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IN THE SUPREME COURT OF FLORIDA

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 REPLY BRIEF

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REPLY

I. THE OPINION UNDER REVIEW IS IN DIRECT CONFLICT WITH IN RE THE INTEREST OF C.T.G., 467 So.2d 495 (Fla. 1st DCA 1984).

Respondent argues that the facts in this case are legally distinguishable from the facts in C.T.G., primarily because HRS never offered the parent a Performance Agreement in C.T.G., but that one of the two parents in this case had been offered a Performance Agreement, which Respondent contends fulfilled its' statutory obligation to offer a Performance Agreement as required by Section 409.168, Florida Statutes. Without question, the Petitioner in this cause and the parent in C.T.G. were both denied the opportunity to enter into a Performance Agreement as contemplated by Section 409.168, Florida Statutes, and to accept Respondent's argument that HRS had fulfilled its' statutory obligation to Petitioner by allowing his wife to enter into a Performance Agreement is inconsistent with the clear language of the statute. Throughout that portion of the statute relating to Performance Agreements, the statute consistently refers to "parent or parents", which could only be construed to contemplate allowing both parents to enter into a Performance Agreement. There is no language in the statute, or any other basis, for Respondent to argue that HRS could substantially comply with the required Performance Agreement by allowing only one of two parents to enter into such an agreement. Not only would such an error in interpretation be totally inconsistent with the clear language and intent of the statute, but such a narrow interpretation of the statute could result

in irreparable harm if a non-custodial parent was not advised that his or her children were in the custody of the State of Florida prior to the commencement of Permanent Commitment proceedings. As Respondent's position is unsupported by reasonable statutory interpretation, the argument that HRS had fulfilled its' statutory obligation to Petitioner by allowing his wife to enter into a Performance Agreement is without merit, and is insufficient to distinguish this cause from the facts of C.T.G.

II THE DECISION OF THE SUPREME COURT IN BURK V. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, 10 FLW 457 So.2d , IS CONTROLLING AND REQUIRES THAT THIS CASE BE REMANDED WITH INSTRUCTIONS CONSISTENT WITH THAT DECISION.

This Court in Burk v. Department of Health and Rehabilitative Services, accepted jurisdiction to review In Re C.B., 453 So.2d 220 (Fla. 5th D.C.A. 1984) and answered the certified question in the affirmative and quashed that District Court decision under review. Respondent argues that the Lower Court ruling in this cause should be affirmed, based upon factual differences in this case and the facts in In Re C.B., but fails to explain how the Lower Court's ruling could be affirmed in light of the opinion of this Court in Burk. In the Burk decision, this Court made it clear that all parents of a child in the custody of the State of Florida must be offered a Performance Agreement, pursuant to Section 409.168, and HRS does not have the discretion to pick and choose which parent deserves to enter into such an agreement. As Burk properly concluded that HRS was required to enter into a Performance Agreement before terminating parental

rights, the Respondent cannot argue, in light of that opinion, that the Lower Court ruling in this cause should be affirmed, even if this case can be distinguished from In Re C.B. Petitioner contends that this case is controlled by Burk and should remand this cause for further proceedings consistent with that opinion.

Even if this case was not controlled by the decision of this Court in Burk, the arguments asserted to affirm this decision, even though In Re C.B. had been quashed, are without merit and are unsupported by the record on appeal. Respondent apparently argues that the order terminating Petitioner's parental rights was correct because allowing Petitioner to enter into a Performance Agreement would have unduly delayed the ultimate resolution of the custody of the children. Petitioner contends the record clearly reflects ample time to allow him to enter into a Performance Agreement, as the children were in foster care only four months when he initiated contact with HRS. Allowing six months for the completion of a standard Performance Agreement, Petitioner could have completed such an agreement prior to the children being in foster care for more than one year, which would comply with the legislative intent as stated in Section 409.168, and would not have unduly delayed the ultimate resolution of their custody.

Respondent also argues that Petitioner was located as a direct consequence of a diligent search conducted by HRS for the preparation of Permanent Commitment proceedings, so as to

imply that Petitioner's request for a Performance Agreement was untimely due to the commencement of Permanent Commitment proceedings. Petitioner would contend that this request for a Performance Agreement was timely, and was well in advance of the commencement of any Permanent Commitment proceedings for a number of reasons. First, the contact was initiated by a letter from a foster care worker pursuant to instructions received at a internal staffing conducted by HRS, in which the referral of this case to Adoption and Related Services for commencement of Permanent Commitment proceedings was expressly rejected. The record shows that at that staff meeting, the foster care worker was instructed to make additional efforts to find Petitioner to determine if he was interested in seeking the return of his children, and had Petitioner been located as a result of the preparation for Permanent Commitment proceedings, it would have been for the purpose of service of process on Petitioner, and not for the purpose of inquiring of his interest in regaining custody of his children.

The record also shows that HRS filed a Permanent Placement Plan for Petitioner after he requested the opportunity to seek the return of his children, and prior to the commencement of Permanent Commitment proceedings, would also rebut Respondent's argument that Petitioner's application for a Performance Agreement was untimely. Clearly, if there was sufficient time to file a Permanent Placement Plan, which can only be filed if a parent will not or cannot enter into a Performance Agreement, then there was ample time to prepare and file a Performance

Agreement.

Clearly, Burk is controlling in this case and the arguments advanced by Respondent in requesting that the Lower Court's decision be affirmed is without merit and unsupported by the record on appeal.

CONCLUSION

The decision of the Fifth District Court should be conformed to IN RE THE INTEREST OF C.T.G., 467 So.2d 495 (Fla. 1st DCA 1984), and remanded with instructions for further proceedings consistent with the conformed opinion and Burk v. Department of Health and Rehabilitative Services, 10 FLW 457, _____so 2d _____.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Reply Brief 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 30th day of September, 1985.

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