IN THE SUPREME COURT OF FLORIDA

MARJORIE MAE GERRY,

Petitioner,

vs.

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

Respondents. /

CASE NO: 66,192

5th DISTRICT COURT OF APPEAL
CASE NO: 84-573

REPLY BRIEF OF PETITIONER

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ISSUE

WHETHER EITHER A PERFORMANCE AGREEMENT OR A PERFORMANCE PLAN AS PRESCRIBED BY SECTION 409.168 IS PREREQUISITE TO PERMANENT COMMITMENT PROCEEDINGS PURSUANT TO SECTION 39.41(1)(f)1.a

ARGUMENT

I. UPON ADJUDICATION OF DEPENDENCY - 409.168 APPLIES

The answer to the certified question does not rely on whether the abuse of the child was so clear cut, "the consequence of which would be inevitable permanent commitment" as stated in In re: The Interest of C.B., 453 So. 2d 272 (Fla. 5th DCA 1984, S.C. Docket No. 65,790), a standard which relies substantially on subjective opinion, nor indeed whether the best interests of the children overrides any parental rights in being reunited with their child. Rather, the answer to the certified question as it relates to the particular facts of this case is clearly answered in the affirmative by Section 39.41(1)(d), Florida Statutes(1983) as amended by Chapter 84-111, Laws of Florida (1984) as it states that when any child is adjudicated by a court to be dependent:

> (a)fter the child is committed to temporary custody of the Department, all further proceedings and under this Section shall additionally be governed by Section 409.168

II. FAIR APPLICATION OF 409.168 TO ABUSE AND NEGLECT CASES

The Respondents claim that the Legislature has recognized that in some cases of abuse or neglect, the prompt permanent commitment of the child may be justified. The flaw in that argument is that the Legislature has not defined those terms in varying degrees of abuse or neglect to the child. Briefly stated, "abuse" is defined as any willful act which significantly impairs a child's health. Section 39.01(2), Florida Statutes (1983).

Briefly stated, "neglect" is defined as deprivation which significantly impairs a child's health. Section 39.01(27), Florida Statutes (1983).

Inasmuch as the legislature has not definitionally distinguished between degrees of abuse or neglect, the provisions of Chapter 39 and Section 409.168 should be applied by the courts in an even same manner in those cases.

No where contained within the detailed provisions of Section 39.41, Florida Statutes (1984) or Section 409.168, Florida Statutes (1984) which the Legislature has paid considerable attention, is there any indication of any disparity of treatment accorded to a "clear" case of abuse or neglect. The definitions of "abuse" and "neglect" as provided in Chapter 39, Florida Statutes (1983) and (1984) are consistent with the spirit, meaning, and clear intention of the legislature with regard to the even handed application of Section 409.168, Florida Statutes to abuse and neglect cases.

III. PERFORMANCE AGREEMENT PROTECTS RIGHTS

It is undisputed that the courts have held that a parent has basic fundamental rights in their child and that the overriding concern is for the ultimate welfare or best interest of the child.

The child's interests are protected by the court ordering permanent commitment after H.R.S. and the court have followed the prescribed legislative directions and procedural bases which

they are bound to do. In re: Interest of T.C., 417 So. 2d 775 (Fla. 3rd DCA 1982). On the other hand, the mother's rights as a natural parent are safeguarded to the extent of giving her the opportunity of participating in the performance agreement process as set forth in Section 409.168. Not only are the mother's rights protected by adhering to this law but also the preparation of a performance agreement between the parent and H.R.S. is essential to the strategy for securing a permanent home for the child, wherever it may be. In re: Interest of C.T.G., 460 So. 2d 495 (Fla. 1st DCA 1984). Judge Zehmer wrote in a special concurring opinion in C.T.G. that the facts of a case may strongly suggest that regardless of the holding by the court, the case will ultimately result in permanent commitment of the child. "For this reason the temptation is great to let the appealed judgment stand, but I am convinced that the majority opinion is a correct interpretation of the law and to hold otherwise would create bad precedent leading to a substantial erosion of the laudatory purpose underlying the 1980 legislation requiring performance agreements." In re: Interest of C.T.G., at 498.

