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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
AUG 21 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

HUBERT EARL WILLIAMS,

Petitioner,

vs.

CASE NO. 66,871

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.
_____/

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

PETITIONER'S AMENDED BRIEF ON MERITS

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PREFACE

In the interest of brevity and clarity, Petitioner will utilize the following abbreviations or symbols in referring to the Record and Transcript On Appeal:

R - Record On Appeal

TR - Transcript At Final Hearing

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, HUBERT EARL WILLIAMS, commenced his initial appeal to the District Court of Appeal, Fifth District from an Order of Permanent Commitment entered by the Circuit Court, Sumter County, Florida on March 21, 1984. The Order of Permanent Commitment terminated Petitioner's parental rights with his three minor children and referred the children to THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES (hereafter HRS), for subsequent adoption. The Court found in its Order that Petitioner had abandoned his children and had no right to enter into a Performance Agreement with HRS, and denied Petitioner's renewed motion for performance agreement which was reserved by the Pre-trial Order of November 19, 1983. The Court found that by clear and convincing evidence, it was in the best interest of the minor children to permanently commit them to the State of Florida for subsequent adoption. (R 44).

Petitioner and CAROL WILLIAMS were husband and wife, with M.E.W., R.G.W., and T.L.W. being minor children born to the parties during the course of their marriage. After Petitioner and his wife ceased living together as man and wife sometime in 1980, Petitioner took physical custody of all three minor children. (TR 124). At the time of the separation of the parties, Petitioner was employed as a truck driver by Hayward Trucking Company, earning approximately $5.00 per hour. (TR 125). In December, 1981, Petitioner lost his job as a truck driver because his Florida driver's license was suspended. (TR 127).

Sometime in the middle of 1981, Petitioner's wife relocated her residence to the state of New York, after which time she made no attempt to maintain contact with her husband or her children, or to provide her children with financial support. (TR 100). When Petitioner's wife returned to the state of Florida at the end of 1981, she made no effort to contact her husband or her children, or to provide financial support for them, even though she was apparently aware of her husband's financial difficulties. (TR 101).

Due to Petitioner's temporary inability to provide for the financial needs of the minor children, Petitioner gave his sister, CECILE CLOUD, the temporary physical custody of the three minor children. (TR 128). The children resided with Petitioner's sister for approximately three months in Sneads, Florida while Petitioner searched for employment, without success. After the children resided with Petitioner's sister for approximately three months, Petitioner regained custody of the minor children which he maintained until May, 1982. (TR 129). In May, 1982, Petitioner and the children visited Hollywood, Florida while Petitioner was seeking employment. (TR 130). Still unable to find work, Petitioner returned to Marion County. Florida and left the three minor children in the custody of their maternal grandmother, ADELINE RYDER. (TR 131). Shortly after Petitioner left the minor children with their maternal grandmother, CAROL WILLIAMS arrived at the residence of ADELINE RYDER, took custody of the three minor children, and

applied for and received both food stamps and AFDC benefits for herself and her minor children. (TR 92).

In August or September, 1982, CAROL WILLIAMS left the residence of her mother with her minor children and moved herself and the children to Wildwood, Florida, where she continued to subsist on food stamps and AFDC benefits. (TR 104). In November, 1982, the mother of the children initiated contact with HRS in Sumter County, Florida to explore the possibility of voluntarily placing her three minor children into the temporary custody of HRS, and to discuss the possibility of placing her unborn child for adoption after the child was born. (TR 105).

On November 22, 1982, HRS filed a Petition to adjudicate M.E.W., R.G.W., and T.L.W. to be dependent within the intent and meaning of Section 39.01(9)(a), Florida Statutes, alleging that the mother was no longer able to care for her children's needs. (R 3). On November 22, 1982, the Circuit Court in Sumter County, Florida entered an order adjudicating M.E.W., R.G.W., and T.L.W. to be dependent and placed them in the temporary care, custody and control of the Department of Health and Rehabilitative Services for placement in foster care, but made no findings as to either parent having neglected, abused or abandoned the minor children. (R 4). Petitioner was not served notice of this proceeding, nor did HRS file a certificate of diligent search and inquiry summarizing its efforts to serve Petitioner with notice of the adjudicatory hearing. On November 22, 1982, HRS and the natural mother entered into a Performance Agreement, in accordance with

Section 409.168, Florida Statutes, the Performance Agreement indicating the children were placed in foster care because there were no relatives suitable for placement. (R 6).

