IN THE SUPREME COURT OF FLORIDA

MARY K. BURK,

Petitioner

vs

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent

CASE NO. 65,790

DCA Case No. 83-668

Certified Question from the Fifth District Court of Appeal

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE

Petitioner will adopt her Statement of the Case as contained in Petitioner's Initial Brief.

STATEMENT OF THE FACTS

Petitioner reasserts the facts as contained in Petitioner's Initial Brief.

Petitioner wishes to emphasize some of the facts as set forth by the Respondent, Department of Health and Rehabilitative Services, hereinafter "HRS" and the counsel for the Respondent child, and wishes to emphasis other facts as set forth by those parties and accordingly, offers the following additional statements of facts.

Petitioner takes issue with the counsel for the Respondent child's characterization of the Petitioner's Statement of Facts as being "self serving facts". Petitioner points out that her Statement of Facts is drawn from the transcript in the light best suited for Petitioner and are no more self serving that the facts as set forth by either of the Respondents in their Answer Briefs.

Petitioner agrees with the counsel for the Respondent child that "in Dr. Bernstein's opinion, the child's best interest would not be served by establishing contact with her natural mother, the Petitioner (T-67)." Petitioner wishes to emphasise that at no time did Dr. Bernstein opine that it would be in the best interest of the child to be seperated from the natural mother.

Petitioner takes exception with counsel for the Respondent's child characterization of the "action for permanent commitment of C.B. filed in the State of Indiana

prior to her move to Florida (T-150)." Petitioner points out that the child was voluntarily surrendered to the Indiana authorities because Petitioner felt she was unable to properly care for the child while she, Petitioner, resided in a center known as The Lighthouse Mission (T-146). In 1979, the mother Petitioned to have the child returned to her and the child was returned to the mother in May or April of 1980 (T-149, 150, 152). Petitioner agrees that supervision was maintained until January, 1981 (T-207, 209). Petitioner points out that such supervision was without further incident.

Petitioner agrees with Respondent, HRS, that the decision to pursue permanent commitment of the child was a decision reached by HRS personnel and not by the court (T-203, 268, 271).

ARGUMENT

POINT I

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?

Respondents, HRS, and counsel for the child, assert essentially two points of attack in its Answer Brief: First, in the instant case, the child CB, is immediately placed at risk, and is in danger from an abusive mother if the court were to order a Performance Agreement and secondly, that in the instant case, the Petitioner should not be afforded the opportunity to enter into a Performance Agreement because the child was not placed in foster care.

Petitioner asserts that it is argument ad hominim and further, is a parade of horribles to argue that in the instant case, the child would be immediately placed at risk by an abusive mother. Contrary to the Respondents' positions, the purpose of the Performance Agreement is to keep the child in a stable, safe environment, and at the same time, to maintain the relationship of the mother and the child while HRS carries out its statutorily mandated responsibility to reunite the family wherever possible, or, in the alternative, to move forward to permanent commitment. Only after a Performance Agreement is entered

into and the parties given an opportunity to meet the requirements of the Performance Agreement can the actions of the parties be recorded and thereby give the court the ability to determine whether or not permanent commitment is indeed proper.

As stated in Section 409.168(3)(a)(1), Florida Statutes (1980 Supp.), (1981), the performance Agreement is:

> "To record the actions to be taken by the parties involved in order to quickly assure the safe return of the child to the parents, or, if such return is untenable, the permanent commitment of the child to the Department of licensed child placing agency for the purposes of finding a permanent adoptive home."

As stated in In the interest of A.B., 444 So 2d 981, 991 (Fla 1st DCA, 1983), "The evident effect of these provisions and [Section 39.41; Section 409.168(3)(c), 409.168(3)(d)] now on the books more than three years is to 1) require an affirmative effort to identify to the natural parents the problem or condition in the home that account for the child having been removed and kept in foster care; 2) to assist the parent in making a personal commitment, assuming the parents cooperation, to remedy these specific conditions; 3) to notify the parent that pursuant to Section 39.41(6)(b) "the court shall return the child to the custody to the natural parent upon expiration of the agreement if the parents have substantially complied with the agreement," Section 409.168(3)(a)6H; 4) finally, should the parents not have complied with the responsibilities as specified in the

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?

written performance agreement, although able to do so, then proceedings to terminate parental rights are required.