IV. FACTUAL/HYPOTHETICAL SITUATIONS; EXCEPTIONS TO 409.168

In the case at bar Miss Gerry's child was adjudicated dependent and placed in the temporary care, custody and control of the Department of H.R.S. for placement in a licensed foster home. (App. 1)

The Respondents briefs pose a variety of different factual and

hypothetical situations other than the precise situation in the case at bar in an attempt to have this Court reach their desired result under Section 39.41(1)(d), Florida Statutes (1983) and (1984). As will be seen in the following paragraphs, to give the meaning to the statutes as the Respondents suggest would be to give them a strained meaning and one that is unreasonable and illogical under the statutes. When the words of a statute are plain and unambiguous the courts must give them their plain meaning. If the language of a statute is clear and not entirely unreasonable or illogical in its operation, the court has no power to go outside the statute in search of excuses to give a different meaning to the words used in the statutes. Vocelle v Knight Brothers Paper Co., 118 So. 2d 664 (Fla. 1st DCA 1960).

The various factual and hypothetical situations framed by the Respondents to show that since a performance agreement may not be required in every imaginable instance, then a performance agreement is not required in this case, must fail. The 1984 statute itself contains in subsection (8) "Exemptions" which indicates that 409.168 does not apply to:"(a) minors who have been placed in adoptive homes by the department or by a licensed child placing agency; or (b) minors who are refugees or entrants to whom federal regulations apply and who are in the care of a social service agency." Section 409.168(8),Florida Statutes (1984).

The only exception on the face of Section 409.168, Florida Statutes (1984) is the situation where "(a) a performance agreement

shall be prepared but not need be submitted to the court for a child who will be in care no longer than thirty days unless that child is placed in foster care a second time within a twelve month period". Section 409.168(3)(e), Florida Statutes (1984).

The following are the factual and hypothetical situations posed by the Respondents:

A. Respondent Guardian Ad Litem states that Miss Gerry "beat her child senseless, rendering him blind, mentally retarded and physically handicapped." (P. 4 of brief). This is an outright distortion. There has been absolutely no finding by the court that Miss Gerry ever beat her child or in any way ever intentionally harmed him. On the other hand, the Respondent Guardian Ad Litem has failed to mention that it was Miss Gerry who along with friends took her son to the hospital; that she was very cooperative with the department; and that she appeared very affectionate towards her son and expressed a desire to have him returned to her. State of Florida, Department of H.R.S., Pre-Disposition Report, December 19, 1983.

> Children rarely enter Foster Care because their parents wanted to hurt them. Usually, Foster Care placements are related to stressful life circumstances, inadequate parenting and coping skills, or the threat that a particular child represents to another important relationship of the parent.
>
> HRS Foster Care HRSM 175-12, 2-28 (May 1, 1982)

B. On page six (6) of Respondent H.R.S.'s brief it states that if a performance agreement or plan had been in place the trial

judge could have exercised his powers of modification to do what he did i.e. that is if the allegations of abuse were sustained he would terminate her parental rights whether a performance agreement was in place or not.

This factual distortion purports to extinguish an agreement which factually never existed in this case. Even if it had existed, it is certainly not the intent of the legislature that the court prohibit the parties from entering into a performance agreement merely when H.R.S. and the Guardian Ad Litem cannot agree to the creation of a legitimate performance agreement between the natural parent and H.R.S. The Guardian Ad Litem has no standing under 409.168 to thwart the performance agreement, as it merely signs it. Section 409.168(2)(g), Florida Statutes (1983) and (1984).

Since the legislative intent of the performance agreement is to reunite children with their natural families whenever possible, it logically follows that the intent of the legislature in giving the court the authority to amend or modify the performance agreement pursuant to Section 409.168(3)(d)5, Florida Statutes (1984) is to better reflect the needs of the parties to the performance agreement rather than to prohibit or discourage the parties from entering into one. The legislative intent is the polestar by which the courts must be guided and that intent shall be carried into effect to the fullest degree. 49 Fla. Jur. 2d, Statutes, Section 114.

