IN THE SUPREME COURT OF FLORIDA

MARJORIE MAE GERRY,

Petitioner,

vs.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA,

Respondent. /

Case No. 66,192

5th District Court of Appeal
Case No. 84-573

INITIAL BRIEF OF PETITIONER

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STATEMENT OF PARTIES, CASE AND FACTS

PARTIES

The Petitioner, MARJORIE MAE GERRY, shall be referred to as Petitioner, or as mother of the Child. B.B., the Child and Donna Richey, the court appointed Guardian Ad Litem for the Child shall be referred to as the Child and the Guardian Ad Litem, respectively. The Department of Health and Rehabilitative Services, the Respondent, shall be referred to as the Department or H.R.S.

CASE AND FACTS

B.B. is a black male child, date of birth October 26, 1982. The Petitioner is the natural mother of the Child. Pursuant to Order of the court dated January 5, 1984, the Child was adjudicated to be dependent and placed in the temporary care, custody and control of H.R.S. for placement in a licensed foster home. (Appendix 1).

The court Order of January 9, 1984 determined that the Petitioner was indigent and entitled to representation in this cause by court appointed counsel. (Appendix 2)

Pursuant to Order of the trial court dated February 8, 1984 an extension of time was granted H.R.S. for filing of a performance agreement on or before March 6, 1984. (Appendix 3)

On March 6, 1984, a hearing was held before the trial court on H.R.S.'s Motion For A Performance Agreement and the Ore Tenus Motion For Performance Agreement of the Petitioner.

H.R.S.'s representative advised the court that H.R.S. was desirous of entering into a performance agreement with a ninety (90) day duration. The Guardian Ad Litem for the Child indicated that she had no objection to the performance agreement being

entered into as long as the goal of the performance agreement was to terminate the parental rights of the natural mother (Petitioner). The court denied H.R.S.'s and Petitioner's Motion For Performance Agreement. The court made the following findings: (Appendix 4)

(1) There is a conflict between Chapter 39, Florida Statutes, (1983) and Section 409.168, Florida Statutes, (1983) as to whether or not a performance agreement is required between the Petitioner and H.R.S. prior to the termination of her parental rights.

(2) If the allegations of abuse as alleged in the Petition For Dependency are sustainable the court will terminate the parental rights of the Petitioner without regard to whether a performance agreement was entered into between her and H.R.S.

(3) A Petition For Termination of Parental Rights and Permanent Commitment For Subsequent Adoption should be filed by the Guardian Ad Litem of the minor child.

The Petitioner sought a Common Law Writ of Certiorari for a determination that the court departed from the essential requirements of the law by entering its Order denying the Motion For Performance Agreement and an Order reversing the court's Order.

The Fifth District Court of Appeal denied the Common Law Writ of Certiorari (Appendix 5) and stated that In re:C.B., 453 So.2d 220 (Fla. 5th DCA 1984) controlled wherein the Fifth District ruled

that it was not necessary in a clear case of child abuse or abandonment for H.R.S. to enter into a performance agreement with a parent prior to instituting permanent commitment proceedings. However, the Fifth D.C.A. again certified, as it did in In re: C.B. that the issues are ones of great public importance and certified the following question to the Florida Supreme Court:

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.

The Petitioner invoked the discretionary jurisdiction of the Supreme Court.

In re: C.B., supra, is presently before this Court captioned Mary K. Burk, Petitioner, vs. Department of Health and Rehabilitative Services, Respondent, case number 65,790, Fifth DCA case number 83-668.

The Petitioner, MARJORIE MAE GERRY's parental rights have not been terminated, nor have any proceedings been commenced to do so.

ISSUE ON REVIEW

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

A performance agreement or a performance plan as prescribed by Section 409.168, Florida Statutes (1983) is a prerequisite to permanent commitment proceedings pursuant to Section 39.41 (1)(f)1.a., Florida Statutes (1983).