The minor children were placed in foster care in Sumter County, Florida and MARIE MCNABB was assigned as their foster care worker. (TR 96). ADELINE RYDER, the maternal grandmother of the children, maintained contact with MARIE MCNABB and provided her with information concerning ELMER WILLIAMS, JOHN WILLIAMS, HOUSTON WILLIAMS and CAROL WILLIAMS, the brothers and sister of Petitioner. (TR 97). There was no evidence presented at the final hearing to support any efforts by HRS to contact the Petitioner's brothers or sister for a possible relative placement of the minor children. (TR 97).

On February 13, 1983, HRS conducted an internal staffing of the cases of M.E.W., R.G.W., and T.L.W. with the assigned foster care worker, the foster care supervisor from Sumter County, a program specialist and the adoption staff from the Adoption and Related Services Unit in Ocala attending. (TR 70). At this staffing, there was no recommendation to refer these children to the Adoption and Related Services Unit, and the foster care worker was directed to attempt to locate the mother, and to use additional efforts to try to locate the Petitioner. (TR 71). Thereafter, HRS sent a "General Delivery" letter to Petitioner in Sneads, Florida, dated March 7, 1983, asking Petitioner to contact the foster care caseworker if he was interested in caring for his children. (R 41). In response to

a similar letter sent to Petitioner, "General Delivery" in Orange Lake, Florida, Petitioner contacted the HRS Foster Care Office in Sumter County as directed by said letter, but was referred to the Adoption and related Services Unit for HRS in Ocala, Florida. Petitioner's phone call to the Foster Care Office in Sumter County, Florida occurred on March 13, 1983, and Petitioner met with an HRS caseworker from the Adoption and Related Services Unit on March 15, 1983. At that meeting, Petitioner requested the return of his children and expressly rejected the alternative of consenting to the voluntary placement of the minor children for subsequent adoption as had been done by their mother only a few days prior to this meeting. (TR 72). At this meeting, the Adoption and Related Services caseworker told Petitioner that she felt that he had abandoned his children as a matter of Florida law and thereafter made no effort to allow Petitioner to enter into a Performance Agreement. (TR 75).

After meeting with Petitioner, the Adoption and Related Services caseworker prepared a Permanent Placement Plan which was filed on March 21, 1983, some six days after Petitioner had requested an opportunity to seek the return of the children. (R 10). The Permanent Placement Plan did not show on its face the basis for its submission, rather than that of a Performance Agreement, and contained no provisions relevant to any social services to be provided to Petitioner to assist him in securing return of the minor children upon its completion. (R 10).

A Petition for Permanent Commitment For Subsequent Adoption was filed in this cause by the Adoption and Related Services Unit of HRS on April 18, 1983. (R 15). No home study was ever conducted of Petitioner's residence prior to its filing. (TR 79). After due notice to Petitioner, a hearing was held before the HONORABLE JOHN W. BOOTH, Circuit Judge, Sumter County, Florida on May 4, 1983, with Petitioner appearing at that hearing without counsel. (R 26). At that hearing, the Court found Petitioner to be indigent and appointed Withlacoochee Area Legal Services, Inc. as his attorney in this cause. (R 29). Petitioner also stated at that hearing of his intention to resist a Petition for Permanent Commitment and to seek the return of his children. (R 25). Petitioner, through his appointed counsel, filed motions for a Performance Agreement and for visitation with the minor children. (R 30). A hearing on said motions was held on September 22, 1983, with Petitioner again testifying that he wished to have his children returned to him and desired the opportunity to enter into a Performance Agreement. (R 172). Counsel for HRS opposed Petitioner's motions and asserted that his current living situation placed Petitioner in a position whereby he could not or would not participate in a Performance Agreement. (R 163). Thereafter, the Court entered an order denying both motions without any finding of fact as to neglect, abuse or abandonment by Petitioner, or that Petitioner would not or could not enter into a Performance Agreement. (R 34).

At the Pre-trial hearing in this cause on November 3, 1983, Petitioner, through his appointed counsel, again renewed his request for a Performance Agreement. (R 153). The Court entered a Pre-trial order on November 19, 1983, reserving ruling on Petitioner's renewed motion for Performance Agreement until the final hearing. (R 39).

