

IN THE SUPREME COURT OF FLORIDA

MARY K. BURK,  
Petitioner

CASE NO. 65,790  
DCA Case No. 83-668

vs

DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES,  
Respondent

PETITIONER'S BRIEF

Charles J. Roberts  
Holcomb, Ennis, Theriac, Amari  
and Roberts

LAW OFFICES OF  
HOLCOMB, ENNIS, THERIAC, BRINSON, AMARI & ROBERTS

*Burk vs. H.R.S.*  
CHARLES J. ROBERTS  
ATTORNEY AND COUNSELOR AT LAW

MARINER SQUARE  
SUITE 302  
96 WILLARD STREET  
COCOA, FLORIDA 32922  
(305) 639-1320

700 N. WICKHAM ROAD  
SUITE 206  
MELBOURNE, FLORIDA 32435  
(305) 242-2292

**FILED**

SID J. WHITE

SEP 21 1984

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

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STATEMENT OF THE CASE

This is an appeal from a Final Order entered by the Honorable Frances Ann Jamieson following a hearing upon the Petition of Elaine Woods, representative of the Department of Health and Rehabilitative Services. The order was entered on April 12, 1983 (APP-1).

A Petition for Dependency was filed by HRS, alleging in pertinent part that the minor child had been abandoned, abused or neglected by the Respondent and requesting that the child be adjudicated a dependent and placed in the temporary control of HRS (APP-2).

What purports to be a Supplementary Petition was filed by the child's mother, Respondent herein, acting in proper person on September 18, 1982 (APP-3). The Petition alleges in pertinent part that the minor child is being deprived of being with her natural mother who loves her, and further deprived of placement in her home. The Petition further alleges that the child's mother feels strongly that the child should be in her own home with her own family to better provide her a secure environment, and further alleges a willingness to cooperate with the State of Florida and HRS in any way for the return of the child.

The court, Judge Frances Ann Jamieson presiding, heard the Petition for Dependency on May 12, 1982 and on that date, entered an Order adjudicating the child dependent and

awarding her control temporarily to HRS for placement (APP-4).

A Petition for Permanent Commitment Subsequent to Adjudication, Elaine Woods, Petitioner, was filed on or about September 28, 1982 (App-5). The Petition alleges in pertinent part that the child has been abused by her mother, Mary K. Burk.

The record does not reflect that a Performance Agreement as contemplated by Section 409.168(2)(g), Florida Statutes (1981) was ever offered to Respondent.

The court, The Honorable Frances Ann Jamieson, presiding, entered an Order of Commitment to the Department of Health and Rehabilitative Services on April 12, 1982. The Order finds, among other things, that all necessary pleadings and documents required by law have been filed, that the mother is guilty of severe abuse to the child, that the mother has neglected and failed to protect the child, and that it is manifestly in the best interest of the child that the rights of the natural mother be permanently severed. The court ordered that the mother be permanently deprived of all rights to the said child which rights, are by the Order, declared permanently forfeited.

An appeal to the Fifth District Court of Appeals followed. That court filed an Opinion on July 26, 1984 certifying the question of great public importance whether a performance agreement or in the alternative, a performance

plan as defined by Section 409.168 Florida Statutes. The District Court of Appeal affirmed the decision of the trial court for the eighteenth judicial circuit in this cause.

The Petition to invoke the discretionary jurisdiction of the Supreme Court followed.

STATEMENT OF THE FACTS

A female child, Charity Lynn Burk, was born to the mother, Mary Burk, on December 15, 1976 in Ashland, Wisconsin (APP.1). At the time of her birth, the mother and the child lived with Respondent's then husband, John Burk. (T-141). In April of 1977 the family moved to Brighton, a suburb of Boston, Mass. (T-144). Mary Burk and John Burk were having domestic problems which included Mr. Burk physically assaulting the Respondent and excessively spanking the child. (T-146, 149). After a period of separation, Respondent and John Burk decided to attempt a reconciliation, including counseling (T-146). After a period of some weeks, the mother took the child and went to stay at a center known as The Lighthouse Mission (T-146). On or about September of 1977 the Virgo County Department of Public Welfare requested the mother to surrender the custody of the child to them until such time as she could secure better accommodations than The Lighthouse Mission for herself and the child and the mother voluntarily surrendered the child. (T-147, 149). In 1979 the mother petitioned to have the child returned to her (T-150). The child was returned to the mother in April or May of 1980 (T-149, 152).

The mother and child resided with Alvin Long and were under home supervision of the Indiana authorities until January of 1981, without further incident (T-153). In Florida, the family, including the child, contributed to the

erection and establishment of their own home (T-255, 247, 248, 249).