A. Chapter 84-311, Laws of Florida (1984)

Chapter 84-311, Laws of Florida (1984)completely resolves the certified question presented to this Court. On October 1, 1984, Chapter 84-311 became law. Section 39.41(1)(d), Florida Statutes (1983) (as amended by Chapter 84-311), is completely dispositive of the certified question herein, as it provides that when any child is adjudicated by a court to be dependent:

> (a)fter the child is committed to the temporary custody of the department, all further proceedings under this section shall additionally be governed by section 409.168. (emphasis added)

The addition of the above referred language in Section 39.41, Florida Statutes (1983) resolves any conflict between Chapter 39, Florida Statutes (1983) and 409.168, Florida Statutes (1983) and clearly establishes that the legislature intended a performance agreement or plan of all children committed to the temporary custody of H.R.S.

The amendment to Section 39.41, Florida Statutes (1983) clearly establishes that a performance agreement or plan is

mandatory anytime a child is committed to the temporary custody of H.R.S. Furthermore a performance agreement or plan is a prerequisite to a valid cause of action for permanent commitment.

Notwithstanding the foregoing amendment clarifying the legislature's intention that performance agreements be mandatory and a necessary prerequisite to any termination of parental rights, a meaningful review of the pre-amendment statute clearly leads to the same conclusion.

B. Statutory And Case Law Requirements When A Child Is Placed In Foster Care.

Florida enacted its first foster care judicial review law in 1977, requiring regular judicial review hearings and mandating dispositional alternatives for all children in foster care in Florida. Section 409.168, Florida Statutes (1977). The Legislature revised Section 409.168, Florida Statutes, in 1980 to require written performance agreements as well as judicial reviews.

A performance agreement is a document that is prepared by the social service agency, in conference with the natural parents. The agreement delineates what is expected of all parties and what must be accomplished before a child can be returned to the parent. If the parent fails to substantially comply with the provisions of the performance agreement, permanent commitment proceedings are to be initiated. Section 409.168, Florida Statutes (1983).

In the event the parent cannot or will not participate in the preparation of a performance agreement (such as in the situation where the parent refuses or is unable to be located), H.R.S. is required to submit a full explanation of the circumstances and to submit to the court a permanent plan in substitution for the performance agreement. The only difference between a performance agreement and a permanent plan is that the latter is written without parental participation. All other requirements as to content are identical for either document. Section 409.168(3)(a)3., Florida Statutes (1983).

If a performance agreement cannot be prepared, a permanent plan can provide for exploration of other alternatives to permanent commitment for the child. For example if the parents have abandoned the child and their whereabouts are unknown, the permanent plan could provide for location of relatives who might be able to care for the child. Section 39.41(3)(a)4., Florida Statutes (1983).

In all cases governed by Section 409.168, Florida Statutes (1983), the performance agreement or plan must be submitted to the court within thirty (30) days after placement, unless the placement is for less than thirty (30) days. If the placement is for less than thirty (30) days, a performance agreement is still required, but need not be submitted to the court. Section 409.168(3)(a), Florida Statutes (1983).

Case law provides further elaboration as to the nature of

Section 409.168 requirements. The First District Court of Appeal has previously found that these provisions are mandatory and not directive. In the Interest of V.M.C., 369 So. 2d 660 (Fla. 1st DCA 1979); Quaintance v Pingree, 394 So. 2d 161 (Fla. 1st DCA 1981). These cases, of course, are bolstered by the principle of statutory construction that where a provision is accompanied by a penalty for failure to observe it, the provision is mandatory. 30 Fla. Jur. Statutes, Section 10. Section 409.168(3)(g)2, Florida Statutes (1983) provides the penalty of contempt for H.R.S.'s failure to comply with its part in the performance agreement.

The parent's failure to substantially comply with the terms of a performance agreement is penalized by the severest sanction available in any civil proceeding. Non-compliance with a performance agreement is grounds for permanent commitment of the child. Section 39.41(1)(f)1.d., Florida Statutes (1983). In re: S.B.B., 379 So. 2d 395 (Fla. 4th DCA 1980) upheld a permanent commitment order where the parents did not comply with conditions of a foster care contract. Parents who face this onerous consequence have every reason to insist that this drastic action strictly conforms to legislative guidelines. In re:Smith, 299 So. 2d 127 (Fla. 3rd DCA 1974).

It is a cardinal rule of statutory construction that non-compliance with the strict terms of a mandatory provision voids and renders illegal the proceeding to which it relates. 30 Fla.

