IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,192

MARJORIE MAE GERRY,

Petitioner,

vs.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA, et al.,

Respondents.

FILED
SID J. WHITE
JAN 28 1985
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By Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENTS, B.B., THE CHILD, AND DONNA RICHEY, THE GUARDIAN AD LITEM FOR THE CHILD

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INTRODUCTION

This brief is filed on behalf of B.B., the child, and Donna Richey, the guardian ad litem for the child, in support of the trial court order and the denial of the petition for writ of common law certiorari. Both the trial court and the appellate court found it unnecessary in a clear case of child abuse or abandonment for HRS to enter into a performance agreement with a parent prior to instituting permanent commitment proceedings. The jurisdiction of this Court has been invoked by the petitioner on the following certified question:

> 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 THE CASE AND FACTS

My name is Bradley. When I was one year old, I was taken to the emergency room of Lake Community Hospital, where I went into seizure. Comatose, I was then flown directly to Shands Teaching Hospital in Gainesville, Florida. I had retinal hemmorrhages, old subdural hematomas, and had lost the use of my legs and one arm. I was blind and retarded from repeated trauma. My mother told the doctor I had fallen out of a double bed.

My mother is the petitioner, Marjorie Mae Gerry. She is unmarried, unemployed, and has an IQ of 59. I have been abused and neglected all of my life. My mother did not make application for WIC assistance until I was nine months old. My weight was below the fifth percentile because I was only receiving one meal a day. My WIC formula was used to make cornbread. My mother did not maintain my immunizations. There is no hair on the back of my head because I was left in bed a great deal of the time.

As the innocent victim of severe child abuse and neglect, I came under the jurisdiction of the circuit court, was adjudicated dependent, and was placed in the care, custody, and control of the respondent Department of Health and Rehabilitative Services. In the order under review, the trial court held:

> If the allegations of abuse as alleged in the Petition For Dependency are sustainable, the court will terminate the parental rights of Marjorie Mae Gerry without regard to whether a performance agreement was entered into between her and the Department of Health and Rehabilitative Services.

The petition for writ of common law certiorari was denied by the Fifth District and this petition for discretionary review by this Court ensued.

SUMMARY OF ARGUMENT

This brief is written on behalf of the child and from the perspective of the child. The petitioner's parental rights were forfeited by her conduct. The rights of the child, however, are inviolate. Clearly the child has done no wrong. He was born to an intolerable situation and has been deprived of the physical and mental ability to enjoy the right to a normal life. The overriding concern of the legislative enactments under review is the welfare of children in this state. Preserving the integrity of the family unit is a means to that end, not an end in itself.

The child and the guardian ad litem adopt by reference and endorse the legal arguments presented in the answer brief of the respondent Department of Health and Rehabilitative Services.

ARGUMENT

IN A CLEAR CASE OF CHILD ABUSE OR ABANDONMENT, A PERFORMANCE AGREEMENT IS NOT A PREREQUISITE TO PERMANENT COMMITMENT PROCEEDINGS PURSUANT TO SECTION 39.41(1)(f)1.a.

The petitioner's brief is deficient in two respects. First, it fails to mention the factual predicate for the allegations of gross child abuse and neglect which precipitated the trial court order. Second, it is written almost exclusively from the perspective of the parent and her claimed rights. There is no mention of the rights of the child.

The flaw in the petitioner's argument is in her failure to recognize that:

> Although the right to the integrity of the family is among the most fundamental rights, the parent's rights are subject to the overriding concern for the ultimate welfare or best interest of the child.

C.E.S. v. State, Department of Health and Rehabilitative Services, 9 F.L.W. 2564 (Fla. 2d DCA Case No. 84-724, December 5, 1984). See, also, In the Interest of W.D.N., 443 So.2d 493 (Fla. 2d DCA 1984); In the Interest of J.L.P., 416 So.2d 1250 (Fla. 4th DCA 1982).

Although taken from a different context, the penultimate paragraph of the J.L.P. decision offers a proper response to the certified question:

> Our sympathy for the mother cannot blind us to the overriding concern for the welfare of the child. We cannot help the one and shall not harm the other. As the trial court pointedly observed in his final order, placing the boy with his mother will assure mistreatment. The Legislature clearly did not intend to have a child suffer such an experience before a trial court could act. [416 So.2d at 1253].

The petitioner forfeited all parental rights when she beat her child senseless, rendering him blind, mentally retarded, and physically handicapped. Florida Statute §39.41(1)(f)1.a (1983), provides for the termination of parental rights and the permanent commitment of the child if the court finds that the parent has abused or neglected the child. Under this provision, the custodial status of the child is immaterial. Demonstrated child

abuse will sustain a termination of parental rights. A child's placement in foster care before, during, or after permanent commitment proceedings is mere happenstance. It has no effect on the operation of the statute or the rights of the parties in a permanent commitment proceeding based upon abuse and neglect.

Florida Statute §409.168 (1983), on the other hand, is concerned with safeguards for the child in foster care. The statute is designed to minimize time spent in foster care and facilitate the return of the child to a permanent and stable environment. The statute is not designed to be an impediment to permanent commitment in a clear case of child abuse and neglect.

The 1984 Amendments to Florida Statute §39.41 and §409.168 confirm this intent. Florida Statute §39.41(1)(f)1.c.(I) still provides that, if the court finds that the parent has abused or neglected the child, parental rights may be terminated and the child permanently committed for subsequent adoption. The petitioner is afforded full substantive and procedural due process in the permanent commitment proceedings. Parental rights will not be terminated except upon clear and convincing proof of child abuse or neglect. A performance agreement is not a statutory prerequisite to permanent commitment.

As before, the failure of the parent to comply with a performance agreement is a separate and independent basis for termination of parental rights and permanent commitment of the child. Compare, Florida Statute §39.41(1)(f)1.d. (1983) with Florida Statute §39.41(1)(f)1.c.(II) (1984). A performance agreement is not a prerequisite to permanent commitment when the

petition for permanent commitment is predicated upon child abuse and neglect. The certified question should be answered in the negative.

CONCLUSION

Both the trial court and the district court of appeal recognized and properly weighed the interests of parent and child in this case. Their interpretation of the statutes was correct and should not be disturbed.

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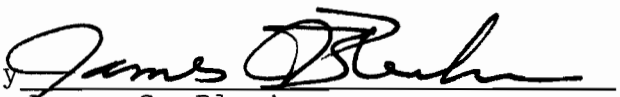
By 
James C. Blecke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents, B.B., the Child, and Donna Richey, the Guardian Ad Litem for the Child, was mailed to: STEPHEN G. BIRR, ESQ., Attorney for Petitioner, 122 St. Clair-Abrams Avenue, Tavares, Florida 32778; WILLIAM G. LAW, ESQ., Attorney for Guardian Ad Litem, Post Office Box 57, Groveland, Florida 32736; PAMELA MILES, Program Director, Guardian Ad Litem Program, Office of the Courts Administrator, Supreme Court Building, Tallahassee, Florida 32301; JAMES A. SAWYER, JR., ESQ.,

Department of Health and Rehabilitative Services District III Legal Counsel, 1000 Northeast 16th Avenue, Gainesville, Florida 32609; LOUIS F. HUBENER, ESQ., Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301; HONORABLE ERNEST C. AULLS, JR., Circuit Judge, Lake County Courthouse, 315 West Main Street, Tavares, Florida 32778, this 24th day of January, 1985.

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