IN THE SUPREME COURT OF FLORIDA

HUBERT EARL WILLIAMS,

Petitioner,

vs. CASE NO. 66,871

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

JAMES A. SAWYER, JR.
DHRS District III Legal Counsel
1000 Northeast 16th Avenue
Gainesville, Florida 32609

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

PREFACE

The Petitioner is the natural father, Hubert Earl Williams. Hubert Earl Williams and his wife, Carol Williams, will be referred to as the natural father and the natural mother, respectively. The Department of Health and Rehabilitative Services, State of Florida, will be referred to as HRS.

In Respondent's Supplementary Statement of Facts, the symbol "R" will denote page numbers in the record on appeal in the lower tribunal, while the symbol "BP" will refer to Petitioner's Amended Brief on Merits .

SUPPLEMENTARY STATEMENT OF FACTS

PRELIMINARY NOTE: Respondent does not dispute and will not restate the facts recited by Petitioner, but includes the following additional facts, with citations to the record on appeal in the lower tribunal.

In May, 1982, the natural father, Hubert Earl Williams, went to Hollywood, Florida and stayed at the residence of his mother-in-law, Adeline Ryder (R 85). Adeline Ryder had no knowledge that he was coming; he had made only one unsuccessful attempt on the previous day to advise her that he and the children were coming to stay with her (R 85).

When the natural father left the home of Adeline Ryder he gave no notice that he was leaving (R 86). His sister-in-law, Debra Jean Williams (Jeanie) (R 87, 140) appeared at the home one morning, and the natural father left with her (R 87, 88). The children were left behind (R 88). In addition to the children involved in these proceedings, the natural father acknowledges that he is the father of two other children whose mother is Debra Jean Williams (R 140). Debra Jean Williams was, and at the time of trial continued to be, the wife of the natural father's brother (R 140). According to the natural father's testimony, his brother had no objection to this relationship (R 140).

After leaving the children with Adeline Ryder in May of 1982, the natural father, by his own admission, made no contact with her to let her know where he was living, never sent any money,

letters, gifts or presents, nor made any phone calls, and acknowledged that he had no real reason why he did not contact them (R 142). He left no forwarding address and made no arrangements regarding the children's return to himself (R 88). As long as Adeline Ryder retained the children, she never heard from him again (R 88).

The natural father learned for the first time that his children were in the custody of HRS when he received a letter from HRS; on receipt of the letter he did make contact with HRS by telephone and on the next day, March 15, 1983, met with Marion Sumner of HRS (R 133). At that time the agency was engaged in preparing to file a petition for permanent commitment of the children, and he advised the agency that he would not sign any release, but wanted to get his children back (R 134).

SUMMARY OF ARGUMENT

PRELIMINARY NOTE: Respondent has significantly reworded the issues stated by Petitioner.

ISSUE I

THE OPINION UNDER REVIEW IS NOT IN CONFLICT WITH IN RE: THE INTEREST OF C. T. G., 467 So. 2d 495 (Fla. 1st DCA 1984).

In C. T. G., the First DCA found reversible error in granting permanent commitment for subsequent adoption with respect to the child who had been admittedly placed in foster care for six months with no attempt by HRS to enter into a performance agreement with anyone.

In the case under review, the children were placed in foster care and a performance agreement entered into with the mother during a clearly and convincingly proved period of abandonment by the father. The issue presented to the trial court and the lower tribunal was whether the father's discovery during the agency's diligent search at the commencement of permanent commitment proceedings gave rise to a separate mandatory performance agreement obligation respecting the father, when the father had abandoned the children, his whereabouts were previously unknown, and the performance agreement obligation satisfied by a performance agreement with the mother. The trial judge and the lower tribunal held the father not entitled of right to a performance agreement.

While the lower tribunal in its decision relied heavily on its opinion in In Re C. B., Burk v. DHRS, 453 So. 2d 220 (Fla. 5th

DCA 1984, quashed, Supreme Court of Florida, Case No. 65,790, August 30, 1985), the correctness of the result reached is independent of the apparent reliance on the now repudiated Burk. An overly literal reading of Burk would prohibit the freeing for adoption of any abandoned child whose parents could not be located, since the statutory performance agreement requirement could never be met. The agency's preparation of a "plan" following the belated appearance of the father is the substantial equivalent of this Court's suggestion in Gerry v. Department of Health and Rehabilitative Services, Case No. 66,192, August 30, 1985.

