O/a 8-27-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,191

STATE, DEPARTMENT OF HEALTH
AND REHABILITATIVE SERVICES,

Petitioner,

vs.

NATIONAL ADOPTION COUNSELING
SERVICE, INC., a domestic
corporaton doing business in
Florida, and RICHARD GITELMAN,
individually,

Respondents.

RESPONDENTS' ANSWER BRIEF

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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Preliminary Statement

The Court has accepted this case for review tentatively, based on an asserted conflict between the district court's decision below and two Adoption Hot Line cases from the Third District Court of Appeal.[1] Respondents suggest there is no express and direct conflict of decisions,[2] and that this Court will similarly so conclude in due course. At this juncture, respondents merely remind the Court that its jurisdictional authority is an open issue.

Respondents additionally believe it is important to call to the Court's attention two other preliminary matters. First, the Department has now premised its standing to sue on section 409.175(9)(a), Florida Statutes (Supp. 1984).[3] This is a wholly new claim of statutory authority, never asserted in the Department's complaint, never presented to the trial court by way of motion (contrary to the Department's contention), never argued to the trial judge, and never raised before the Fourth District Court of Appeal. Respondents suggest that this belated assertion of statutory standing

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[1]Adoption Hot Line, Inc. v. State, Department of Health and Rehabilitation Services, 385 So.2d 682 (Fla. 3d DCA 1980) ("Adoption Hot Line I"); Adoption Hot Line Inc. v. State, Department of Health and Rehabilitation Services, 402 So.2d 1307 (Fla. 3d DCA 1981) ("Adoption Hot Line II")

[2]Art V, §3(b)(3), Fla. Const.

[3]Initial brief of the Department, at pages 7-10.

should not be considered by the Court as a basis to upset the district court's decision.

Second, the Department suggests throughout its brief that the Fourth District Court of Appeal either misread or misapplied the record, both in stating facts on which its opinion is based and in expressing doubt as to the propriety of the trial court's entry of a temporary injunction. Respondents will show, however, that the district court fully mastered and accurately recounted the record on appeal. Every asserted record disagreement is solely the result of imprecision by the Department in characterizing the record.

These points are merely mentioned here for focus. Each will be explored in depth in the pages that follow.

Statement of the Case

In its initial brief, the Department has combined its statement of the facts and the case. That recitation does not identify accurately either the course of proceedings below or the record facts there established. For the Court's clarification, respondents respectfully restate each statement separately.

The case on appeal to the Fourth District Court of Appeal, now on review here, evolved from the entry of two non-final orders in the Broward County Circuit Court.

On November 21, 1984, the Department filed a complaint seeking a temporary and permanent injunction against respondents National Adoption Counseling Service, Inc. and Richard Gitelman, in the conduct of their business. (R. 1-5). (Because of its importance to the issues on review, a copy of the complaint is attached as Appendix 1).[4] Respondents moved to dismiss the complaint, but that motion was denied. (R. 23). This order of the trial court was one of the two orders appealed to the district court.

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[4]In its initial brief on page 5, the Department states (without record reference) that the district court failed to note that the complaint was amended. The index to the record on appeal reflects no amendment to the complaint. If it was somehow amended, however, the Department suggests only that the amendment substituted the words "sections" for the words "counts" in its petition for relief. There is no suggestion, and respondents find no record basis to suggest, that the complaint was amended in any substantive way with respect to allegations or request for relief.

After respondents answered the complaint (R. 24-25), three hearings were held in circuit court. The first, held on February 5, 6 and 7, was an evidentiary hearing at which three persons testified. Richard Gitelman testified as to the business activities of National Adoption Counseling Service, Inc., and his personal background. An employee of the Department testified regarding her understanding of adoption procedures in Florida under Chapter 63, Florida Statutes, and the regulations thereunder. A Miami attorney (who is not now and who has never been a legislator) testified for the Department as a purported expert in adoption matters in general, for the ostensible purpose of identifying the legislative history of Chapter 63, Florida Statutes, and the intent of the legislature with respect to its enactment. Transcripts of the hearings held on these dates appear in the record at R. 26-60, 61-85 and 552-602.

On March 8, a second hearing was held, at which no testimony was elicited. The court merely heard legal arguments of counsel. (R. 266-80).

On April 22, there was a hearing on respondents' motion for clarification of the status of telephone depositions. (R. 541-51). In the course of that hearing, the trial judge announced that he intended to grant the Department's request for a temporary injunction. (R. 545-46). Three days later the trial court did just that, entering the second order now on review granting a temporary injunction against respondents. (R. 539-40). (Because of its importance, that order is reproduced in Appendix 2 to this brief.)

On April 25, after the trial judge had announced his decision, the Department filed transcripts of telephone depositions. (R. 378,414). These depositions in large part provide the testimonial evidence on which the Department's brief relies, as will be developed.