The final hearing in this cause was held on January 5, 1984, before THE HONORABLE JOHN W. BOOTH, Circuit Judge, Sumter County, Florida, with an Order of Permanent Commitment For Subsequent Adoption being entered against Petitioner on March 21, 1984. (R 44). On April 18, 1984, Petitioner duly filed his Notice of Appeal. (R 49).

Immediately prior to the oral arguments scheduled in this cause, Fifth District Court, Case 84-589, The District Court of Appeal, Fifth District, issued their opinions In Re C.B., 453 So.2d 220 (Fla. 5th DCA 1984), and Gerry v. Aulls, 457 So.2d 598 (Fla. 5th DCA 1984). After oral argument was conducted, but prior to the entry of their mandate in this cause, the District Court of Appeal, First District entered their opinion In Re C.T.G., 460 So.2d 495 (Fla. 1st DCA 1984). Copy of the opinion in In Re C.T.G., supra, was filed by Petitioner with the District Court of Appeal, Fifth District, as a notice of supplemental authority. The Fifth District Court of Appeal affirmed the Order of Permanent Commitment, and cited In Re C.B., supra, and Gerry v. Aulls, supra, as controlling and acknowledged conflict with In Re C.T.G., supra. Thereafter, Petitioner duly petitioned this Court

to exercise its discretionary authority to review this cause pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

SUMMARY OF ARGUMENT

This case is an express and direct conflict with a decision of the District Court of Appeal, First District, In Re The Interest of C.T.G., with said conflict being express and direct as to both the controlling factual elements and points of law. This opinion should be conformed to the opinion of C.T.G., because the First District Court of Appeal in this case, and in their prior opinion of A.B., have made a very rational and exhaustive statutory interpretation which correctly disposes of the points on appeal in this cause. The amendment to Section 39.41 effective August 1, 1984, if construed as an expression of legislative intent, also supports the interpretation that the First District Court of Appeal has applied to the interaction of Section 409.168 and Chapter 39 Dependency Proceedings.

If this case is conformed to the ruling in C.T.G., such conformed ruling will support Petitioner's request for a Performance Agreement and will require a reversal of the Order of Permanent Commitment, with instructions for Petitioner to be allowed the opportunity to enter into a Performance Agreement. Petitioner requested the return of his children prior to any judicial finding that he abused, abandoned or neglected his children and before any judicial review or other Court Order had referred the case for Permanent Commitment. The caseworker who refused Mr. Williams an opportunity to seek the return of his children erroneously construed the definition of abandonment to create a presumption of abandonment after six months absence,

which is clearly incorrect. Petitioner's strongest argument that he is entitled to a Performance Agreement is supported by the actions by HRS after he requested their return in their filing a Permanent Placement Plan, even though there is no evidence that he would not or could not enter into a Performance Agreement, nor had the Court made any other finding which would have allowed the file to be referred for Permanent Commitment thus cutting off his rights to a Performance Agreement. HRS undertook to file a Permanent Placement Plan, but it was clearly defective on its face because it failed to substantially comply with the terms mandated by 409.168. As HRS undertook to file a Permanent Placement Plan for Petitioner, which was defective on its face, to Plaintiff's detriment, the finding at the final hearing that Petitioner had abandoned his children and was not entitled to a Performance Agreement is insufficient to correct the errors HRS committed when they filed the Permanent Placement Plan.

Petitioner also contends that there was insufficient evidence on the record to establish, by clear and convincing evidence, that it was in the best interest of the minor children to terminate his parental rights with them. The caseworker for HRS admitted that she had never seen Petitioner interact with his children, nor had she ever conducted a home study of Petitioner's residence. The only other witnesses was the children's mother and their grandmother, both who admitted, under cross-examination, that Petitioner was a loving and caring father and that they had never seen him abuse or neglect his children in any way.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEALS, FIFTH DISTRICT, CASE NO. 84-589, SHOULD BE CONFORMED TO IN RE THE INTEREST OF C.T.G., 460 So.2d 495 (Fla. 1st DCA 1984).