Even if its reasoning be disapproved, the result reached in the trial court and lower tribunal should be allowed to stand.

ISSUE II

EVEN IF THE OPINION UNDER REVIEW IS DEEMED IN CONFLICT WITH C. T. G., THE FACTS OF THIS CASE DO NOT REQUIRE THAT THE FATHER BE TENDERED A PERFORMANCE AGREEMENT.

Respondent will present no separate argument on this point, as the response is included as an essential portion of the response to Issue Number I.

ISSUE III

THE EVIDENCE BEFORE THE LOWER TRIBUNAL CLEARLY AND CONVINCINGLY PROVED ABANDONMENT BY THE FATHER AND CLEARLY AND CONVINCINGLY PROVED THAT PERMANENT COMMITMENT FOR SUBSEQUENT ADOPTION WAS THE DISPOSITIONAL ALTERNATIVE WHICH MOST SURELY ADVANCED THE BEST INTEREST OF THE CHILDREN.

In the absence of a transcript of the trial proceedings, this Court may not consider a request to re-weigh the sufficiency

or the weight of the evidence.

The father's abandonment was proved by eye witness testimony, including the testimony of the father. The factual basis for the finding of abandonment was not contested factually in the lower tribunal.

In chosing among the available dispositional alternatives, the prior and present conduct of the parties, including the abandonment by the father, and the strong inferences regarding future conduct provided a clear and convincing foundation for the trial judge's conclusion that permanent commitment for subsequent adoption was manifestly in the children's best interest.

ARGUMENT

ISSUE I

THE OPINION UNDER REVIEW IS NOT IN CONFLICT WITH IN RE: THE INTEREST OF C. T. G., 467 So. 2d 495 (Fla. 1st DCA 1984).

Any conflict appearing between the opinion under review and the opinion in In The Interest of C. T. G., 467 So. 2d 495 (Fla. 1st DCA 1984) is more apparent than real. The cases considered legally distinguishable facts, and the results reached are supportable on entirely separate points of law.

In C. T. G. the First DCA dealt with a straightforward noncompliance with statutory mandate. In C. T. G., the child had admittedly been in foster care for six months when permanent commitment proceedings were commenced. In C. T. G. the opinion recited the uncontested fact that at no time during this foster care stay was a performance agreement prepared or executed. In C. T. G. the trial court recognized that it was departing from a statutory mandate, which it attempted to explain by stating that the reason a performance agreement was not required was strictly limited to the facts of the case. Reciting these facts, the First DCA correctly reversed.

In the case under review, the lower tribunal did not include in its published opinion a recital of the legally significant facts established in the trial court. Instead, it approvingly recited the conclusions and inferences drawn by the trial judge, and then affirmed, not by addressing the specifically limited issue,

but in general reliance on the now reversed In Re. C. B., 453 So 220 (Fla. 5th DCA 1984), quashed, Florida Supreme Court case No. 65,790, August 30, 1985.

Despite the loss of the loss of the authority cited as precedent, the lower tribunal's decision in sustaining the trial judge can and should be affirmed.

The specific issue presented to the lower tribunal was not the broad issue stated in the certified question. A much more limited issue was and remains available as a basis for decision, that issue being whether a father who had abandoned his children and whose children have been placed in foster care and subject to a performance agreement between HRS and the mother, and whose whereabouts is discovered during the agency's diligent search at the commencement of a permanent commitment action, is entitled of right to a performance agreement respecting the children prior to the prosecution of an action for permanent commitment.

If this statement of the issue be answered in the negative, the trial judge (and not HRS) has the power to find on the evidence before him that the permanent commitment petition should be denied and the father given the opportunity to enter into a performance agreement. The trial judge also has the opportunity to determine that the evidence proves the children at such risk of future harm that a second performance agreement, this time with the abandoning father, offers no reasonable prospect of success. See In The Interest of A. B., 444 So. 2d 981 at 993, 994 (Fla. 1st DCA 1983)

approvingly citing authorities that harm to children may be proved prospectively.

In this case the agency had fulfilled its statutory obligation to enter into a performance agreement, and had entered into such an agreement with the mother. The mother was the parent in actual possession of the children and was the parent who was attempting, however unsuccessfully, to perform a parental function.

Fla. Stat. 409.168 requires the entry of a performance agreement or plan within thirty days following entry of a child into foster care. Further, this statute contemplates entry into a performance agreement with an available parent. This statute does not specifically treat the situation where one parent is present and willing to agree, and the other parent cannot be located. However, no delay in offering the performance agreement is authorized for this situation.