Once in Florida, the mother placed Charity in a school program known as Head Start (T-155). Though the child at first enjoyed the Head Start program, the child later became fearful of attending school (T-239, 250). While Charity was in Head Start, the child suffered a broken arm and exhibited to the mother bruises that she alleged she had received at school, and the mother secured the appropriate medical care for the child (T-124). The mother was also concerned that the child seemed to have excessively thin hair (T-157). The mother had numerous confrontations concerning the child's health and education with the teacher, Mrs. Riedesel, who testified at trial (T-156).

On or about April 27, 1982 the child apparently wandered away from the home (T-251). The mother searched the neighborhood for her and called the local police (T-251, 252). Thereafter, the child was reported to the police by a neighbor Sue Crans to be in her home (T-101, 102). The police and HRS responded (T-105). The mother went to the police station for the child (T-105). She requested that the child be returned and asked advice from representatives of HRS as to what could be done to expedite the child's return (T-255). She was advised that if she left Mr. Long and moved to the spouse abuse center it would facilitate return of the child (T-255.) The mother moved to the spouse



abuse center on or about April 28, 1982 and when the child was not returned to her, returned home (T-255).

The child was examined by a physician and appeared to have some bruising on her buttocks (T-10, 11, 12). A cut on the cheek and some bruising was administered by another neighborhood child of approximately the same age (T-254). The Respondent appropriately confronted the mother of that child regarding that incident (T-253, 254).

The child has been continuously in the care of HRS since the pick up on April 27, 1982 (T-202). She was adjudicated a dependent child on July 31, 1982 (T-202). She was in foster care a little less than a month when HRS determined to pursue permanent commitment (T-23). The decision of May, 1982 was that HRS would pursue permanent commitment and the case came directly to Elaine Woods with the express intention of not initiating a Performance Agreement (T-203). At no time did HRS attempt to work out a Performance Agreement and the mother was given no opportunity to work with HRS to be reunited with the child (T-203, 268). During that time, there were supervised visits of the mother with the child and on at least one occasion, the child asked when she would go with her mother (T-202). The HRS Petition for Permanent Commitment followed (APP-5).

ISSUE ON APPEAL

DOES SECTION 409.168, FLORIDA STATUTES, (1981) REQUIRE THAT A PERFORMANCE AGREEMENT BE OFFERED TO THE PARENTS, OR IN THE ALTERNATIVE, A PERFORMANCE PLAN, BE ADOPTED BY THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES SO AS TO REQUIRE THE APPLICATION OF THE LEAST RESTRICTIVE ALTERNATIVE AND TO ASSURE PROPER PLACEMENT OF THE CHILD, PREFERABLY IN EACH CHILD'S OWN HOME?

POINT I     PETITIONER, AS REPRESENTATIVE OF HRS, HAS FAILED  
              TO APPLY THE LEAST RESTRICTIVE ALTERNATIVE TO  
              ASSURE PROPER PLACEMENT OF THE CHILD.

Even a cursory reading of Chapters 39 and 409 of the Florida Statutes, reveals that the legislature, as the reasoned voice of the community, has decided the nuclear family is a highly desirable environment and one that should be protected by the state wherever possible. Section 39.001(2)(b), Florida Statutes (1978), states that it is the purpose of the "Florida Juvenile Justice Act" to assure all children the care, guidance and control, preferably in each child's own home, which would best serve the moral, emotional, mental and physical welfare of the child and the best interest of the state. That section goes on to state that one of the purposes is to preserve and strengthen the child's family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal. That section further implicitly recognizes that the state can be too intrusive by providing procedures by which the provisions of the law are executed and enforced; so to assure the parties fair hearings at which their rights as citizens are recognized and protection. Section 409.145(1), 1980 states that the services of the department [of HRS] are to be directed toward the goal of the prevention of separation of children from their families, and the reunionification of families

who have had children placed in foster homes or institutions.

Subsection 409.168(1), Florida Statutes (1981), states that the legislature finds that seven out of ten children placed in foster care do not return to their biological families after the first year. That subsection further states:

It is the intent of the legislature, therefore, to help insure a permanent home for children by requiring a performance agreement.

That section defines a performance agreement as a document written in layman's terms, ordered by the court, prepared by the Social Service Agency responsible for foster home placement, in conference with the natural parents, and signed by, among others, the parent of the child. Subsection 409.168(3)(a)1 states:

The purpose of a performance agreement shall be to record the actions to be taken by the parties involved in order to quickly assure the safe return of the child to his parents, or, if such return is untenable, the permanent commitment of the child to the department or licensed child placing agency for the purpose of finding a permanent adoptive home. (Emphasis added).