Jur. Statutes, Section 8; 73 Am Jur 2d, Statutes, Section 16. The absence of a performance agreement renders illegal and void any permanent commitment proceeding.

The first case to analyze at length the legislative history and policy implications of the requirements of Section 409.168 was In the Interest of A.B., 444 So. 2d 981 (Fla. 1st DCA 1983). This decision makes clear that the Florida legislature in enacting Chapter 39 and Section 409.168 replaced any commom law best interests of the child standard with a specific set of statutory requirements designed for reconciliation of children with their natural parents whenever possible and permitting permanent commitment only after active efforts at reunification have failed. The decision emphasizes that the legislative goal for Florida's foster children is permanence. This goal can only be achieved if H.R.S. has fulfilled its affirmative objection to design and carry out a meaningful performance agreement. "(A) meaningful performance agreement between the parent and H.R.S. has become central to the strategy for securing each child a permanent home with his legally recognized parent." Id at 991. The court summarizes its understanding of the principles and processes governing a case where a child has been adjudicated dependent and placed in foster care in pertinent part as follows:

> When a child has temporarily been committed for dependency, and by placement in foster care has been made subject to Section 409.168, Florida Statutes, a performance agreement is required, and the Department, spurred by the court as necessary to produce a meaningful agreement with

> the diligence prescribed, will see to it. See S.B.B., 379 So.2d at 397. (emphasis added).
>
> Id at 994.

The answer to the question certified by the Fifth District Court of Appeals does not rely on whether the abuse to the Child was so clear cut, "the consequence of which would be inevitable permanent commitment" as stated by In re: The Interest of C.B.,453 So2d 222(Fla. 5th DCA, 1984) a standard which relies substantially on subjective opinion, nor indeed whether the best interest of the child overrides any parent right in being reunited with their child. Rather, the answer to the certified question is disposed of by Section 39.41(1)(d), Florida Statutes (1983) as amended by Chapter 34-111, Laws of Florida (1984) previously discussed herein as well as the court's recognition of legislative history, philosophy and policy surrounding dependent children and the consistent pronouncements of the United States and Florida Supreme Court regarding the natural, God-given right to family integrity and to efforts by the state to reunite and preserve the family unit.

Since a performance agreement mandated by Section 409.168, Florida Statutes (1983)is the central strategy to accomplish the goals of family reunification, the only logical and consistent interpretation is that a performance agreement or plan is a prerequisite to permanent commitment proceedings. Recently the First District in Interest of C.T.G. (case number AU-42, December 11, 1984) reviewing the exact same question as here,

reached the same conclusion advanced herein, namely that a performance agreement is a prerequisite to permanent commitment proceedings.

C. Florida Statutes Codify Constitutional Right To Family Integrity.

Although this Court need not reach constitutional issues to decide this case, it is apparent that the reunification goal of Florida's juvenile laws is clearly consonant with the Petitioner's constitutional right to family integrity. The constitutional context of this case will be summarized because it provides additional support for the statutory interpretation the Petitioner urges upon this Court.

Finding its roots in the seminal case of Meyer v Nebraska, 43 S. Ct. 625 (1923) where the Supreme Court held that the Fourteenth Amendment guaranteed an individual the liberty "to marry, establish a home and bring up children," 43 S. Ct. at 626, the fundamental right to family integrity gained impetus in cases such as Pierce v Society of Sisters, 48 S. Ct. 571 (1925); Prince v Massachusetts, 64 S. Ct. 438 (1944); and Stanley v Illinois, 92 S. Ct. 1208 (1972). The concept was refined when family integrity was held to constitute an intrinsic human right. The Supreme Court in Moore v City of East Cleveland, 97 S. Ct. 1932 (1977), most precisely stated the origins of the right to family integrity in these terms:

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our cherished values, moral and cultural."

97 S. Ct. at 1938.

There is no question that the State may interfere with important family rights through the exercise of its police and parens patriae powers, in the interest of protecting children. However, because the right to family integrity is fundamental, courts have strictly scrutinized the manner in which intervention occurs. Roe v Wade, 93 S. Ct. 705 (1973). Roe v Conn, 417 F. Supp. 709 (M.D. Ala. 1976); Alsager v District Court of Polk County, 406 F. Supp. 10 (S.C. Iowa 1975).