Petitioner asserts that throughout this inquiry and throughout the investigation by the various agencies that are charged with attempting to reunite the families and provide social services to the family for that purpose, the child would certainly not be at risk from abuse.

Respondent HRS attempts to characterize Petitioner's argument as one which would require a Performance Agreement prior to any permanent commitment proceedings. Petitioner asserts that such a Performance Agreement should be required wherever possible but at the same time, Petitioner recognizes that the legislature has seen fit to couch the statutory terms in the disjunctive so that a Performance Agreement may not always be required. However, that begs the fundamental issue of this case and is an attempt by Respondents to cloud the real issue. The real issue is whether or <u>not in the instant case</u> a Performance Agreement should have been required because the child was placed in "foster care". Respondent HRS terms shelter care as being "emergency care" but the real facts belie such an assertion.

Shelter is defined at Section 39.01(31): As a facility which "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)". At no place did shelter care confine to emergency facilities as Respondent would

have the court believe here. Further, foster care is defined by Section 409.168(2)(d):

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

Such a definition is so broad as to certainly encompass the type of supervision the child received in the instant case for the many months prior to a permanent committment petition being filed.

In the instant case, the detention petition is dated April 28, 1982 and requests that the child be placed "in shelter care at a licensed HRS emergency shelter". The Detention Order is dated the same date and places the child in an "HRS shelter home". See Appendix of C.B., a child A-1,2. The Petition for Dependency is dated May 5, 1982 and the hearing and Order of Dependency is dated May 12, 1982. Most importantly, the Petition for Permanent Commitment does not follow until some five months later on October 11, 1982. It is during this time that Petitioner asserts that a Performance Agreement was required to have been offered and the distinction between shelter care and foster care, especially given the statutory definitions, is simply a matter of semantics and is without the spirit of the legislative intent of the statutory provisions; to unit families, to move affirmatively to reconcilliation or permanent commitment; to give the court a record of the actions of the parties and so, a basis for sound judgment.

Respondent HRS goes on to attempt to bootstrap its position by asserting that permanent commitment in this case was a foregone conclusion and that the best interest of the child dictated the actions of the court. This matter was addressed in the extremely well reasoned opinion of Justice Smith in In the interest of A.B., 444 So 2d 981 (Fla 1st DCA 1983). On page 994, the court drops a foot note as follows:

> "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 the present Section 39.41(1)(f)1d as yielding the test stated by Judge Safer and this court in CMH; 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..."

It thus becomes more compelling that the decision to proceed with permanent commitment proceedings and not to offer the Petitioner a Peformance Agreement was a decision reached by HRS personnel, and not by the court. See Respondent HRS's Statement of Facts and Petitioner's Statement of Facts. In the instant case, the testimony of Elaine Woods shows that HRS personnel had made the decision approximately a month after taking the child into custody to go forward with permanent commitment. The Petitions for Detention and Dependency and the Orders thereon make no mention by the court that this case is one which requires immediate

permanent commitment proceedings and interestingly enough, none of those documents even recite the freestanding test that Respondent HRS would have the court pursue "the best interest of the child". Thus, HRS personnel, not the court, unilaterally made a judgment and a decision to pursue severance and failed to inform the court so that the proper findings could be made and appropriate steps taken.

Counsel for the Respondent child argues similarily to Respondent HRS. It is interesting to note that both the cases primarily relied upon by counsel for the Respondent child deal with Performance Agreements. In In the interest of RWH, 447 So 2d 341 (Fla 4th DCA, 1984) there is a dissent with opinion in which Judge Waldon states that HRS should have been required to provide the mother with a psychiatric evaluation and that the time for the Performance Agreement should have been extended. In In the interest of AB, 444 So 2d 981 (Fla 1st DCA, 1983), at least three Performance Agreements were entered into by the parties.