Respondents timely appealed the two referenced non-final orders to the district court. That court reversed both, vacating the temporary injunction and directing that the complaint be dismissed. National Adoption Counseling Service, Inc. v. State, Department of Health and Rehabilitative Services, 480 So.2d 250 (Fla. 4th DCA 1985). The sole basis for reversal was the Department's lack of authority to enjoin respondents under the statutes expressly identified and relied on in the Department's pleadings, the record on appeal, and the Department's brief to the district court (there was no oral argument).

The Department did not seek rehearing or clarification of the district court's decision. After the time for rehearing had expired, and after the court's mandate had issued, the Department moved to vacate the mandate. (Appendix 3 to this brief). That request was denied. (Appendix 4 to this brief). As required under the circumstances, the trial court on January 30, 1986, dismissed the Department's complaint. (Appendix 5 to this brief). Based on that dismissal, respondents have filed with this Court a motion to dismiss this review proceeding as moot.

Statement of the Facts

This proceeding arose under the Florida Adoption Act, Chapter 63, Florida Statutes. (See the Department's complaint in Appendix 1.) The Department asserted that respondents were operating an unlicensed "child-placing agency," as that term is defined in section 63.032(7), Florida Statutes (1983). The facts upon which the Department relied for injunctive relief are essentially stated below. The Department asserted its statutory authority to enjoin respondents' activities, expressly and exclusively, on the basis of section 381.031, Florida Statutes (1983). (App. 1, para. 2.)

National Adoption Counseling Service, Inc. ("National") is a corporation organized under the laws of the State of Florida. (See App. 1, para. 6, admitted in respondent's answer at R. 24-25). Richard Gitelman was the president and sole director of that corporation. (App. 1, para. 8; R. 28-29). National's business consisted of performing searches outside the State of Florida on behalf of couples from outside the State of Florida who wished to adopt a newborn child. (R. 33). National did not advertise, promote, or in any way market its services to couples desiring to adopt. Rather, couples who wished to adopt a newborn child initiated contact with National by telephone from outside the

State of Florida. (R. 59). Typically, these couples had been referred to National by their own out-of-state attorney. (R. 32-33).

As president of National, Richard Gitelman advised couples who contacted him that National performs a search to locate a pregnant female who is desirous of giving up her child for adoption at the time of its birth. Couples who desired to engage the services of National were sent a form contract. If they chose to avail themselves of National's services, a completed contract was then mailed back to National with one-half of an agreed search fee. (R. 342-343).

National conducted its search for prospective mothers-to-be solely by placing advertisements in newspapers outside the State of Florida. (R. 56). In these advertisements, National listed only <u>its</u> telephone number, in order to preserve the anonymity of prospective adoptive parents. On seeing these ads, pregnant women desiring to avoid abortion but hoping to give up their child-to-be for adoption, would contact National by telephone. (R. 58-59). At that time, National obtained biographical information concerning the future mother. This was needed for potential adoptive parents, as well as for most legal adoption proceedings which might be instituted. (R. 44-46, 59).

In due course, the corporation provided a prospective birth mother with biographical information on the prospective adoptive parents, and vice-versa. (R. 44). No identification of the prospective birth mother or the prospective adoptive parents, however, was exchanged. The names, addresses and telephone numbers of each were maintained in strictest confidence by National.

If the prospective birth mother advised the corporation that she was satisfied with the information on the prospective adoptive parents, and if the prospective adoptive parents were satisfied with the information on the potential birth mother, the corporation then turned over its information about the prospective birth mother to an attorney whom the prospective adoptive parents had chosen to represent them in formal adoption proceedings. (R. 31, 33-34, 37). An adoption was then arranged and consummated by counsel for the adoptive parents, in accordance with the laws of the state where the adoption was to take place. National in no way participated with the attorney for the adoptive parents in the formal adoptive process.

Occasionally, a prospective adoption did not take place, as when the natural mother had a change of heart and decided not to relinquish her child, or when some unforeseen medical problem arose. (R. 54-55). In those cases, and in accordance with National's contract, the corporation undertook a new search at no additional charge to find another

prospective birth mother willing to give up her child-to-be for adoption. (R. 58-60). The same process would be repeated unless and until, for personal reasons, the adoptive parents chose not to adopt a child or avail themselves further of National's services.

A few of the prospective parents who had voluntarily suspended National's search for a pregnant mother expressed their natural frustration at a failed adoption process and their attendant financial loss. (R. 55). The Department endeavored, in the main, to build its case against respondents on a few of these out-of-state former clients of National.

Based on the foregoing facts, the trial court nonetheless temporarily enjoined all of respondents' business activities throughout the United States. Respondents have asserted throughout that the trial court was without lawful authority to enjoin its activities, that the Department was without lawful authority to bring this proceeding, and that in any event relief was granted without legal justification.