Section 409.168 further sets forth certain procedures to be followed in the event that the parents will not or cannot entered into a performance agreement and provides for a plan for the permanent placement of the child which plan shall take the place of a performance agreement. Section 409.168 (2)(3) provides that:

"In the event the natural parents will not or cannot participate in preparation of performance agreement, the Social Service Agency shall submit a full explanation of the circumstances, any plan for the permanent placement of the child to the court within the time provided for a performance agreement. The plan shall include but need not be limited to, the specific services to be provided by the social service agency, the goals and plans for the child, and the time frame for accomplishing the provisions of the plan and for accomplishing permanence for the child. The plans shall take the place of the performance agreement and shall meet all requirements provided for the performance agreement. The parent who has not participated in the development of a performance agreement may seek review of the plan developed by the social service agency prior to the initial six months judicial review."

This section also provides that the person preparing the performance agreement shall explain the agreement to all persons involved and sets forth certain things that the agreement shall include. These include, among other things, the specific reasons for the placement of the child in foster care, including a description of the problems or conditions in the home of the parent or parents which necessitate the removal of the child from its home and the remediation of which determines the return of the child to the parent or parents; and the specific actions to be taken by the parent or parents of the child to eliminate or correct the identified problems or conditions and the period during which the actions are to be taken. This section also sets forth the social and other supportive services to be provided by the Department to the parent, the child, and the

foster parents during the period the child is in foster care. This section states that:

...The purpose of such social and other supportive services shall be to promote the child's need for a continuous, stable, living environment and should promote family autonomy and strengthen family life wherever possible;...

This section requires the agency to give a date on which the child is expected to be returned to the home of the parent or parents and the nature of the effort to be made by the social service agency responsible for the placement to reunite the family. The section further provides for notice of termination of parental rights if the performance agreement is not complied with but only after a hearing.

In the instant case, it is uncontroverted that no such performance agreement was presented to the natural mother. In fact, the testimony reflects that HRS had decided not to enter into a performance agreement and to move forward to permanent commitment of the child within a month of the child being placed in foster care (T-202, 203). The evidence at trial indicates that no effort was made by a licensed, competent clinical child psychologist or psychiatrist to evaluate the relationship of the child and the mother either before the decision to initiate permanent commitment proceeding or prior to trial (T-72). With this valuable tool, the trial court had no "record" as required by Florida Statutes to aid in evaluating the performance of the parties prior to commitment. Without the benefit of the

performance agreement, the trial court and this court must always wonder how the mother and child would have responded to counseling and reunion efforts.

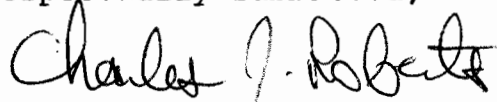
Although Respondent can cite no case reversing the trial court where there has been a failure to comply with this particular section of the statute, Respondent would assert that the legislature is mandating that a doctrine of the least restrictive alternative be found and applied so as to assure proper placement of the child, preferably with the natural mother in the child's own home.

Further, it is clear from a reading of the Statute that the legislative intent of the statute is to protect the family, reunite families wherever possible, and assure the proper placement of the child, preferably with the child's natural parents, and failing this, placement with the appropriate adoption agency but only after an opportunity on the part of the parents to comply with a performance agreement or in the alternative, notice to the court of the Department's inability to enter into a performance agreement through a placement plan to aid the court in the proper placement of the child.

CONCLUSION

In the instant case, Petitioner has failed to comply with these statutory requirements. Respondent would urge this court to find that the least intrusive and least restrictive alternative should be attempted by HRS prior to permanent commitment, especially in light of the legislative recognition in Section 39.001(2)(d), Florida Statutes (1978) that citizens have rights in these proceedings which should be recognized and protected so as to maintain the family unit; and providing procedures by which the provisions of law are properly executed and enforced. Respondent urges the court to reverse the finding by the trial court that all necessary papers have been filed, reverse the order of the trial court for permanent commitment, and remand this cause to the trial court with a mandate to direct Petitioner to enter into the appropriate performance agreement to assure the proper placement of the child, preferably with the natural mother.

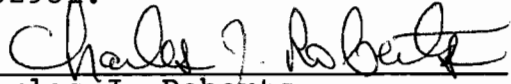
Respectfully submitted,

  
Charles J. Roberts



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. Mail upon the following parties this 18th day of September, 1984: James A. Peters, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301, 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, and Stepahnnie Dacosta, 1980 N. Atlantic Avenue, Suite 602, Cocoa Beach, Florida 32931.



Charles J. Roberts  
Holcomb, Ennis, Theriac, Amari  
and Roberts  
261 Merritt Square  
Merritt Island, Fla 32952  
(305)453-1832