Petitioner agrees with counsel for the Respondent child that compliance with the Performance Agreement does not necessarily mean that the child should be returned. AB points out that in fact, other considerations may require that the child not be returned to the parents, and that indeed, it is at this point the "best interest of the child" governs the course between restoring the child to the parent or continuing foster care, or between committing the child

permanently to HRS for adoption. The court in AB with tremendous insight recognizes the evidence of discrimination against the poor and in child placement systems obstentsibly for the "best interest of the child" and that our own HRS can "temporarily" continue children in foster care to the extent that they are weaned from their natural parents and remain wards of the state indefinitely. The court in AB points out that the legislature prefers an active process toward reconciliation or permanent separation and summarizes the principals governing such cases as:

1. When a child has temporarily been committed for dependency and by placement of foster care has been made subject to Section 409.169 Florida Statutes, a performance agreement is required, and the Department spurred by the court to produce a meaningful agreement with the diligence prescribed will see to it.

2. The Performance Agreement will specify..."the problems or conditions in the home and the parent or parents which necessitate a removal..." and the remediation of which determines the return of the child to the parent...

3. If at the end of the agreed performance, the parent has substantially complied, the child shall be returned to the parent, subject to continued judicial supervision...

4. If the parent has not substantially complied with the Performance Agreement...and so has not alleviated the child's dependency past or in prospect, and it being manifestly in the best interest of the child, ... the court is to permanently commit the child for adoption.

Petitioner points out that in AB, the court made significant mention of the fact that the mother had constantly inquired of HRS and the Court what she could do to have the children returned to her.

Similarily, in the instant case, and a fact which makes the failure of HRS to attempt to reunite the mother and the child more compelling is the so called Supplemental Petition filed by the mother, prior to receiving the aid of counsel in her own handwriting, where she alleges that she will do anything she can do to work with HRS to have the child returned to her. Petitioner asserts that in the instant case, HRS is thus charged to attempt to reunite the family and if such is not possible, is charged with entering into at lease a permanent commitment plan whereby the court at the dependency hearing, would be properly and could make the appropriate findings that this is such a compelling case that permanent commitment is immediately required. In any case, either a Performance Agreement or Permanent Commitment Plan or Placement Plan is necessitated by the statutory scheme.

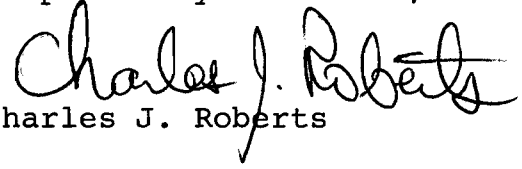
CONCLUSION

Petitioner asserts that in any case in which it is possible, a Performance Agreement or Placement Plan should be required. Certainly the decision to proceed for permanent commitment in the instant case is a decision which should be left to the court and not a decision of HRS personnel.

Petitioner asserts that the true issue in this case is whether or not a Performance Agreement should have been required. Petitioner asserts that since the child remained in custody for such a long period of time in facilities which meet the definition of foster care, that a Performance Agreement should have been required. Certainly Petitioner should have been given the opportunity in light of her stated willingness to work with HRS to demonstrate her ability to care for the child.

Petitioner urges this court to answer the certified question in the affirmative and to remand this cause to the District Court of Appeals with appropriate instructions to reverse the trial court and remand the cause to the trial court with instructions for the trial court to require a performance agreement, or in the alternative, a permanent placement plan as required by applicable Florida Statutes.

Respectfully submitted,



Charles J. Roberts

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed this 17th day of December, 1984 to James Dulfer, Esquire, Central Florida Legal Services, Inc., 308 South Campbell Street, Daytona Beach, Florida 32014, Douglas E. Witney, Esquire, Department of HRS, 400 W. Robinson Street, Suite 911, Orlando, Florida 32901; Joan Bickerstaff, 1811 South Riverview Drive, Melbourne, Florida 32901; Stephannie Dacosta, 1980 N. Atlantic Avenue, Suite 602, Cocoa Beach, Florida 32931; and James A. Peters, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301.

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