Summary of Argument

The Florida Adoption Act is a statute enacted by the Florida Legislature in the exercise of its sovereign power over the citizens and residents of Florida. Sections 63.012-.232, Florida Statutes (1983). There are neither allegations nor proof in this proceeding (1) that any Florida citizen or resident has been affected by the business activities of National or its president, Richard Gitelman, or (2) that any Florida parent, any Florida mother-to-be, or any Florida child is likely to be affected by the business activities of National or its president, Richard Gitelman.

The Department of Health and Rehabilitative Services is an agency created by the Florida Legislature for duties specifically prescribed by law. It has no statutory authority to act beyond the boundaries of the State of Florida or to interfere with interstate commerce. Moreover, the Department has not been granted the injunctive powers it has invoked. As the district court held, section 381.031 does not confer standing to enjoin respondents' business activities. Nor does Chapter 63 confer the power of a private attorney general to enforce the criminal laws of Florida, as the Department initially asserted (but apparently no longer argues). Section 409.175, now raised for the first time by the Department, is similarly unavailing.

(1) In seeking injunctive relief against respondents, the Department specifically relied on authority conferred in section 381.031, Florida Statutes (1983). (See complaint, paragraph 2, in Appendix 1.) By its terms, that section specifically limits the injunctive authority of the Department to matters and subjects contained within the four corners of Chapter 381. Section 381.031(3)(b) does not authorize the Department to enforce the provisions of Chapter 63, Florida Statutes, and the district court so held. Reliance on Section 381.031(b) has apparently been abandoned by the Department in this proceeding, as it is nowhere argued in its initial brief.

(2) The Florida Adoption Act is found in Chapter 63 of the Florida Statutes. The Act contains only one provision relating to its enforcement. That provision, section 63.212, is penal, prescribing criminal sanctions for violations of the Act. The Department's complaint asserts that National's business activities violate section 63.212. The Department has no statutory authority, expressed or implied, to enforce the criminal laws of the state, and again the district court so held. In its initial brief to this Court, the Department does not raise section 63.212 as a basis for its standing and apparently has now abandoned that position as well.

(3) Section 409.175, Florida Statutes (Supp. 1984), is one of many amendments made in 1984 to the laws relating to the care and placement of "dependent children." (See §1, Ch. 84-311, Laws of Fla.) Dependent children are the

subject of Part III of Chapter 39, Florida Statutes, entitled "Proceedings Relating to Juveniles." The title to this 1984 revision of the dependency laws in no way references Florida's adoption statute (Chapter 63) or public health law (Chapter 381). (See West's 1984 Florida Session Law Service, Vol. 6, pages 1111-1114.)[5] In line with the intent of the legislature, section 409.175 is a licensing statute. The injunctive authority found within the section is primarily enlisted in connection with unlicensed child-care centers and placement agencies. This statute does not authorize the Department to enjoin respondents' pre-intermediary search services for out-of-state persons.

To obtain a temporary injunction, a plaintiff's allegations and proof must show that a defendant's conduct will cause irreparable harm, that plaintiff has a clear legal right to injunctive relief, and that there is no adequate remedy at law. Both the complaint and proof of the Department are insufficient as a matter of law to meet this stringent test.

(1) As regards allegations, the complaint makes inadequate assertions in each of the three categories. It recites the Department's speculative concern for potential consequences which will ensue if corporations "such as"

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[5]The court will no doubt recall the child care and foster home crisis which precipitated this revision of the child dependency laws.

National, and persons "such as" Richard Gitelman, are permitted to "fall into the hands of unscrupulous individuals," are allowed to create "unwarranted hopes" for prospective parents, or are allowed to deal with prospective adoptive parents. (See the Department's complaint at paragraphs 23, 24 and 25, in Appendix 1.)

(2) As regards proof, the Department's presentations to establish the elements necessary for injunctive relief fare no better. No record evidence suggests that respondents have engaged in or will engage in the conduct with which the Department is concerned. No evidence suggested that respondents' business activities involved any "child," as that term is defined in Chapter 63. See section 63.032, Florida Statutes (Supp. 1984). There is no proof whatsoever that the "dire consequences" of which the Department complained were imminent or threatened.

There is no express and direct conflict of appellate decisions. The district court below expressly stated that the _Adoption Hot Line_ cases did _not_ involve the standing issue on which the court decided this case. _National Adoption_, 480 So.2d at 253. On the face of the opinions in _Adoption Hot Line_, those cases make no mention of and offer no interpretation of the statutes addressed below. Additionally, the new ground asserted by the Department for its statutory standing completely belies its claim of conflicting appellate decisions. That is, if the Department is correct in now

asserting that section 409.175(9)(a) supplies authority for its actions in this case (which respondents deny), there is no possible conflict between this 1984 provision of the law and the pre-1984 Adoption Hot Line cases.

Argument

1. Introduction

There are four, distinct issues in this case. National is entitled to a determination in its favor on each.