C. On page twenty (20) of Respondent H.R.S.'s brief, it is

stated that "the action of the lower tribunal in ordering the Guardian Ad Litem to prosecute an action for permanent commitment is in effect the adoption of a (permanent placement) plan by the court".

The statute is clear that only in the event that the natural parents "will not or can not participate in the preparation of a performance agreement" shall a permanent placement plan be prepared. There is no dispute in this case that Miss Gerry would not or could not participate in the preparation of a performance agreement. On the contrary, she was ready and willing to do so. Section 409.168(4)(b), Florida Statutes (1984) gives some guidance as to what "will not or can not" means, as follows:

> In a case in which the physical, emotional, or mental condition or physical location of the parent is the basis for the development of a permanent placement plan, it is the burden of the social service agency to provide substantial evidence to the court that such condition or location has rendered the parent unable or unwilling to participate in the preparation of a performance agreement, either pro se or through counsel.

Further, H.R.S.'s own Foster Care Manual provides as follows:

> The use of a plan should be an exceptional situation, such as a parent who repeatedly refuses to participate, one who is critically ill, retarded, or whose whereabouts are unknown (after numerous inquiries by the Department).

HRS Foster Care HRSM 175-12,2-37 (May 1, 1982)

Furthermore, the statute is clear that a permanent placement plan takes the place of a performance agreement and must meet all the requirements provided for a performance agreement. The goal of both are the same i.e. reunify the child with his natural

parents if at all possible. The action of the lower tribunal in ordering the Guardian Ad Litem to prosecute an action for permanent commitment is certainly not consistent with the statutory requirements for the adoption of a permanent placement plan by the court.

D. Respondent H.R.S.'s suggestion on page eighteen (18) of its brief that the Order denying the performance agreement suggested "virtually total disagreement among the parties" is not consistent with the facts. Both H.R.S. and Miss Gerry had agreed that a performance agreement would be entered into. The Guardian Ad Litem had no standing whatsoever under 409.168 to object as it did, to the performance agreement. The fact that it objected to a lawful performance agreement was irrelevant. Further, there was no "disarray". There was no disagreement between H.R.S. and Miss Gerry. The court was simply of the opinion that there was a conflict between Chapter 39 and 409.168 and mindful of that conflict and the importance if the issues to the parties and to the court, it moved the case forward in hopes of an appellate resolution of the conflict which shall occur.

E. Respondent H.R.S. states that Section 39.41 provides that permanent commitment promptly after adjudication is one of the dispositional alternatives available to the court on adjudication of dependency. Respondent admits that this is uncommon and only a legal possibility.

Not only is it uncommon, it is entirely inconsistent with the facts of either this case or the Interest of C.B., supra.

The trial judge did not permanently commit either child immediately following adjudication in either case. Respondents have failed to cite any authority wherein permanent commitment occurred promptly after adjudication of dependency. Respondent refers to Noeling v State, 87 So. 2d 593 (Fla. 1956). However, this case merely recognizes the possibility of that situation occurring. This Court in fact quashed the lower court order permanently committing the child for subsequent adoption. Furthermore, at the time of the Noeling case, the legislature certainly had not enacted Section 409.168, Florida Statutes (1980) nor was Section 39.41(1)(d), Florida Statutes (1984) in effect. The situation recognized by Noeling should never arise given the intent of the legislature in expressly weaving together Section 39.41(1)(d), Florida Statutes (1984) and Section 409.168, Florida Statutes (1984) as it has.

A statute should be construed in its entirety and as a whole. It is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of the provision under construction and every part of the statute as a whole; from a view of the whole law in pari materia, the reviewing court will determine legislative intent. 49 Fla. Jur. 2d, Statutes, Section 115.

Miss Gerry's child was adjudicated dependent on January 5, 1984. (App. 1) The Order Appointing Counsel for her was not signed

by the court until January 9, 1984. (App. 2-3) Under the proposition posed by Respondents that permanent commitment could have been done immediately after adjudication of dependency it is entirely inconsistent with the facts and the law, as to do so would have terminated her parental relationship without benefit of counsel. This Court has held in In re: The Interest of D.B. and D.S., 385 So. 2d 83 (Fla. Sup. Ct. 1980) that there is no absolute right to counsel for indigent parents at the dependency hearing; only in permanent commitment proceedings or when the proceedings because of their nature may lead to criminal child abuse charges is there such right. This would have resulted in Miss Gerry's parental rights being served without benefit of counsel promptly after adjudication of dependency if the law was as suggested by the Respondents.