The ruling by the District Court of Appeal, Fifth District, in this cause is in express and direct conflict with the decision of the District Court of Appeal, First District, In Re The Interest of C.T.G., 460 So2d 495 (Fla. 1st DCA 1984). The conflict is express and direct as to both the controlling factual elements and points of law. In this case, the District Court of Appeal, Fifth District, concluded that Section 409.168, Florida Statutes (1980), did not require HRS to enter into a Performance Agreement with the parent of a child in foster care prior to commencement of permanent commitment proceedings where it appears that the child has been abandoned or abused, and returning the child to the custody of its parent is not a feasible alternative. The ruling in this cause by the District Court of Appeal, Fifth District, that a Performance Agreement is not mandated for a child in foster care prior to commencement of permanent commitment proceedings is in direct conflict with C.T.G., supra, which held:

> "The preparation of a performance agreement between the parent and HRS is "central to the strategy of securing each child a permanent home with his legally recognized parent", In the Interest of A.B., at 991, and should be mandated in every case when a child is placed in foster care. The statute requires that the mother's rights as a natural parent should be safeguarded to the extent of giving her the opportunity of participating in the performance agreement process as set forth in Section 409.168."
>
> In Re The Interest of C.T.G., supra.

These decisions, in which the First District has concluded that a Performance Agreement is mandatory with the Fifth District ruling that a Performance Agreement is not mandated under certain circumstances appear to be in direct conflict on their face which cannot be reconciled by any distinguishable factual circumstances.

Both this cause and C.T.G., supra, involve appeals taken from Orders of Permanent Commitment referring minor children to HRS for subsequent adoption, when the proceedings for Permanent Commitment were commenced after the minor children were placed in foster care but prior to offering the natural parent an opportunity to enter into a Performance Agreement. In both causes, the parents of the minor children in foster care requested the opportunity to enter into a Performance Agreement, pursuant to Section 409.168, Florida Statutes (1980), but were denied an opportunity to do so. In both causes, there was no finding of abuse, abandonment or neglect by clear and convincing evidence prior to the natural parent requesting an opportunity to enter into a Performance Agreement.

In C.T.G., in the First District Court of Appeal properly concluded that a Performance Agreement is mandatory for parents of a minor child placed in foster care by HRS, with the exception of parents who will not or cannot enter into such an agreement, and the ruling of the Fifth District Court of Appeal in this cause should be conformed to that opinion. In concluding that Section 409.168, Florida Statutes mandated Performance Agreements for

children in foster care, the Court cited In the Interest of A.B., which concluded:

> "In 1980 the Florida Legislature amended Section 409.168 'to provide a new tool in aid of limiting recourse to foster care to protect and promote every child's right to security and stability of a permanent family home.'"
>
> In the Interest of A.B., 444 So.2d 891 (Fla. 1st DCA 1983).

Again citing A.B., the First District Court of Appeal also concluded that Section 409.168 required an affirmative effort to identify the problems of the natural parents, to assist the parents in making a personal commitment and to remedy those specific conditions. In Re In The Interest Of A.B., supra. Relying on their previous findings in A.B., and construing the legislative intent in creating the Performance Agreement procedure as set out in Section 409.168(1), Florida Statutes, the Court concluded:

> "Based on the aforementioned underlying purposes and intent of Section 409.168, the preparation of a performance agreement between the parent and HRS is 'central to the strategy for securing each child a permanent home with his legally recognized parent', In The Interest of A.B., at 991, and should be mandated in every case when a child is placed in foster care. The statute requires that the mother's rights as a natural parent should be safeguarded to the extent of giving her the opportunity of participating in the performance agreement process as set forth in Section 409.168."
>
> In The Interest of C.T.G., supra.

In addition to the case law which supports mandatory Performance Agreements for children in foster care, the Florida Legislature amended Section 39.41(1)(d), effective October 1, 1984,

to read as follows:

> "After the child is committed to the temporary custody of the department, all further proceedings under this Section shall additionally be governed by Section 401.168." (Emphasis Added)
>
> Section 39.41(1)(d) Florida Statutes, (1984).

This amendment does not appear to be a substantive change in Chapter 39, but rather a clarification of legislative intent which should be related retrospectively to the creation of Section 409.168 in 1980. The manifested legislative intent of this amendment supports the reasoning and statutory interpretation relied upon by the First District Court of Appeal and their opinions in A.B., supra, and C.T.G., supra. Even though Petitioner was denied his Performance Agreement prior to the effective date of the statute, this Court can still consider the manifested intent of the legislature in clarifying this issue and apply that clarification retroactively, and as this would not constitute a retroactive application of a substantive change in the statute, it would be permissible and not barred on constitutional grounds.