The first, that the Department has no statutory standing to seek an injunction against National, was the only issue addressed conclusively by the district court. The second, raised by the Department in the event standing is found and noted by the district court to be doubtful, is whether the trial court properly entered a temporary injunction against National. A third issue is whether this Court has constitutional jurisdiction for review of the district court's standing determination, based on an express and direct conflict of decisions. Each of these three issues is addressed in this brief.

A fourth issue is whether this case is moot. The Department's complaint has been dismissed, so there is no pending controversy between the parties. This last issue is presented to the Court in a separate motion served simultaneously with this brief.

2. The Department has no standing to bring this suit for an injunction.

(a) Section 409.175 has never been raised previously in this proceeding.

For the first time in this proceeding, the Department claims authority to seek injunctive relief against respondents under section 409.175(9)(a), Florida Statutes (Supp. 1984). This is an improper position for the Department to take. It constitutes an attempt to undermine the district court's decision-making process by arguing issues different from those presented by the Department to that court. It departs from that which the Department presented and argued to the trial court. It also, incidentally, constitutes an untenable reading of this newly raised statute.

This Court should not condone the Department's new and novel approach to its pursuit of an injunction against respondents. No regulatory agency should be permitted to "find" statutory authority for enjoining Florida's citizens at the Supreme Court level, when it has litigated before the circuit court and then appealed to the district court on precise, but different, legal grounds. That the Department's reliance on section 409.175 is new in this proceeding is easily demonstrated.

(i) Complaint.

In its complaint, the Department nowhere mentioned or identified section 409.175, Florida Statutes (Supp. 1984). (Appendix 1).

(ii) Motion for Temporary Restraining Order.

The Department's six-page motion for temporary injunctive relief appears in the appendix to its initial brief at pages 38-43. It contains no reference to section 409.175. Nor does the motion refer to "Chapter 409," as the Department states on pages 7 and 9 of its initial brief.

In its prayer for relief on pages 5-6 of the motion (Department appendix pages 42-43), the Department cites to Chapter 63 "and Chapter 409.401, et seq." This reference in no way encompasses section 409.175, as a matter of law, logic or English grammar.[6] Sections "409.401 et seq." are a discrete set of laws which comprise the "Interstate Compact on the Placement of Children." These sections appear in Volume 2 of the 1983 Florida Statutes. They were not amended in 1984, and consequently do not appear in the 1984 Supplement to Florida Statutes. The Department's motion reference to "section 409.401 et seq." is not an express or implied reference to injunctive powers as conferred in section 409.175, as amended in 1984. It can not be because, prior to 1984, section 409.175 gave the Department no injunctive power.

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[6]Black's Law Dictionary (5th Ed.) defines "et seq." to mean an abbreviation of "and the following." Section 409.175 obviously comes before section 409.401. The phrase "409.401 et seq.", therefore, can only mean the named section and provisions following.

This analysis of the Department's motion is not designed to attack a trivial misstatement in the Department's brief. The Department flatly states it presented section 409.175 to the trial court. It did not. The misstatement is a distortion of the record, for the Department's pleading (to the Interstate Compact and not injunctive powers) in fact matched its argument and offer of proof. It was only the Interstate Compact, and not injunctive authority, to which the Department and its witnesses referred before the trial court, and on which the judge commented.[7]

The Department's motion asked for relief under the Interstate Compact. The Department never sought relief against respondents under section 409.175 as amended in 1984.

(iii) District court brief.

There was no oral argument in the district court. The Department's answer brief never mentioned or alluded to injunctive powers under the 1984 revision of section 409.175. Nor did respondents present that section to the court

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[7]The Department again misstates the record when it says, in its initial brief at page 9, that "the trial court noted his knowledge of Chapter 409. (R. 62)." The record speaks for itself, and the cited record reference will show that the trial judge expressed his familiarity only with the Interstate Compact. (R. 62; transcript of Feb. 6, 1985 hearing at p. 5, lines 16-18). The judge made no reference to other provisions of Chapter 409, and he certainly made no reference to the 1984 statute on dependent children which amended section 409.175.

in any way, since they had not been advised at any stage that the Department purported to rely on section 409.175. The critical issue briefed to the district court was lack of standing, based on section 381.031 and on Chapter 63, Florida Statutes. These were the provisions of law on which the Department had previously relied. The court ruled on what the parties presented.

(iv) Inferential assertion of authority.

A final thread of the Department's argumentative web urges that section 409.175, Florida Statutes (Supp. 1984), was truly there all the time before the circuit and district courts. This contention rides not on express references in the Department's pleadings and brief, but on references to a rule of the Department which appears in Florida Administrative Code Rule 10C-15.82. That rule does not deal with injunctive powers in any respect. Rather, it sets forth the Department's definition of a "child-placing agency" on which the Department had supported its arguments under Chapter 63. (Those assertions of the Department have also been abandoned here.)

