IN THE SUPREME COURT OF FLORIDA

HUBERT EARL WILLIAMS, :

Petitioner, :

vs. : CASE NO. 66,871

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, :

Respondent. :

ANSWER BRIEF ON JURISDICTION

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STATEMENT OF FACTS AND PROCEDURE

The Respondent would supplement Petitioner's Statement of the Case and of the Facts by adding the following, all taken from the trial judge's Order of Permanent Commitment (App. 7 - 11).

The children's natural father, Hubert Earl Williams, left the children at the home of their maternal grandmother near Fort Lauderdale, Florida in June, 1982. At the time the children's father left the children with the maternal grandmother, the grandmother's husband was terminally ill with cancer. The children's natural father left the children at the home of the grandmother and departed with his girl friend and newborn child from that union without giving the grandmother any notice that he was leaving, and without giving her any address where he could be located. The natural father has not seen the three subject children since the date that he left them with the grandmother in June, 1982.

The children's mother moved in with the grandmother and the children at about the time that the father left the children with the grandmother. The children lived with the mother and grandparents until approximately August, 1982, when the mother and the children relocated to the Wildwood, Sumter County, area. The children lived with their mother, without any support or any other contact from the children's father, until November 3, 1982, when the mother voluntarily placed them with the Department.

After the Department had custody of the children, it began a diligent search and inquiry to determine the residence of the

natural father and it was unable to locate him until March, 1983. At the time the Department located the children's natural father, approximately nine months had passed since he relinquished the children to the grandmother. He had not seen, visited, supported or attempted to contact the children, their mother, the grandmother, or the Department during that entire period of time.

The children's natural father testified that he left the subject children with the grandmother in June of 1982 due to extreme financial hardships. Since that time, he has fathered two new children from his current relationship, and his current financial situation is not vastly different from the way it existed in June of 1982.

Prior to the final hearing the children's natural mother, Carol Williams, executed and filed with the court written waivers and surrenders consenting to the termination of her parental rights in the children and further consenting to their permanent commitment to the State of Florida, Department of Health and Rehabilitative Services, for subsequent adoption. At the final hearing, the Court received as evidence those written waivers of the natural mother for each of the three children.

When the father was located by the Department of HRS, he requested that the permanent commitment proceedings be delayed and that he be allowed to enter into a Performance Agreement to attempt to regain custody of his children. The Department of HRS declined to do so, and the court has declined to order the Department to enter into a Performance Agreement with the father.

The trial judge found that the father had abandoned the children, that the mother had voluntarily surrendered the children, that the children if returned to the father would be substantially likely to be neglected or abandoned by the father in the future, and that it was manifestly in their best interest that the children be permanently committed to the Department of HRS for subsequent adoption.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CAUSE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH AN OPINION OF THE FIRST DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.

The petitioning father attempts to invoke the jurisdiction of this court based on an alleged express and direct conflict of the opinion of the lower tribunal with In Re The Interest of C. T. G., 467 So 2d 495 (Fla. 1st DCA 1984). The requisite jurisdictional conflict is in fact not present, because an examination of the two opinions in question clearly reveals that these two District Courts of Appeal have ruled on two separable and distinct points of law, arising on clearly distinguishable factual bases, and the two opinions are not in conflict.

The opinion of the First District Court of Appeal, In The Interest of C. T. G., supra, reveals that when HRS filed its Petition for Permanent Commitment, the child had been in foster care for roughly six months, from March through September of 1982. During this period of time, the opinion recites that the agency had not participated in the execution of a Performance Agreement (App. 4). The opinion also recites that this was the third time that C. T. G. had been in foster care, with two intervening placement attempts, one with the mother and one with a great-aunt and great-uncle, having both failed.

The C. T. G. opinion makes no reference whatsoever to the father of the child. The agency originally obtained custody of C. T. G. from the mother, and the agency maintained contact at some

level with the mother from the initial adjudication of dependency one month after the child's birth in June, 1977, until permanent commitment proceedings began on September 30, 1982. Based on the provision of Fla. Stat. 409.168(3)(a) it was with the mother that the First DCA found HRS obliged to enter into a Performance Agreement. The First DCA found that the child had been in foster care for six months and that no Performance Agreement with the mother had been undertaken, and for this reason reversed the judgment of permanent commitment.

The opinion of the lower tribunal is quite different. In this case the opinion does not recite the child to have been in foster care, and the opinion of the lower tribunal makes no mention of the mother of the child. Addressing itself exclusively to the father, the Fifth DCA found these children abandoned, and to be in danger of further abandonment if returned to him. The lower tribunal relied upon its earlier opinion In Re C. B., Burk v. DHRS, 453 So 2d 220 (Fla. 5th DCA, 1984), Supreme Court Case No. 65,790, to reach its decision affirming the permanent commitment. In its earlier opinion, the Fifth DCA had rejected the proposition that the mere taking custody of a child by HRS for emergency shelter triggered a Performance Agreement requirement, and held that in a clear case of child abuse or abandonment, a Performance Agreement was not required as a condition precedent to permanent commitment. The court held that permanent commitment was available as a dispositional alternative upon a finding of dependency.