There are other consitutional, social and historic issues which support the mandatory nature of Performance Agreements, but these issues have been addressed in great detail in the Brief of Amicus Curaie filed by Florida Legal Services, Inc. in Case No. 65,790, Mary K. Burk v. Department of Health and Rehabilitative Services, and said issues will not be restated in this brief in the interest of brevity.

For all of the aforesaid grounds, this Court should conform this case to the opinion of the First District Court of Appeal, In Re The Interest of C.T.G., 467 So.2d 495 (Fla. 1st DCA 1984).

II. IF THIS CASE IS CONFORMED TO THE RULING OF THE FIRST DISTRICT COURT OF APPEAL IN C.T.G., THE FACTS WOULD MANDATE A PERFORMANCE AGREEMENT FOR PETITIONER.

If the ruling in this case is conformed to the ruling of the First District Court of Appeal in C.T.G., this Court must conclude that Petitioner was improperly denied a Performance Agreement based upon that conformed ruling. In this case, as in C.T.G., the children of the parent denied a Performance Agreement were in custody of HRS in foster care. Petitioner contends that his children were still in foster care at the time of his request for their return. HRS has disputed this issue, and contends that the children were no longer in foster care at the time of Petitioner's request for their return. Although there is absolutely no evidence in the record to support their contention, HRS has argued that the children were no longer in a foster care status, but had been referred to Adoption and Related Services, which frees them from the requirement to offer Petitioner a Performance Agreement.

The record appears to support Petitioner's contention that the children were still in foster care at the time of his request of their return to his custody. The Adoption and Related Services caseworker who testified at the Permanent Commitment proceeding acknowledged that approximately three weeks prior to Petitioner's requesting the return of his children, HRS conducted an internal staff meeting to consider recommending to the Court that these children be referred to Adoption and Related Services. After this file was discussed at the internal staff meeting, it

was concluded by HRS that the children would not be referred to Adoption and Related Services, but would remain in foster care, with the foster care worker being instructed to undertake additional efforts to locate the father of the children to inquire of his interest in seeking the return of his children to his custody. Approximately two weeks after that internal staff meeting, and approximately one week prior to Petitioner requesting the return of his children, the foster care worker sent a "general delivery" letter to Petitioner in Orange Lake, Florida requesting that he contact the foster care worker if he was interested in caring for his children. Approximately seven days after the date of that letter, Petitioner contacted the foster care worker who sent the letter in Sumter County, Florida, but was referred by that caseworker to an Adoption and Related Services caseworker in Marion County, Florida. The following day, Petitioner met with the caseworker in Adoption and Related Services and requested return of his children. The caseworker testified that she told Petitioner that he could not have his children as a matter of Florida law. Whether or not the children were in foster care at the time of this request was not addressed by the caseworker at that time, nor was this issue ever raised or argued at the final hearing, and only upon appeal did HRS raise this as a grounds for denial of the Performance Agreement. The record on appeal does not support the position of HRS. As there was no order of the Court referring this case from foster care to Adoption and Related Services, the only evidence that would fix the date of their change

of status is the Permanent Commitment Petition, which was filed approximately two weeks after Petitioner had requested return of his children.

The record supports the children being in foster care at the time of Petitioner's request, and there is no evidence in the record that could lead the Court to draw any other conclusion. As Petitioner's children were in foster care when he requested their return and was denied an opportunity to enter into a Performance Agreement a conformed ruling in this case to C.T.G. would require this Court to conclude that the denial of the Performance Agreement was a reversible error, unless there was evidence that Petitioner had engaged in some conduct that would excuse HRS from offering the Performance Agreement, or would not or could not enter into such an agreement.

The opinion in C.T.G. recognizes the submission of a Permanent Placement Plan in lieu of a Performance Agreement if the parent would not or could not enter into a Performance Agreement. However, there is no evidence that Petitioner refused to enter into a Performance Agreement, nor is there evidence that his physical, emotional or mental condition or physical location precluded his entry into a Performance Agreement. Section 409.168(4)(b)., Florida Statutes, (1980). Prior to commencing Permanent Commitment proceedings in this cause, and after advising Petitioner he had no right to seek the return of his children, HRS submitted a Permanent Placement Plan for the Petitioner. At the Permanent Commitment proceeding, HRS argued that the Permanent Placement Plan was ubmitted for Petitioner because he would not or could not participate