The Department now suggests that its reference to the rule in the lower courts put the judges on notice that section 409.175, as amended in 1984, provided statutory standing. This assertion is premised on the fact that reference is made under the rule in the Administrative Code to section 409.175, as a source of its promulgation. But even the Department's strained suggestion of indirect reference is faulty. The 1984 amendment

to section 409.175 is not the statute to which the rule's legislative note refers. The rule was adopted in 1977, under the predecessor section 409.175. See Fla. Admin. Code Annot. Rule 10C-15.82. The limited injunctive authority added in 1984 was conferred seven years after Rule 10C-15.82 was adopted. Plainly, the Department's reference to the rule in the lower courts, for a wholly different purpose, could not have alerted those courts to the Department's new-found reliance on injunctive standing conferred in 1984.

(b) Section 409.175 does not empower the Department to enjoin National Adoption.

Even if the 1984 version of section 409.175 were appropriate for consideration by this Court, this would not be a proper case for its application. The section is intended primarily to safeguard children within the state who have been placed for day care, and the like, through licensed child-care agencies. It was drafted in response to the day-care crisis of the early 1980's.

One subsection of the statute concerns placement of children by child-placing agencies that receive or arrange for placement of children in adoptive homes. Section 409.175(3)(b), Florida Statutes (Supp. 1984).
The Department did not establish or purport to show that the services provided by respondents involve placing children in adoptive homes. As noted, section 409.175 itself is directed to the licensing of unlicensed child-placing agencies. Its mechanics operate only after departmental notification of

non-licensure. See section 409.175(9)(b), Florida Statutes (Supp. 1984). Only then may the Department institute civil process to enjoin a child-placing agency, in order to effect compliance with prescribed licensing requirements. Section 409.175(10)(a), Florida Statutes (Supp. 1984). The Department has never tried to enforce the licensing provisions of section 409.175 against respondents. That is not what this case is all about, and the Department has not at any stage provided statutory notice that respondents were operating without a required license.

No aspect of the Department's proof shows a violation of section 409.175. Respondents cannot be enjoined from serving out-of-state couples and out-of-state natural mothers as a predicate to legal, out-of-state adoptions.

Lifting a particular subclause of newly-enacted section 409.175 as a statutory basis for this lawsuit is a flawed legal method. The entire statute is inapposite to this case.[8]

(c) Chapter 63 does not grant injunctive authority to the Department on the facts of this case.

The district court assessed the Department's injunctive powers under Chapter 63 and concluded that they are

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[8] As the title of the statute reveals, section 409.175 was substantially rewritten by the 1984 legislature to deal with dependent children concerns.

directed at enjoining intermediaries who violate the provisions of section 63.092, Florida Statutes (Supp. 1984). See section 63.092(9), Florida Statutes (Supp. 1984). The court held that the Department lacked statutory authorization under the Florida Adoption Act to bring suit for injunctions, except for those "having to do with intermediaries." National Adoption, 480 So.2d at 253.

The district court's reasoning is on the mark. Indeed, the Department does not assert otherwise in its brief. The Florida Adoption Act confers authority on the Department to qualify persons as intermediaries in the adoption process. The term is defined to include lawyers, physicians and agencies approved by the Department. Section 63.032(8), Florida Statutes (Supp. 1984). In section 63.202, the Department is authorized to license Florida child-placing agencies. This case does not involve a licensed intermediary. National Adoption, 480 So.2d at 253. The Department has not claimed that it does. In the presence of a limited but express grant of injunctive powers, the omission of any other power is highly persuasive that none may be inferred. See Thayer v. State, 335 So.2d 815 (Fla. 1976).

Before the district court (but apparently abandoned on review in this proceeding), the Department supported its position on injunctive authority by reference to section 63.212, Florida Statutes (Supp. 1984). Subsection 6 of that section provides that "a person who violates any provision of

this section" (emphasis added) is guilty of either a felony or misdemeanor, depending on the violation. The district court discarded any implied basis for injunctive authority grasped from the specific criminalizing of conduct not at issue. "[Section 63.212], of course, affords HRS no authority to maintain this suit." National Adoption, 480 So.2d at 253.

The Department seems to maintain that by reading Chapters 63 and 409 in conjunction, the whole is more than a sum of the parts. (Department's initial brief at 7). No legislation identified by the Department, however, authorizes it to enjoin respondents from matching out-of-state adoptive couples and birth mothers as a preliminary step to legal adoptions in other states. This form of activity was all the Department's proof ever reflected that respondents had done. That the statutory scheme does not reach purely out-of-state conduct is reflected in section 63.207, which proscribes any agency or intermediary, other than the Department, from sending a child out of the state to complete an adoption. It further prohibits counseling a natural mother to leave the state in order to obtain a larger fee for an intermediary role in placing a child for adoption outside the state. Even in the case of statutorily created intermediaries, these comprehensive statutes do not reach purely out-of-state conduct.

