that she was responsible for causing the bruises on C.B.'s buttocks by hitting the child with a hairbrush as a punishment (T 83-84).

Again on April 8, 1982, H.R.S. received a report that the child had been put out of her home on April 6th and had spent the night sleeping in a car, and was also put out of the home on April 7 (T 84).

Efforts made on behalf of H.R.S. to discuss the child's injuries of April 27, 1984, with Petitioner were unsuccessful. Petitioner refused to permit entry to her residence by an H.R.S. counselor, refused to discuss the child's bruises except to say that C.B. was a behavior problem, and told the caseworker that "she had to run some errands." (T 86-88). Upon being advised that the child could not be placed in her custody if she refused to discuss the matter, Petitioner drove away in her car (T 88). Subsequently, however, in the presence of two H.R.S. caseworkers, MARY KAY BURK admitted that she was responsible for the child's bruises and stated, "I hit her with a belt." (T 91-93, 211).

Nor was the interest of Respondent, H.R.S., the only official scrutiny made of Petitioner's misconduct with respect to C.B. Petitioner herself testified that an action for permanent commitment of C.B. was filed in the State of Indiana prior to her move to Florida (T 150). The evidence presented at trial established that C.B. was in foster care in Indiana in March 1977 and from September 22, 1977, until April 1980, and that supervision was maintained until January 1981 (T 207-209).

At the time that C.B. was removed from her mother's custody, MARY KAY BURK was living with one of a series of men to whom she was not married, with C.B.'s illegitimate younger brother, whose natural father, like that of C.B., was unknown to MARY KAY BURK (T 127, 129, 131-132).

According to the Petitioner, C.B. disappeared on April 27, 1982, and she had no marks or bruises on her body at any time during the period of April 17 through April 27, 1982, with the exception of a mark on the side of her face caused by another child (T 137-139). MARY KAY BURK denied any memory of having struck the child during that time period (T 139), and denied having made any admission to the H.R.S. caseworkers in May that she was responsible for the child's bruises (T 158-159).

The child, C.B., relies upon the Statement of Facts contained in the Answer Brief of H.R.S. for all other matters pertinent to this review proceeding.

CERTIFIED ISSUE ON APPEAL

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

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.

Respondent, Department of Health and
Rehabilitative Services, has correctly identified the fatal
flaw in Petitioner's argument that Section 409.168,
Florida Statutes (1983), mandates a performance agreement
in every permanent commitment proceeding.

This very issue was recently addressed by the
Court in In the Interest of A.B., 444 So.2d 981 (Fla. 1st
DCA 1983). While focusing upon the necessity of a
performance agreement in the circumstance of alleged
abandonment and subsequent placement of the minor child in
foster care, the court in A.B. recognized that the same
requirement was not the case with respect to a dependent
child not placed in foster care:

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 'ors' 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.

Id., 994, fn.2.

In the case at bar, the original Detention

Petition filed by Respondent requested that the child be permitted to remain in emergency shelter care, not foster care (A 1). The trial court's Order for Detention of Child granted Respondent authority to place the child in a "shelter home" and found probable cause that the child was dependent (A 2). The dependency petition alleged the child to be dependent and recited the earlier contacts which Respondent and the State of Indiana authorities had had with Petitioner respecting the minor child, C.B. (A 3). In its Order of the Court dated May 12, 1982, the trial court adjudicated C.B. dependent and placed her temporary care, custody and control in the Respondent "for placement" (A 5). A Petition for Permanent Commitment Subsequent to Adjudication was filed by Respondent on September 28, 1982, (A 6-8) and an Order of Commitment was entered on April 12, 1983 (A 9-11).

The terms "shelter" and "foster care" are distinctly, and separately, defined under Florida law. Section 39.01(31), Florida Statutes, contains the definition of the former, and Section 409.168(2)(d), Florida Statutes, the latter:

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

'Foster care' means care provided a

child in a foster family or boarding home, group home, agency boarding home, child care institution, or any combination thereof.

Permanent commitment proceedings are authorized in Florida under Section 39.41(1)(f)1., Florida Statutes, under four (4) circumstances, each of which is independently sufficient to justify permanent commitment. This mutual exclusivity, indicated by the Legislature's multiple use of the disjunctive "or," authorized the trial court in this case permanently to commit C.B. absent proof of any performance agreement. Section 39.41(1)(f)1.a., Florida Statutes, authorizes such action:

if the court finds that it is manifestly in the best interests of the child to do so, and ...[i]f the court finds that the parent has abandoned, abused, or neglected the child ...

The three (3) other circumstances justifying permanent commitment are contained in subsections b., c. and d. of the statute, with only the latter making reference to a performance agreement. Section 39.41(6)(b), Florida Statutes, also embodies the principle that not all permanent commitment proceedings involve performance agreements.*

*This statutory provision states that a court shall return a child to the custody of the natural parents upon expiration of a performance agreement upon substantial compliance by the parents, and applies "[w]ith respect to a child who is the subject of a performance agreement under s. 409.168."