Although the parent may lose temporary custody of the children, the parent does not lose the right to family integrity, as the U.S. Supreme Court noted in Santosky v Kramer, 102 S. Ct. 1388 (1982):

> "The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."

102 S. Ct. at 1394.

The Florida Constitution in Article 1, Section 9, also recognizes the fundamental right to family integrity. Shevin v Byron, et al, 379 So. 2d 663 (Fla. 1980), the Florida Supreme Court has long recognized the significance of the right to family

integrity. Indeed, this proposition has been characterized as being a natural God-given right, older than common law. State ex rel. Sparks v Reeves, 97 So. 2d 18 (Fla. 1957). The Third District Court of Appeal, in extending Sparks, stated that the right of parents to the custody, care and upbringing of their children is one of the most basic rights of our civilization. Foster v Sharpe, 114 So. 2d 373, 376, (Fla. 3rd DCA 1959). More recently the Fourth District Court of Appeal has confirmed that the fundamental interest of parents in the care, custody and management of their children is strong public policy in this State, and therefore the natural family unit is the placement of perference. In re: Guardianship of D.A. McW., 429 So. 2d 699 (Fla. 4th DCA 1983).

Florida courts hold that the natural rights of parents may not be lightly regarded, Noeling v State, 87 So. 2d 593 (Fla. 1956) and natural parents have a God-given right to enjoy the custody, fellowship and companionship of their offspring. Behn v Timmons, 345 So. 2d 388 (Fla. 1st DCA 1977). The latter assertion is very close to the United States Supreme Court's belief that the right to family integrity is an intrinsic human right.

The limitations on state intervention through the parens patriae powers lie in the lack of constitutional permission to separate children from fit parents and in the recognition that even parents who are separated from their children have a right to future custody. Because of the fundamental nature of these

rights, the state may pursue its protective powers only when a compelling state interest has been demonstrated and only when the least drastic alternatives are used.

D. Florida Law Preference For Reunification of The Natural Family.

Florida's Juvenile Justice Act, Chapter 39, Florida Statutes, (1980) provides the statutory authority for the State to intervene in family relationships and to place dependent children in the homes of relatives or in foster care. In enacting this legislation, the legislature expressly stated the purposes of the Chapter, indicating a clear preference for maintaining and restoring the natural family. Thus Section 39.001, Florida Statutes, provides that the purposes of Chapter 39 include:

> To assure to all children brought to the attention of the courts, either as a result of their misconduct or because of neglect or mistreatment by those responsible for their care, the care, guidance, and control, preferably in each child's own home, which will best serve the moral, emotional, mental, and physical welfare of the child and the best interests of the state.
>
> 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; and, when the child is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents; and to assure, in all cases in which a child must be permanently removed from the custody of his parents, that the child be placed in an approved family home and be made a

member of the family by adoption.

Section 39.001(b)(c), Florida Statutes,(1980).

In addition to Florida's Juvenile Justice Act, the legislature has mandated that H.R.S. administer a program for dependent children and their families. Section 409.145, Florida Statutes, (1978). In so mandating, the legislature set forth goals towards which the program was to be directed, again clearly indicating its preference for reunification of the natural family.

> "The department shall conduct, supervise and administer a program for dependent children and their families. The services of the department are to be directed toward the following goals:
>
> a) The prevention of separation of children from their families.
>
> b) The reunification of families who have had children placed in foster homes or institutions.
>
> c) The permanent placement of children who cannot be reunited with their families or when reunification would not be in the best interest of the child. . . ."

Section 409.145(1), Florida Statutes,(1978).

The statute goes on to enumerate those dependent children who shall be subject to the protection, care, guidance, and supervision of H.R.S. including "any child who has been temporarily or permanently taken from the custody of his parents. . . in accordance with those provisions in Chapter 39 that relate to dependent children," Section 409.145(2)(a), Florida Statutes. Circuit courts exercising juvenile jurisdic-

tion are mandated by Section 409.145(4) to cooperate with H.R.S. in carrying out these purposes and intent.