Simply the intent of Sections 409.168 and 39.41 (1983) and (1984) is not as so suggested by Respondents. The intent, meaning and spirit of the law is not that the parental rights of an indigent mother would be terminated before she has even had the opportunity to confer with counsel, plan her defenses and conduct discovery. Any uncertainty as to the legislature's intent should be resolved by an interpretation that best accords with the public benefit. 49 Fla. Jur. 2d Statutes, Section 114.

V. GERRY DISTINGUISHED FROM INTEREST OF C.B.

The Fifth District Court of Appeal in this case stated that In the Interest of C.B., supra, was controlling, however the facts

of the C.B. case are distinguishable from this case. In this case the child had been adjudicated dependent and committed to the temporary custody of H.R.S. and placed in a foster home. In C.B., supra, the child had been placed in an emergency shelter. H.R.S. contended in C.B. at the Fifth District Court level that Section 409.168 did not apply because the child had not been committed to the custody of H.R.S., but was in an emergency shelter. At the time of the C.B. decision, (opinion filed July 26, 1984), Chapter 84-311, Laws of Florida (1984)had not become law, its effective date being October 1, 1984. The Fifth District Court of Appeal did not consider the effect of Chapter 84-311, Laws of Florida (1984) either in C.B. or in this case. Clearly the effect of Chapter 84-311, Laws of Florida (1984) upon the facts of this case require that the after the child is committed to the temporary custody of the department all further proceedings are to be governed by Section 409.168 and that a performance agreement be done.

VI. PERFORMANCE AGREEMENT - OVERALL PLANNING TOOL

Respondent H.R.S. states that 409.168 is a remedial statute to ensure that children do not stay in foster care for too long. However, as stated on page eight (8) of Petitioner's Initial Brief the requirements of Section 409.168 are made mandatory and not directive by the provision for contempt in Section 409.168(3)(g)2, Florida Statutes (1983). This is reinforced by case law In re: Interest of V.M.C., 369 So. 2d 660 (Fla. 1st DCA 1979) and

Quaintance v Pingree, 394 So. 2d 161 (Fla. 1st DCA 1981) and the principle of statutory construction that when a provision is accompanied by a penalty for failure to observe it, the provision is mandatory. 30 Fla. Jur. Statutes, Section 10.

Furthermore, it is clear from a reading of the well-reasoned decisions in In re: The Interest of A.B., 444 So. 2d 981 (Fla. 1st DCA 1983) and In re: The Interest of C.T.G., 460 So. 2d 495 (Fla. 1st DCA 1984) and from a review of Section 409.168 from pre-1980 performance agreement days to the year 1984, that 409.168 has much more significance than merely to remedy the evil of prolonged stay in foster care.

The nature of 409.168 has changed drastically since the pre-1980 days when the statute in 1979 was strictly a review statute (when the stated sole intent of the statute was to ensure a permanent home for children in foster care by requiring a periodic review and report on their status Section 409.168(1), Florida Statutes (1979))to 1980 when the statute became a performance agreement and review statute (with the stated intent of insuring a permanent home for children in foster care by requiring a performance agreement and a periodic review of their status), to 1984 when the stated intent became (through the utilization of a performance agreement) to assure a permanent home for each child, preferably the child's own home or if that is not possible then an adoptive home, and further that if neither of those options are achievable, the child be prepared for long term foster care or

independent living.

Section 409.168, Florida Statutes(1984) now recognizes that long term foster care may be required. However, whether in the case of reuniting the child with his natural parent, or long term foster care or any other of the options available, a meaningful performance agreement is essential to the strategy of securing a permanent home for the children. In the Interest of A.B., supra, at page 991.

The performance agreement is a flexible document that is meant to cover a myriad of situations involving children in foster care. It is illogical to believe that the legislature meant to carve out of the heart of 409.168 the factual circumstances of the case at hand.