In the Adoption Hot Line cases, the Department apparently took a similarly expansive view of the reach of Chapter 63.[9] While this view led the trial court to grant an injunction covering all aspects of Adoption Hot Line's business commensurate with its acting as an unlicensed intermediary or child-placing agency, Adoption Hot Line II, 402 So.2d at 1308, the district court dissolved the permanent injunction because it was too expansive.

> We do not read Chapter 63 as prohibiting all unlicensed parties from referring children to licensed or authorized parties to place for adoption.

402 So.2d at 1308. According to the court, even in the context of purely *intra*-state adoptions, Adoption Hot Line could perform referrals consistent with Chapter 63. *Id.* at 1308.

The Department here seeks to enjoin purely out-of-state conduct. The Department, in essence, asks this Court to approve an expansive view of its authority under Chapters 63 and 409 which has now been rejected by two district courts of appeal. Respondents re-assert that neither Chapter 63 nor 409 grant the Department standing to

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[9] The complaint prepared by Mr. Laitner and filed in this case was, in fact, a mirror image of the complaint prepared by Mr. Laitner and filed in the Adoption Hot Line case. Compare the complaint in this case (Appendix 1) with Adoption Hot Line I, 385 So.2d at 684-685 n.1 (Fla. 3d DCA 1980) (Schwartz, J. dissenting).

seek injunctive relief against respondents' activities on behalf of adoptive couples and natural mothers who are not residents of Florida.

(d) Section 381.031 provides no authority to enjoin respondents.

The Department argued to the trial court and to the district court that section 381.031, Florida Statutes (1983), conferred authority to enjoin respondents' activities. That argument is not re-asserted to this Court. Apparently it has been abandoned. For the sake of completeness, respondents note that the Department's reliance on section 381.031 was dealt with and rejected by the district court expressly. Since the Department has not challenged the court's reasoning or ruling, respondents will not enlarge this brief with unneeded argument. Respondents simply rely on the decision below as to this point.

3. A temporary injunction should not have been granted by the circuit court.

For a preliminary injunction to be entered, the plaintiff must establish three essential elements: irreparable harm, a clear legal right, and an inadequate remedy at law. Walsh v. French, 409 So.2d 1131 (Fla. 4th DCA 1982). An injunction does not lie to prohibit an act which has already been committed. Wilkinson v. Woodward, 105 Fla. 376, 141 So. 313 (1931); Quademain Condominium Ass'n Inc. v. Pomerantz, 341 So.2d 1041 (Fla. 4th DCA 1977). The Department's complaint in

this case either directly states or implies that all activities alleged to be contrary to statute occurred in the past. (See complaint, paragraphs 5, 6, 9 and 16, in Appendix 1.)

(a) No irreparable harm.

The Department presented no specific facts on which to base any allegations of irreparable harm to residents of Florida. After a thorough review of the record, the district court said "the only semblance of any activity that would constitute a nexus with Florida is that National's contract with the adoptive parents says it will 'commence to search, for and on behalf of the client, both locally and nationally for a pregnant woman who desires to give up her child for adoption.' The testimony is that National does not search in Florida. The only evidence of activity with Florida residents was precipitated by an employee of HRS who simply set National up by calling Gitelman, identifying herself as a potential parent, and inquiring about National's operation." National Adoption, 480 So.2d at 250-251.

Contrary to the Department's contention that the district court failed to consider pertinent evidence in reaching its conclusion (Department's initial brief at 5-6, 9-10), the district court overlooked nothing when it said that, "[i]n the main . . . [National Adoption's] business is conducted outside the state." Id. at 251. The testimony relied on by the Department to challenge the district court involves a pregnant woman who allegedly was requested to come

into the State of Florida to deliver her child at respondents' expense. (Department's initial brief at 3). The witness to whom the Department referred, however, was Martha Cohen, a social worker from Michigan who saw respondents' advertisement in a Michigan newspaper and decided to conduct her own investigation to determine if the advertisement was contrary to Michigan law. (R. 378, transcript pp. 10-11).[10] She admitted telling Mr. Gitelman, prior to any discussion of travel expenses, that she desired to winter in Florida, that she had an uncle in West Palm Beach with whom she could stay (*Id*. at 11) and that she intended to come to Florida and surrender a baby for adoption. (*Id*. at 13). Other than the one telephone conversation with Mr. Gitelman, Cohen had no contact or correspondence with respondents after the time of her investigatory overture. (*Id*. at 16).

The Department's initial brief also maintains that National flew pregnant women to Florida. (Department's initial

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[10] It is also relevant that Cohen's testimony was obtained in a telephonic deposition, and that the deposition was filed as part of the record in the circuit court three days after the trial judge had announced his decision to grant a temporary injunction. (R. 545-546).

brief at p. 3). This conclusion similarly derives from a telephonic interview. In this case, the telephone deposition was given by a man from New York who had engaged respondents' search services.[11] One prospective birth mother was to travel at this adopting couple's expense from New Jersey to Oregon. (R. 414 at transcript p. 15). The husband never suggested that respondents sought to match this New York couple with a prospective birth mother residing in Florida. (Id. at 7-15).