The final statute which carries out the theme of family reunification is the foster care review statute, which serves this purpose:

> "It is the intent of the Legislature that permanent placements with their biological or adoptive families be achieved as soon as possible for every child in foster care and that no child remain in foster care longer than 1 year. It is the intent of the Legislature, therefore, to help ensure a permanent home for children in foster care by requiring a performance agreement and a periodic review and report to the court on their status."

Section 409.168(1), Florida Statutes, (1980).

The trial court's order violates the purposes of the above-referenced Statutes. H.R.S. has a statutory obligation to provide services with the goal of reuniting the natural family, and the court's continuing jurisdiction over the children must be directed primarily to that goal, and secondarily to the goal of providing the child with a permanent family home if reunification is not possible.

An additional guide to determining legislative intent so that these statutes can be correctly interpreted is the legislative history and its surrounding circumstances. 1 Sutherland, Statutory Construction, Section 1931. Ideal Farms Drainage Dist. v. Certain Lands, 19 So. 2d 234 (Fla. 1944). In construing a statute, resort may be had to the public history of the times and

the conditions under which the statute was enacted. Sheip v. Amos, 130 So. 699 (Fla. 1930).

Both the legislative history and the conditions of the times support the need for family reunification.

The Committee Report on HB 1648 later codified as Section 409.168 (1980) states the following:

> "Chapter 409 of the Florida Statutes is replete with statements indicating the intent of the Legislature to be that children have a right to the security and stability of a permanent family home and that the services of the department are to be directed toward the reunification of families who have had children placed in foster homes, if at all possible."

Appendix, Committee Report, 1.

E. Conclusion and Relief Requested

The certified question of the Fifth District Court of Appeals should be answered in the affirmative. Chapter 84-311, Laws of Florida (1984) clearly resolves any conflict that may have existed between Chapter 39, Florida Statutes (1983) and Section 409.168, Florida Statutes (1983) by the amendment to Section 39.41(1)(d), Florida Statutes(1983) by the requirement that after a child has been adjudicated dependent all further proceedings shall be governed by Section 409.168, Florida Statutes (1983).

A performance agreement or plan is a prerequisite to a valid cause of action for permanent commitment proceedings pursuant to Section 39.41(1)(f)1.a.

Further, the certified question is disposed of by the court's recognition of legislative history, philosophy, and policy surrounding dependent children and the consistent pronouncements of the United States and Florida Supreme Court regarding the natural God-given right to family integrity and to efforts by the state to reunite and preserve the family unit.

"Performance agreements are designedly addressed to improving the parental capacity of a displaced parent who has no other control over what may be considered the best interest of the child. . . .For good reasons the legislature preferred an active process toward reconciliation or permanent separation over a passive system on relying upon a judge's perception of

the 'best interest of the child'. That naked test demands more wisdom than Solomon's, and its discriminatory ramifications, penalizing the poor be reparenting their children to more affluent candidates, are distressingly evident." In the Interest of A.B., Id at 993.

Respectfully submitted.

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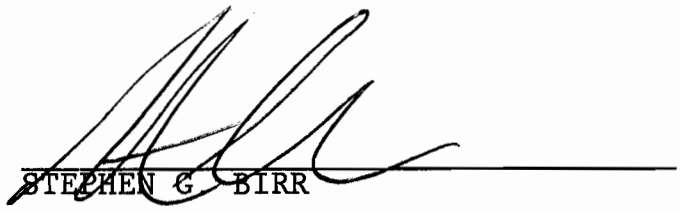
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was mailed by U.S. Mail to the following: WILLIAM G. LAW, Esquire, Attorney for Guardian Ad Litem, Fifth Circuit, P.O. Box 57, Groveland, FL 32736; LOUIS F. HUBENER, Esquire, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, FL 32301; PAMELA MILES, Program Director, Guardian Ad Litem Program, Office of State Courts Administrator, Supreme Court Building, Tallahassee, FL 32301; HONORABLE ERNEST C. AULLS,JR., Circuit Judge, Lake County Courthouse, 315 W. Main Street, Tavares, FL 32778; and JAMES A. SAWYER, JR., Esquire, District III Legal Counsel, 1000 N.E. 16th Avenue, Gainesville, FL 32609 this 31 day of December, 1984.



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