in the preparation of a Performance Agreement. On appeal, HRS has contended that the Permanent Placement Plan, though labeled as such, was really not a Permanent Placement Plan but some other document to commence the Permanent Commitment proceedings. In either event, both positions are legally incorrect. Petitioner requested the return of his children prior to the Permanent Placement Plan being filed on his behalf and there is no evidence in the record which would support that he would not or could not enter into a Performance Agreement. Even if we assume, for the purpose of argument, that HRS was correct to submit the Permanent Placement Plan for Petitioner, the Permanent Placement Plan is defective on its face as it fails to include the mandatory specific services to be provided by the Social Service Agency, goals and plans for the children, and relevant time periods to accomplish the provisions of the Plan. A valid Permanent Placement Plan must meet all requirements provided for a Performance Agreement, and the document submitted by HRS in this cause meets none of those requirements. Section 409.168(4)(c), Florida Statutes (1980). As there is no showing that Petitioner would not or could not enter into a Performance Agreement, and that the Permanent Placement Plan failed to include any of the mandatory provisions mandated for Permanent Placement Plans, the Plan as submitted in tis cause cannot serve as a legal substitute for a Performance Agreement mandated by the opinion in C.T.G.

Even though the Permanent Placement Plan submitted by HRS in this cause is defective on its face, the fact that it was

submitted, for whatever reason, prior to commencement of Permanent Commitment proceedings, supports Petitioner's contention that he was entitled to a Performance Agreement. The only statutory basis for the submission of a Permanent Placement Plan is in the event a parent, who is otherwise entitled to a Performance Agreement will not or cannot participate in the development of that agreement. Stated simply, it is totally inconsistent to file a Permanent Placement Plan for Petitioner, and then attempt to argue that Petitioner was not entitled to a Performance Agreement. Clearly, Petitioner was entitled to a Performance Agreement, and the actions of HRS in submitting a Permanent Placement Plan supports that contention.

Although not addressed in C.T.G., there are other statutory grounds that might be argued as a basis to deny a parent an opportunity to enter into a Performance Agreement. In the event that the Court makes an affirmative finding that the parent has abandoned, abused or neglected the child, if the parent fails to respond to notice of proceeding to commit the child after being properly served, if the parent or parents voluntarily execute a written surrender or if the parent or parents fail to substantially comply with the Performance Agreement could each serve as grounds for denying a parent a Performance Agreement, but none of these circumstances apply to Petitioner at the time of his request. Section 39.41(1)(f)(1), Florida Statutes (1980). At the time of his request of the return of his children, Petitioner had not been adjudicated to have abandoned, abused or neglected

his children. The mother of the children had executed a voluntary release of the children to free them for adoption but this individual act of one parent has no legal effect on the parental rights of the non-consenting parent. Even though the mother of the children in this cause consented to their adoption, HRS was not excused by that consent from their requirement to offer Petitioner a Performance Agreement.

When Petitioner requested the return of his children, he was advised by HRS that he had abandoned his children as a matter of Florida law and was not entitled to seek their return. Although it is undisputed that Petitioner had not made contact with his children for approximately nine months, his admitted lack of contact for more than six months, in and of itself, could not serve as a basis for HRS to deny Petitioner a Performance Agreement because the statutory definition of abandonment does not create a presumption of abandonment after no contact for more than six months. As the definition of abandonment does not create a presumption of abandonment, HRS cannot conclude that a parent is barred from seeking a Performance Agreement unless there is an adjudication of abandonment by the Court, which has been given the discretionary power to make such an adjudication. Section 39.01(1), Florida Statutes (1980). As there is no statutory presumption that a parent has abandoned his child for lack of contact for more than six months, and as there was no judicial finding of abandonment by the Court prior to Petitioner's requesting a Performance Agreement, his lack of contact with his children

could not, in and of itself, serve as a basis for a denial of the Performance Agreement. Although Petitioner's contention that he was entitled to a Performance Agreement at the time of his initial contact with HRS requires the relevant statutes to be strictly construed, Petitioner is entitled to a strict interpretation of the statutes. In Re Smith, 299 So.2d 127 (Fla. 3rd DCA 1974). As Petitioner is entitled to a strict interpretation of Section 409.168, the failure of HRS to comply with those strict requirements when they submitted the defective Permanent Placement Plan for Petitioner, coupled with the fact that this failure resulted in harm to Petitioner in the subsequent loss of his parential rights to his children, cannot be corrected or cured by the retroactive finding of abandonment as occurred at the final hearing in this cause.