The full tale of this New York couple is actually instructive as to the attenuation of the Department's position in this case. The couple's first adoption effort involved only respondents' preliminary assistance putting them in touch with an attorney in Oregon. (Id. at 23-29, 34-38). Their second effort involved a prospective mother from Missouri, contacted through their New York attorney and a social worker from Missouri. (Id. at 41-42). None of this activity implicated either a Florida adoptive couple or mother. Both were wholly outside the Department's legal sphere of concern.

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[11] Once again, this telephonic deposition was not filed until after the circuit court's decision to grant a temporary injunction.

These were the Department's attempts to demonstrate the need for a temporary injunction. Respondents submit they were legally insufficient. The district court expressed its doubt that a case had been made for this extraordinary relief.

The first test for a temporary injunction is proof of irreparable harm. Walsh v. French, 409 So.2d 1131 (Fla. 4th DCA 1982). The Department presented no specific fact on which to found any allegation of irreparable harm. No affidavit, statement or testimony was presented to the trial court from any Floridian who was an alleged "victim" of respondents' business activities. The Department did set about trying to create evidence against respondents, in much the same manner as had the Michigan social worker discussed earlier. An employee of the Department called respondent, masquerading as a prospective parent who had learned of their services through an out-of-state successful adoptive couple. She requested a copy of a service contract. National Adoption, 480 So.2d at 251-52. That was the proof -- that respondents answered their telephone.

The district court criticized the Department's investigatory procedure, characterizing it appropriately as a scheme devised to "simply set National up." Id. at 251. Yet even this attempt fell short of proving the necessary Florida nexus, and this was the sole Florida contact which the Department could muster in support of its motion for a temporary injunction despite prolonged investigation prior to

and in the course of a lower court proceeding which itself spanned several months. On this "evidence," the Department asserts that the Fourth District Court of Appeal misread the record when that court said it had "serious doubts that HRS made out a sufficient case for the allowance of a temporary injunction." Id. at 252.

The Department's brief attempts to supply proof of harm by force of adjectives. According to the Department, National "browbeats distraught" women; causes "emotional agony" to clients; and, its behavior "constitutes the intentional infliction of emotional stress." (Initial brief at 16). Not once, however, did the Department present testimony by a Florida prospective parent or natural mother to buttress these inflammatory characterizations. The only victims presented by the Department were two New York couples who claimed dissatisfaction with respondents, although they had engaged in a number of searches for them, because respondents were unable to provide their first choice of newborns. (R. 135, 414).

Throughout this proceeding, the Department's case for temporary injunctive relief has basically been bombast. It started with a softly-couched complaint which contained general allegations of prospective harm. In paragraph 23, for example, the complaint asserts plaintiff's fear that agencies "such as respondents" may fall into the hands of unscrupulous persons and deal in black market babies. Paragraph 24 states the

Department's fear that respondents "could create unwarranted hopes in the hearts of prospective parents causing which upon National Adoption Counseling Service, Inc.'s failure to find a child for said prospective parents could and could cause grave cases of mental distress." These are the allegations which, as a matter of law, must provide the clear, distinct, and unequivocal allegation of imminent harm and a nexus with Florida. In paragraph 25, the Department states that failure to grant an injunction "could" result in individuals "such as" respondents causing distress -- a concern that nowhere reveals clear and distinct potential harm to Floridians. Paragraph 26 essentially repeats these imagined possible horrors.

Mere general allegations of irreparable injury are not sufficient, as the Court well knows, to warrant the grant of injunctive relief. See Metcalf v. Martin, 45 So. 463 (Fla. 1907). There must be something more than mere opinion in order to justify injunctive relief. See Williams v. Dormany, 126 So. 117 (Fla. 1930).

To warrant injunctive relief, a prospective injury must be more than a remote possibility; it must be so imminent and probable as reasonably to demand preventive action by the court. City of Coral Springs v. Florida National Properties, Inc., 340 So.2d 1271 (Fla. 4th DCA 1976). As was stated in that case, quoting from Cramp v. Board of Public Instruction of Orange County, 118 So.2d 541, 544 (Fla. 1960):

> It has been consistently held that in order to support the granting of a temporary restraining order, the allegations of the complaint must be clear, distinct and unequivocal. The plaintiff by his complaint must likewise clearly demonstrate that irreparable injury would follow the denial of the injunction. (emphasis in original).

340 So.2d at 1272.

(b) No clear legal right.

The Department was required to show it has a clear legal right to enjoin the acts it claims are prohibited. Dade Enterprises, Inc. v. Wometco Theatres, Inc., 119 Fla. 70, 160 So. 209 (1935). The court is referred to the earlier discussion of the Department's lack of a statutory basis to enjoin the services performed by respondents.

