IN THE SUPREME COURT OF FLORIDA

HUBERT EARL WILLIAMS,

Petitioner,

-vs-

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.

_____/

CASE NO. 66,871



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

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# PETITIONER'S BRIEF ON JURISDICTION

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## STATEMENT OF THE CASE AND OF THE FACTS

HUBERT EARL WILLIAMS, Petitioner herein and Appellant in District Court of Appeal, Fifth District, Case Number 84-589, In Re: The Interest of M.E.W., R.G.W., and T.L.W., has requested this Court to exercise its discretionary authority to review this cause, pursuant to Article V, Section 3(b)(3) of the Florida Constitution. Petitioner appealed an Order of Permanent Commitment entered by the Circuit Court, Sumter County, Florida, which 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. Petitioner's main issue raised on appeal was the failure of HRS to allow him an opportunity to enter into a Performance Agreement prior to commencement of permanent commitment proceedings.

Petitioner's three minor children were voluntarily placed into foster care with HRS by Petitioner's wife, from whom Petitioner had been separated since 1980. Petitioner initially retained custody of the minor children after the separation of he and his wife, and placed the minor children into the custody of their maternal grandmother in June, 1982. Petitioner's wife regained custody of the minor children immediately thereafter, without knowledge of Petitioner, and moved herself and the children to Sumter County, Florida, in September, 1982. The minor children were voluntarily placed into foster care by their mother in November, 1982. At the adjudication hearing, the Circuit Court made no finding in the Order of Adjudication that Petitioner had abused, abandoned or neglected his children.

After the minor children were in foster care for approximately four months, HRS contacted Petitioner by letter. The letter sent by HRS inquired of Petitioner's interest in regaining custody of his minor children, but when he contacted HRS approximately one week thereafter, he was told that he had no right to seek the return of the minor children as he had abandoned the children as a matter of law. The conclusion that abandonment barred Petitioner's right to seek a Performance Agreement was the conclusion of HRS, and was not based on any order of the Circuit Court, as there was no finding of abandonment at the initial adjudication of dependency, nor was there any judicial review thereafter. Having denied Petitioner the opportunity to enter into a Performance Agreement, HRS prepared and filed a Permanent Placement Plan for Petitioner alleging that he could not or would not participate in the preparation of a Performance Agreement. The Permanent Placement Plan filed for Petitioner reflects no effort on the part of HRS to reunify Petitioner with his children, but served only to refer the children to Adoption and Related Services for the commencement of permanent commitment proceedings. Shortly after filing the Permanent Placement Plan for Petitioner, HRS commenced permanent commitment proceedings without allowing Petitioner to enter into a Performance Agreement, or without conducting a home study of Petitioner's residence.

Petitioner filed a Motion for Performance Agreement after permanent commitment proceedings were commenced and renewed that Motion at the pre-trial and trial of this cause, but all Motions were denied by the Court without making any express

finding that the Petitioner was not entitled to a Performance Agreement due to any abuse, abandonment or neglect of the children.

At the final hearing of this cause, the Circuit Court of Sumter County, Florida, ruled that Petitioner was not entitled to a Performance Agreement and entered an Order of Permanent Commitment terminating the parental rights of Petitioner and referring the minor children to HRS for subsequent adoption.

## ARGUMENT

### I. THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN THIS CAUSE IS IN EXPRESS AND DIRECT CONFLICT WITH THE OPINION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, ON THE SAME POINT OF LAW.

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 C.T.G., 460 So. 2d 495 (Fla. 1st DCA 1984). The conflict is express and direct as to both the controlling factual elements and points of law. In this cause, the District Court of Appeal, Fifth District, concluded that Section 409.168, Florida Statutes (1983), 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 the opinion of the District Court of Appeal, First District, In Re C.T.G., supra, which ruled:

> 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 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.

A) The Controlling Factual Elements Of This Case And In Re C.T.G., Are So Similar That They Are Legally Indistinguishable.

The controlling factual elements of this cause are not distinguishable from In Re C.T.G., supra.

For this Court to exercise their discretionary review of the conflict cited in this cause with C.T.G., supra, the controlling factual elements of both cases must not be distinguishable. V.I. Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962). If the two cases are distinguishable in controlling factual elements, then no conflict can arise. Florida Power and Light Co. v. Bell, 113 So. 2d 697 (Fla. 1959), and Neilsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960). In this cause and In Re C.T.G., supra, the controlling factual elements appear to be "on all fours" factually in all material respects. Florida Power and Light Co. v. Bell, supra. 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 (1983), 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.