In this case the father became involved not through his own efforts in communicating with his family, but in direct consequence of the agency's diligent search for him while preparing an action for permanent commitment. The purpose of this diligent search is to afford the father, if he can be located, an opportunity to appear and present his defenses to the permanent commitment action. Where all other statutory preconditions to permanent commitment have been satisfied, including the performance agreement obligation, the father is not prejudiced by being called upon to demonstrate that he does in fact have meritorious defenses

to present. Had he not been located, the action could have proceeded to final judgment without further delay, and the children placed for adoption. In the absence of more specific statutory requirement, it is unfair to the children and contrary to legislative intent to subject the children to yet another round of foster care before giving the trial judge an opportunity to determine if the father can successfully complete a performance agreement. If he can, the trail judge can then abate the proceedings to see if he will.

In the instant proceedings the trial court found and the lower tribunal affirmed that the children had been abandoned by the father, and that the children, if returned to him, would be at risk of further abandonment and neglect. This decision was found by the trial court by clear and convincing evidence following a full trial on the merits, at which the father, with assistance of counsel, had every opportunity to present such evidence as he had that he could comply with a performance agreement. On review, that finding was affirmed. Both decisions are correct, and should be allowed to stand.

ISSUE II

EVEN IF THE OPINION UNDER REVIEW IS DEEMED IN CONFLICT WITH C. T. G., THE FACTS OF THIS CASE DO NOT REQUIRE THAT THE FATHER BE TENDERED A PERFORMANCE AGREEMENT.

Respondent will present no separate argument on this point, as the response is included as an essential portion of the response to Issue Number I.

ISSUE III

THE EVIDENCE BEFORE THE LOWER TRIBUNAL CLEARLY AND CONVINCINGLY PROVED ABANDONMENT BY THE FATHER AND CLEARLY AND CONVINCINGLY PROVED THAT PERMANENT COMMITMENT FOR SUBSEQUENT ADOPTION WAS THE DISPOSITIONAL ALTERNATIVE WHICH MOST SURELY ADVANCED THE BEST INTEREST OF THE CHILDREN.

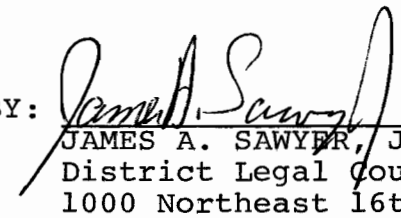
In the absence of a transcript of the trial proceedings, this Court may not consider a request to re-weigh the sufficiency or the weight of the evidence. Stack v. LaReau, 433 So. 2d 66 (Fla. 4th DCA 1983), Pape v. Pape, 444 So. 2d 1058 (Fla. 1st DCA 1984). In these proceedings, while a complete record was before the lower tribunal, such a complete record was not brought by Petitioner before this Court, thus precluding further review of the weight or sufficiency of the evidence adduced at trial.

CONCLUSION

This Court should hold that the performance agreement requirements of Fla. Stat. 409.168 have been satisfied by the entry into a performance agreement by the mother and the Department of HRS, and that the belated appearance of the father created no new performance agreement obligation or entitlement. The learned trial judge had discretion to order HRS to enter into a performance agreement with the father, or to refrain from so ordering. On the facts of this case the trial judge did not abuse his discretion, and the result (if not the reasoning and authority cited) of the Fifth DCA should be affirmed.

Respectfully submitted,

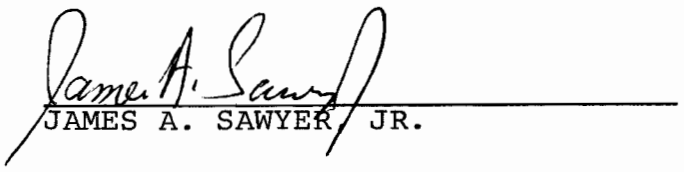
STATE OF FLORIDA, DEPARTMENT OF
HEALTH & REHABILITATIVE SERVICES

BY: 

JAMES A. SAWYER, JR.
District Legal Counsel
1000 Northeast 16th Avenue
Gainesville, Florida 32609
904/395-1013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Respondent's Answer Brief has been furnished to DAVID L. RANKIN, ESQ., Withlacoochee Area Legal Services, Inc., Post Office Box 1597, Bushnell, Florida 33513 by U.S. Mail delivery the 8th day of September, 1985.



JAMES A. SAWYER, JR.