Supreme Court of Florida

No. 66,192

MARJORIE MAE GERRY, Petitioner,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Respondent.

[August 30, 1985]

McDONALD, J.

We have for review Gerry v. Aulls, 457 So.2d 598 (Fla. 5th DCA 1984), which certified the following question of great public importance:

> 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.

Id. at 599. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the certified question in the affirmative.

The trial court adjudicated Marjorie Gerry's son dependent after the child had suffered severe physical abuse, resulting in blindness and brain damage, while in his mother's custody. Gerry petitioned the district court for a common law writ of certiorari on the ground that the trial court departed from the essential requirements of law by denying her motion to require the Department of Health and Rehabilitative Services (HRS) to enter into a performance agreement with her so that she might regain custody of her son. The district court denied Gerry's petition on the basis of its holding in In re C.B., 453 So.2d 220 (Fla. 5th DCA 1984), that HRS need not prepare a performance agreement with a parent before bringing permanent commitment proceedings and

terminating parental rights. The district court certified the same question presented in C.B.

In Burk v. Department of Health & Rehabilitative Services, No. 65,790 (Fla. Aug. 30, 1985), we quashed C.B. and held that section 409.168, Florida Statutes (1983), requires that a performance agreement be prepared in every case where a child is in the custody of a social service agency and in foster care. That holding is equally applicable here. We recognize that the child in this case has suffered horrible abuse from which he will probably never recover. Under these circumstances HRS might be justified in preparing a performance agreement for the permanent commitment of the child for adoption because a safe return of the child to his parents is untenable. § 409.168(3)(a)(1). A performance agreement must be offered to Gerry, even if not with a view toward returning custody to her.

Accordingly, we answer the certified question in the affirmative, quash the decision under review, and remand for further consistent proceedings.

It is so ordered.

ADKINS, OVERTON and SHAW, JJ., Concur
ALDERMAN, J., Dissents with an opinion with which BOYD, C.J., and EHRLICH, J., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ALDERMAN, J., dissenting.

I dissent for the reason stated by me in my dissent to Burk v. Department of Health and Rehabilitative Services, No. 65,790 (Fla. Aug. 30, 1985).

BOYD, C.J., and EHRLICH, J., Concur

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fifth District - Case No. 84-573

Stephen G. Birr, Tavares, Florida,

for Petitioner

James A. Sawyer, Jr., District III Legal Counsel, Gainesville, Florida, for Department of Health and Rehabilitative Services; Jim Smith, Attorney General, and Louis F. Hubener, Assistant Attorney General, Tallahassee, Florida, for the Honorable Ernest C. Aulls, Jr., Circuit Judge; Pamela Miles, Tallahassee, Florida, and James C. Blecke, Miami, Florida, for B.B., he Child, and Donna Richey, The Guardian Ad Litem for the Child,

Respondents

Christina A. Zawisza, Mark K. Williams, James Dulfer, Henry George White, Jeffrey H. Barker and Brent R. Taylor, Tallahassee, Florida,

for Florida Legal Services, Inc., Amicus Cuiae