Not only is the performance agreement central to the strategy of securing a permanent home for the child, it is also a valuable tool specifically used by the social service agency responsible for the foster home placement in developing overall planning for the child and is utilized in situations both where the child is voluntarily and involuntarily placed in foster care; situations where the child has been abandoned, abused, neglected, i.e. clearly in any situation according to 409.168 when the child is placed in foster care, and clearly in any situation according to Section 39. 41(1)(d), Florida Statutes (1984) when the child is committed to the temporary custody of the department.

The performance agreement is not to be used selectively in the "easier" cases where there may be little or no abuse, abandonment

or neglect. In those cases there may well be as many or more difficult problems and decisions facing the department, the parents, relatives, etc., as there are in the cases of alleged "clear cut" abuse or neglect (the "harder" case).

The social service agency will have many of the same decisions to make in the "harder" cases as they will in the "easier" cases and the child of alleged severe abuse or neglect or abandonment may well need as much, or more, planning for the future as will the child who has not been subjected to the degree of abuse, abandonment or neglect. The performance agreement is designed to address those problems.

The input of the natural parents into the performance agreement process is certainly significant in the overall planning for the future permanence of the child as it provides the social service counselor with additional information and greater insight into the needs of the child and the family. Without this hopefully voluntary input from the natural parent, the agency may lose valuable insight into the conditions and circumstances that contributed to removal of the child from the home.

VII. H.R.S.'S SOCIAL WORKER DESIRED A PERFORMANCE AGREEMENT WITH MISS GERRY

The H.R.S. social worker, Cyndra S. Smith, who had personal knowledge of Miss Gerry and had conferred with her was willing to commit H.R.S. to the entry of a performance agreement even in the face of the Guardian Ad Litem's objection. It was Mrs. Smith who

along with Miss Gerry, jointly moved the court for a performance agreement.

CONCLUSION

VIII. MARJORIE MAE GERRY'S SON WAS ADJUDICATED DEPENDENT AND COMMITTED TO THE TEMPORARY CUSTODY OF THE DEPARTMENT AND PLACED IN FOSTER CARE.

Section 409.168, Florida Statutes (1983) clearly required a performance agreement at such time that a child was placed into foster care.

Any ambiguity or conflict that may have existed between Section 39.41, Florida Statutes (1983) and Section 409.168, Florida Statutes (1983) has been resolved by Chapter 84-311, Laws of Florida (1984) which amended Section 39.41(1)(d), Florida Statutes (1983) to make it clear that at such time that a child is committed to the temporary custody of the department, all further proceedings are to be governed by Section 409.168.

The legislative intent of Section 409.168, clear prior to the enactment of Chapter 84-311, Laws of Florida (1984), has been made crystal clear by the addition of the language indicating the preference for children to remain in their own homes.

The law is well established that once the intent of the legislature is made known, that intent shall be carried into effect to the fullest degree.

The mechanism to achieve the intent of the legislature is through the procedure established in Section 409.168 and the performance agreement.

As the issue certified by the Fifth District Court of Appeal

applies to this case, a performance agreement is a prerequisite to a permanent commitment proceeding to terminate Marjorie Mae Gerry's parental rights. The certified question should be answered in the affirmative and the decision of the lower tribunal should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner was mailed by U.S. Mail to: JAMES C. BLECKE, co-Counsel for B.B., a child and Guardian Ad Litem, Biscayne Building,suite 705, 19 W. Flagler Street, Miami, FL 33131; HON. ERNEST C. AULLS, JR., Lake County Courthouse, 315 W. Main Street, Tavares, FL 32778; LOUIS F. HUBENER, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, FL 32301; JAMES A. SAWYER, JR., District III Legal Counsel, Department of Health and Rehabilitative Services, 1000 Northeast 16th Avenue, Gainesville, FL 32609; PAMELA MILES, Program Director, Guardian Ad Litem Program,Office of the Courts Administrator, Supreme Court Building, Tallahassee, FL 32301; and to WILLIAM G. LAW, Counsel for Guardian Ad Litem, P.O. Box 57, Groveland, FL 32736 this 9 day of February, 1985.

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