III. THIS COURT MUST REVIEW THIS CAUSE ON ITS MERITS UPON EXERCISING ITS DISCRETIONARY POWER TO REVIEW ON THE GROUNDS OF CONFLICT.

Upon the exercising of this Court's discretionary power to review an action on the grounds of conflict with prior decisions of the Supreme Court or District Courts of Appeal, the Court has the duty and responsibility to consider the case on the merits and decide the points in question as though the case came originally before such Court on Appeal. Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961), Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974).

In addition to those issues which resulted in a conflict between the opinions of the Fifth District Court and First District Court on Performance Agreements being mandated for children in foster care, the Petitioner also cited as an error on Appeal the lack of clear and convincing evidence to support the findings of the Trial Court. To support an Order of Permanent Commitment, the Trial Court is required to make a twofold finding in that the parent has abused, abandoned or neglected his children, and that it is in the manifest best interest of the children to terminate those parental rights. Section 39.41(1)(f), Florida Statutes, 1980. In addition to making this twofold finding, the weight of the evidence must meet the test established in Santosky, which requires that the termination of parental rights must be based upon a showing of clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 102 S.CT. 1388 (1982). Even though

Respondent has previously argued that the clear and convincing evidence of Santosky is applicable only to the abuse, abandonment or neglect findings of the Court, it is clear that that standard must be applied to both conduct of the parent and to the finding of the manifest best interests of the minor children. In Interest of C.K.G., 365 So.2d 424 (Fla. 2d DCA 1978).

Petitioner contends that the findings of the Court to support the Order of Permanent Commitment, particularly relating to the best interests testimony, is not supported by clear and convincing evidence. HRS called three witnesses to testify as to the best interests of the minor children being served by the termination of Petitioner's parental rights. These witnesses included the Adoption and Related Services caseworker assigned to this file, the mother of the children who had consented to the termination of her parental rights, and the maternal grandmother who had waived her right to have the children placed into her care as a relative placement. At the final hearing, it was apparent that all three parties were committed to pressing for permanent commitment of the minor children and the termination of the parental rights of Petitioner, and all three testified that their best interests would be served by termination of Petitioner's parental rights. However, the opinion of the caseworker should have been given little, if any, weight in determining the best interests of the children as she admitted that she had seen Mr. Williams on only one occasion, that being on March 15, 1984, when he came to her office to request the return of his children. In

addition to having only one contact with the Petitioner, the caseworker also admitted under cross-examination that she had never seen Mr. Williams interact with his children, nor had she conducted a home study of his residence, either prior to or after commencing the Permanent Commitment proceeding. With so little contact between the caseworker and the Petitioner, it would appear that the Court should have disregarded her opinion, or attributed very little weight to her opinion as to the best interests of the children.

The other two witnesses, those being the mother of the children and their maternal grandmother, even though they testified that it would be in the best interests of the minor children to terminate Petitioner's rights, provided some of the strongest testimony in support of Petitioner's defense of the Permanent commitment action, as they both acknowledged under cross-examination that the Petitioner was a loving and caring father, and they had never seen him, under any circumstances neglect his children, or use excessive discipline with them. If the caseworker's testimony is properly discounted, and if the Court properly considered the admissions by the other two witnesses as to Petitioner's love and affection for his children, then it is clear that the finding that it would be in the best interests of the minor children to terminate Petitioner's parental rights is not supported by clear and convincing evidence. As a result of said abuse of discretion, Petitioner would contend that this cause should be reversed, or remanded for further proceedings to determine if the

termination of his parental rights are in the best interests of the minor children, can be supported by clear and convincing evidence.

CONCLUSION

The opinion in this case should be conformed to the opinion of the First District Court of Appeal In Re The Interest of C.T.G., 467 So.2d 495 (Fla. 1st DCA, 1984) and this case should be remanded to the Circuit Court with instructions to require HRS to enter into a meaningful Performance Agreement with Petitioner, and to take such other action as may be consistent with the conformed opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Amended Brief on the Merits has been furnished to JAMES A. SAWYER, JR., DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES, District III, Legal Counsel, 1000 N.E. 16th Avenue, Gainesville, Florida, 32601, and to SHIRLEY WALKER, ESQUIRE, OFFICE OF THE ATTORNEY GENERAL, STATE OF FLORIDA, Suite 1501, The Capitol, Tallahassee, Florida, 32301 by U.S. Mail on this 19th day of August, 1985.

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