Congress has the exclusive power to regulate interstate commerce. Respondents are engaged in purely interstate commerce. No evidence was presented to the trial court to show that citizens of Florida have been affected, much less harmed, by respondents' business activities. The state cannot regulate or burden interstate commerce, or deny respondents their right of free speech. See Adoption Hot Line II, 402 So.2d 1307 (Fla. 3d DCA 1981).

The Department has no jurisdiction to control activities that occur in other states. It is attempting, through this case, to control the actions of individuals in other states. The Department's previous attempts to control

the actions of citizens of other states have been rebuffed by the courts. Of primary note is State, Department of Health and Rehabilitative Services v. Castagnino, 429 So.2d 102 (Fla. 2d DCA 1983), where the Department attempted to prohibit a couple residing outside the state from adopting a child residing in Florida. The court held that the Department may not unilaterally prevent out-of-state residents from adopting in Florida by refusing to conduct a home study. Here, too, the Department's main thrust is to control out-of-state residents with respect to adoptions of their choice in their home state.

This reach for unauthorized power is also without the range of authority conferred by Chapter 63. A "child" is defined in section 63.032(2) as a son or daughter, whether by birth or adoption. The statute makes no mention of unborn children. In Florida, an unborn fetus is not a child. See Stokes v. Liberty Mutual Ins. Co., 213 So.2d 695 (Fla. 1968); Stern v. Miller, 348 So.2d 303 (Fla. 1977). Since respondents' services consist only of performing searches on behalf of prospective adoptive parents for pregnant women willing to give up their yet unborn children for adoption, those services clearly do not fall within the ambit of the law.

It has long been the law that injunctive relief "should not be granted where there is a substantial dispute as to the legal rights involved and the right of the complainant is doubtful, or is not clear." Dade Enterprises, Inc. v. Wometco Theatres, Inc., 119 Fla. 70, 160 So. 209, 214 (1935).

Another cloud of doubt on the Department's legal right to the award given by the trial court is the First Amendment to the United States Constitution. When the trial judge signaled his decision to enjoin respondents' business, respondents urged that any restraining order be limited to prohibiting National from accepting any Florida residents as clients, publishing any newspaper advertisements in Florida newspapers, or accepting any telephone calls from potential birth mothers who are citizens of Florida. (R. 266, at p. 18). The court rejected that advice. Its order, which enjoined all respondents' business activities everywhere, was overly broad and attempted to restrain free speech. See Article I, Section 4 of the Florida Constitution; Adoption Hot Line II, 402 So.2d 1307 (Fla. 3d DCA 1981).

(c) An adequate remedy at law.

There is adequate remedy at law for the Department if it believes that respondents' conduct is improper. The district court suggested that, "if HRS perceives that National's activities violate the provisions of Chapter 63, resort to the State Attorney's Office would seem appropriate for criminal prosecution." National Adoption, 480 So.2d at 253.

4. There is no express and direct conflict of decisions on which this court may accept jurisdiction of this case.

The district court held that the Department had no standing to enjoin respondents' business activities by virtue of Chapters 63 or 381 of the Florida Statutes.

The Department's argument for express and direct conflict is based only on alleged conflict with the Adoption Hotline cases. These cases were resolved on the merits, not on a standing issue. For this reason alone, there is no express conflict of decisions. Compare Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

It is instructive that the position embraced by the Department before this Court is not the majority opinion in Adoption Hot Line I or II, but rather the dissenting opinion of Judge Ferguson in Adoption Hot Line II. (Department's initial brief at 14). The obvious reason for this choice is that Judge Ferguson alone, in dissent, is the only jurist to embrace the Department's suggestion that Chapter 63 supports enjoining the conduct of a search agency not licensed as an intermediary. The majority opinion in Adoption Hotline II expressly disagreed with the Department's reading of Chapter 63 (402 So.2d at 308), and it overturned the preliminary injunction which had been entered by the circuit court in that case. Id.

Respondents re-emphasize that there was no discussion in either Adoption Hot Line case of the Department's injunctive powers under section 409.175, Florida Statutes (Supp. 1984). The situation before this Court is identical to that in State, Department of Health and Rehabilitative Services v. Lake County, 472 So.2d 732 (Fla. 1985), where the Court accepted, then on full review rejected conflict jurisdiction.

There, as here, the statute on which the petitioner relied "was not involved and played no part in the Court's decision." Id. at 733.

Conclusion

The Department's petition for review should be denied based on the now-apparent absence of jurisdictional conflict. Should the Court decline to discharge the case as having been accepted for review improvidently, it should affirm the district's court's decision that the Department lacked statutory standing to maintain this suit for injunctive relief.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of this brief was mailed on June 27, 1986, to Morton Laitner, Esq., Dade County Health Dept., 1350 N.W. 14th Street, Miami, Florida 33125.

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