In the case under review, the Fifth DCA did not consider the mother, who had voluntarily placed the children in foster care and subsequently surrendered the children for permanent commitment and adoption, but instead focused solely on the father. With respect to the mother, the full record would reveal that the agency and the mother did enter into a Performance Agreement, fully complying with the statutory requirements. The father, however, was by his own choice not available to enter into a Performance Agreement, as he had abandoned the children, leaving no indication as to where he would be or how he might be found, and making absolutely no effort to find or communicate with his children. In reaching the decision below, the Fifth DCA has clearly treated the father as though the children were in emergency shelter rather than foster care. The agency did not receive or take the children from him, and he by his own choice was not available to work with the agency toward reunification.

Fla. Stat. 409.168(3) does not require Performance Agreements for children in emergency shelter, but only for children placed in foster care.

Both the trial court and the lower tribunal have given affect to the legislative intent that stay in foster care be minimized and that permanent homes be found for children as promptly as possible, by clearly and effectively distinguishing the status of the mother and father in this case. With respect to the mother, from whom the agency received the children, the statutory requirements were clearly met and she has not appealed the judgment.

With respect to the father, both the trial court and the lower tribunal have treated him as though the children were in emergency shelter. He was accorded a full evidentiary proceeding on his abandonment of the children and his possibilities of reconciliation and rehabilitation, on notice and pleadings placing permanent commitment properly at issue. The lower tribunal affirmed the trial judge's decision that the children were abandoned, and that return of the children to him would expose these children to substantial risk of further abandonment and neglect.

The First DCA's opinion in The Interest of C. B. is on its face limited in application to children in foster care; the opinion of the lower tribunal does not recite that the children had previously been adjudicated dependent or were in foster care, or that during the father's abandonment the agency had worked with the mother and had fully complied with all Performance Agreement requirements. The opinion below merely recites that the children were abandoned by the father, and would be in substantial danger of further abandonment and neglect if returned to him.

The concurrent appearance of the opinion below with that of the First DCA in The Interest of C. B., supra, creates no express and direct conflict with the decisional law of this state.

The lower tribunal, in the opening paragraph of its opinion, concluded the paragraph with the following:

> We acknowledge a conflict with our sister court on this point. See In Re C. T. G., 460 So.2d 495 (Fla. 1st DCA 1984).

The point is that HRS need not enter into a Performance Agreement

prior to seeking a termination of parental rights, pursuant to section 409.168, Florida Statutes (1983), where it appears the child has been abandoned or abused, and returning the child to the custody of its parents is not a feasible alternative.

While the lower tribunal made this acknowledgement, it did not expressly certify conflict to exist, and the language of Petitioner's Notice To Invoke Discretionary Jurisdiction tracks not Fla. R. App. P. 9.030(a)(2)(A)(VI), but instead invokes Fla. R. App. P. 9.030(a)(2)(A)(IV). Because the opinion of the First DCA is on its face limited to children in foster care, while the decision of the lower tribunal does not recite or suggest that the children are in foster care, no express and direct conflict is presented, and the conflict "acknowledged" by the lower tribunal is in fact not supported on the face of the two issued opinions.

SUMMARY OF ARGUMENT

The opinion of the lower tribunal is not in express and direct conflict with In Re The Interest of C. B., 453 So 2d 220 (Fla. 1st DCA 1984), because the opinion of the First DCA is limited on its face to children in foster care, while the opinion of the lower tribunal makes no suggestion that the subject children are in foster care.

There is further no conflict because the facts of the cases are distinguishable; in the First DCA case, In Re C. T. G., supra, the agency had kept the child in foster care for some six months, knowing where the mother was and having worked with her for a substantial period of time, without doing a Performance Agreement, while in the instant case the agency had performed all its obligations with respect to the non-appealing mother, but had had no opportunity to deal with the voluntarily absent father. From the father's perspective the children were still in emergency shelter, as his derelictions and rehabilitative possibilities were litigated for the first time at the permanent commitment hearing, as would be the case in a proceeding commencing permanent commitment under Fla. R. Juv. P. 8.810.

Thus, there is no express and direct conflict of decisions, no certification of express and direct conflict by the lower tribunal, and the "acknowledgement" of conflict by the lower tribunal appears to rely on portions of the record not recited in the issued opinion, and is in fact not supported by the two issued opinions.

CONCLUSION

As the opinion of the lower tribunal creates no express and direct conflict in the decisional law of this state, this court is without jurisdiction and the Petitioner's Notice To Invoke Discretionary Jurisdiction should be dismissed.

Respectfully submitted,

STATE OF FLORIDA, DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Respondent's Answer Brief on Jurisdiction has been furnished to DAVID L. RANKIN, ESQ., Withlacoochee Area Legal Services, Inc., Attorney for Petitioner, Post Office Box 1597, Bushnell, Florida 33513 and to SHIRLEY WALKER, ESQ., Attorney General's Office, Suite 1501, The Capitol, Tallahassee, Florida 32301 by U.S. Mail delivery this 8th day of May, 1985.

James A. Sawyer

JAMES A. SAWYER, JR.