The major factual difference between this cause and In Re C.T.G., supra, is the lack of contact with the minor children by Petitioner for more than six months, but this fact should not be sufficient to distinguish this cause from In Re C.T.G., supra, as the Court never found the Petitioner in this cause to have abandoned, abused or neglected his children at the initial adjudication of dependency of the children, or at any time thereafter prior to the entry of the Order of Permanent Commitment. This factual issue of the alleged abandonment of Petitioner of his minor children is not a controlling factual issue which would distinguish this cause from In Re C.T.G., supra, as the alleged abandonment of the minor children by the Petitioner was never addressed before Petitioner requested the return of his children in Petitioner's initial contact with HRS, or before his Motion for Performance Agreement filed after permanent commitment pro-

ceedings were instituted.

B) The Ruling Of The Appellate Courts In Our Cause And In Re C.T.G. Constitute Divergent Decisions On The Same Point Of Law.

In order for this Court to exercise their discretionary powers of review in this cause, there must be a direct conflict that stems from divergent decisions on the same point of law, which, if permitted to stand, would collide with a prior decision of the Supreme Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedence. Kincaid v. World Insurance Company, 157 So. 2d 517 (Fla. 1963). Just such a conflict on the same point of law has arisen in our cause and In Re C.T.G., supra, which results in divergent decisions on the same point of law, the particular point of law being whether Section 409.168, Florida Statutes (1983), mandates a Performance Agreement for children in foster care prior to commencement of permanent commitment proceedings. The District Court of Appeal, Fifth District, In Re C.T.G., supra, concluded that the language in Section 409.168 requiring a Performance Agreement for children in foster care was mandatory and reversed the lower Court's Order of Permanent Commitment. In this cause, the District Court of Appeal, Fifth District, construing the same Section of the Florida Statutes, in substantially the same factual circumstances, reached the opposite conclusion and found that Section 409.168, Florida Statutes (1983), did not mandate a Performance Agreement for children in foster care prior to commencement of permanent commitment proceedings if it appears the child has been abandoned or abused, and returning the child

to the custody of its parent is not a feasible alternative. These opinions of the District Courts appear to be divergent and conflicting rulings on the same point of law with substantially identical controlling factual issues.

II. THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, ACKNOWLEDGED CONFLICT WITH IN RE C.T.G., ON THE FACE OF ITS OPINION RENDERED IN THIS CAUSE.

The District Court of Appeal, Fifth District, acknowledged conflict with its opinion in this cause and the opinion of the District Court of Appeal, First District, In Re C.T.G., supra. There was no attempt by the Appellate Court in this cause to distinguish this cause from In Re C.T.G., supra, either as to issues of law or controlling factual circumstances.

## SUMMARY OF ARGUMENT

The District Court of Appeal, Fifth District, rendered an opinion on April 1, 1985, In Re: The Interest of M.E.W., R.G.W., and T.L.W., Dependent Children, HUBERT EARL WILLIAMS, natural father, Appellant, vs. STATE OF FLORIDA, Appellee, Case Number 84-589, in which that District Court ruled that Section 409.168, Florida Statutes (1983), did not require HRS to enter into a Performance Agreement with a parent of a child in foster care prior to commencement of foster care proceedings where it appears that a child has been abandoned or abused, and returning the child to the custody of its parent is not a feasible alternative. This decision is in express and direct conflict with In Re C.T.G., 460 So. 2d 495 (Fla. 1st DCA 1984), in which that Appellate Court concluded that Section 409.168, Florida Statutes (1983), mandates

the preparation of a Performance Agreement when a child has been placed in foster care by the appropriate social service agency and that the only exception to the preparation of a Performance Agreement is when the parent will not or cannot participate in its preparation. In both cases, the respective Appellate Courts have interpreted Section 409.168, Florida Statutes (1983), in cases of substantially identical controlling factual elements, and appear to have reached divergent decisions on the same point of law, which is whether it is mandatory to enter into a Performance Agreement with a parent of a child in foster care prior to commencement of permanent commitment proceedings. There appear to be no distinguishing factual circumstances which would justify or explain the divergent conclusions of the two opinions.

## CONCLUSION

The express and direct conflict between the Appellate Courts in the Fifth and First District on the same point of law are divergent and in direct conflict with each other, and Petitioner, HUBERT EARL WILLIAMS, would pray that this Court exercise its discretionary power to review this cause for the purposes of resolving the conflict between the Appellate Courts pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished to Honorable JIM SMITH, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, and JAMES A. SAWYER, JR., HRS District III Legal Counsel, 1000 Northeast 16th Avenue, Gainesville, Florida, 32601, by U. S. Mail, this 9th day of April, 1985.

DAVID L. RANKIN