The trial testimony in this case established that the decision to pursue a permanent commitment of C.B. was made almost immediately, in May 1982, less than one month after the child was placed in emergency shelter care (T 203). The delay between May 12, 1982, the date of the adjudicatory hearing on Respondent's Dependency Petition, and the filing of the Petition for Permanent Commitment on September 28, 1982, was occasioned by the existence of pending criminal charges against Petitioner for child abuse (T 205).**

Florida case law rejects the proffered notion of Petitioner that C.B. was required once again to be placed at risk at her mother's hands (as is required upon successful completion of a performance agreement), prior to permanent commitment. In the Interest of A.B., supra, answers the rhetorical question posed In the Interest of C.M.H., 413 So.2d 418, 424 (Fla. 1st DCA 1982): "how would it be possible for a parent to be guilty of either [abuse or neglect] if the child were removed from the home?" As stated in A.B., at page 993:

**The criminal case against MARY KAY BURK was dismissed prior to submission to a jury (T 206).

That is simply a matter of prediction, confirmed if necessary 'after the return' of the child, § 39.41(6)(b). Either neglect or abuse may be proved prospectively, as was held by In the Interest of J.L.P., 416 So.2d 1250(Fla. 4th DCA 1982)[emphasis supplied].

Id., 993-994.

Section 39.41(1), Florida Statutes, confers upon a trial judge broad powers of disposition with respect to a child adjudicated to be dependent. Permanent commitment, though drastic, is a statutorily recognized option which does not depend upon the offering of a performance agreement or adoption of a performance plan contemplated by Section 409.168, Florida Statutes. The Fifth District Court of Appeal correctly found that the position urged by Petitioner would produce "absurd results:"

For example, notwithstanding a clear case of child abuse or abandonment, the consequence of which would be inevitable permanent commitment, H.R.S. would have no choice but to enter into a performance agreement. Accordingly, we hold that a performance agreement is not a prerequisite to permanent commitment [fn. omitted].

(R 3)

The trial court's Order of Commitment found that "the child, while in the care of the natural mother in Brevard County, Florida, was severely abused," and that "the natural mother is guilty of abuse." (A 10). That court also found that "MARY KAY BURK has neglected and failed to protect" the child. (A 10). The district court

found that "the order is supported by clear and convincing evidence" (R 2). These findings fully support permanent commitment under Section 39.41(1)(f)1a., Florida Statutes.

In any case, even successful compliance with a performance agreement may not be the sine qua non of a permanent commitment proceeding. Although deciding the issue on facts in which there had been a failure to perform, the court in In the Interest of R.W.H., 447 So.2d 341, 343 (Fla. 4th DCA 1984), stated the following with regard to performance agreements:

Let us hypothesize, however, that notwithstanding complete performance by the parent, objective investigation still revealed substantial reasons not to return the child to the parent. We need not be prisoners of our self-constructed intellectual walls, nor can we be, when a child is involved, just because 'a deal's a deal.' The child never signs the performance agreement and the court never sees it until review is sought. An agreement so executed by adults can not fetter the court, whose primary concern must be the child.

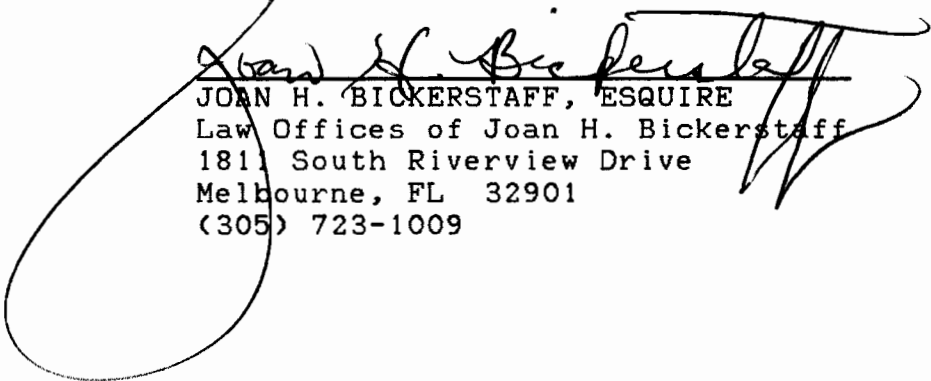
In addition to the matters set forth above, the child, C.B., hereby expressly adopts and incorporates herein the matters contained in the Answer to Brief of Respondent previously filed with this Court.

CONCLUSION

Based upon the foregoing argument and citations of authority, as well as those set forth in the Answer Brief of Respondent, the child, C.B., respectfully requests this Court to answer the certified question of the Fifth District Court of Appeal in the negative, and to affirm that court's opinion dated July 26, 1984.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. mail to James A. Peters, Assistant Attorney General, Attorney for Respondent, 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 19th day of November, 1984.


JOAN H. BICKERSTAFF, ESQUIRE
Law Offices of Joan H. Bickerstaff
1811 South Riverview Drive
Melbourne, FL 32901
(305) 723-1009