68,191

IN THE SUPREME COURT
OF FLORIDA

DCA-4 NO. 85-1072

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

Plaintiff, Petitioners,

vs.

NATIONAL ADOPTION COUNSELING SERVICE, INC., AND RICHARD GITELMAN,

Defendants, Respondents.

JURISDICTIONAL BRIEF OF THE STATE OF FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

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SUMMARY OF ARGUMENT

The State of Florida, Department of Health and Rehabilitative Services files this jurisdictional brief for discretionary review of the decision by the Fourth District Court of Appeal in National Adoption Counseling Service, Inc., and Richard Gitelman v. State of Florida, Department of Health and Rehabilitative Services, Case No. 85-1072, Appendix 1.

This Court may constitutionally exercise its discretionary jurisdiction when a decision of a district court of appeal directly and expressly conflicts with a decision of another district court of appeal.

The decision below unequivocally found that the Department of Health and Rehabilitative Services had no standing to seek injunction against an alleged referral service, and/or an unlicensed child-placing agency. This decision is in direct conflict with the decisions of the Third District Court of Appeal in the Adoption Hot Line, Inc. v. State of Florida, 385 So.2d 682 (Fla. 3d DCA 1980), and Adoption Hot Line, Inc. v. State of Florida, 402 So.2d 1308 Fla. 1981) cases.

The Third District Court of Appeal clearly mandated that there was, "A governmental interest" expressed in Chapter 63, Florida Statutes, as to the issuance of an injunction, and further cited the Florida Administrative Code, which references Florida Statute 409.175, which clearly gives the Department the authority to seek an injunctive remedy against unlicensed child-placing agencies.

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff, Petitioner, State of Florida, Department of Health and Rehabilitative Services, hereinafter referred to as HRS, seeks to have reviewed, a decision of the District Court of Appeal, Fourth District, dated and filed on December 31, 1985. The Petitioner was the original Plaintiff below and the Appellee before the District Court of Appeal. The Respondents, National Adoption Counseling Service, Inc., (National) and Richard Gitelman, were the original Defendants in the trial forum and were the Appellants before the District Court of Appeal.

This was an appeal by the Respondent from two orders entered by the Circuit Court in and for Broward County, granting a temporary injunction against Respondents and an order denying Appellants' Motion to Dismiss Appellee's complaint.

The District Court of Appeal, Fourth District, reversed and remanded with directions to dismiss the cause.

In this brief, the parties will be referred to by their names and by the positions they occupy before the Court.

The following symbol will be used for references: "R" for "Record of Proceeding Sought to be Reviewed".

National, a Florida corporation, placed advertisements in news publications throughout the nation requesting expectant mothers who do not want to keep their children to contact a "young, white couple", and listed National's Florida telephone number. National obtained personal information about the expectant mother, which National utilizes in conjunction with information gathered about the prospective adoptive parents, who have paid National a fee of

up to eight thousand ($8,000.00) to National.

Upon payment of the fee, National furnished the counsel of the adoptive parents' choice the name, address and telephone number of the natural expectant mother. HRS contends that National's activity is a referral, contrary to Section 63.212(1)(g), Florida Statutes (1984), and National is also operating a child-placing agency in violation of Sections 63.207 and 63.212(1) and Section 409.175, Florida Statutes (1984), and Chapter 10D-15.82-90 of the Florida Administrative Code.

HRS filed on March 8, 1985 the trial court with a Motion for Temporary Restraining Order outlining numerous repugnant activities conducted by National and Gitelman. (See Appendix Exhibit 2.)

On April 25, 1985, the Circuit Court issued an order granting Temporary Injunction. The Court found that National and Gitelman were not licensed by the Department as a child-placing agency, pursuant to Chapter 63, Florida Statutes, and/or Chapter 10C-15.82 Florida Administrative Code. (See Appendix Exhibit 3 for full order.)

The District Court of Appeal, Fourth District, held that HRS had no standing to maintain the suit for injunction and ordered its dismissal.

ARGUMENT

1. THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE NATIONAL CASE DOES DIRECTLY AND EXPRESSLY CONFLICT WITH TWO DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL IN THE ADOPTION HOT LINE CASES, AND THEREFORE, THIS COURT SHOULD EXERCISE JURISDICTION THEREIN.

The decision of the Fourth District Court of Appeal is in express and direct conflict with the two Adoption Hot Line, Inc. v. State of Florida cases 385 So.2d 682 (Fla. 3d DCA 1980) and 402 So.2d 1307 (Fla. 3d DCA 1981).

In Adoption Hot Line, Inc. 385 So.2d 682, at 684, the Third District delineated the allegations made by HRS against Adoption Hot Line and the Lauers.

> (1,2) The most significant allegations made by appellees regarding the activities of the Lauers and Adoption Hot Line, Inc. are: (1) that the appellants/defendants did, in fact, commence the process of placing a 17-month old child; (2) that there has been no licensing by the Department of Health and Rehabilitative Services as a child-placing agency, pursuant to Chapter 63, Florida Statutes, and/or the Florida Administrative Code; (3) that no such licensing has been applied for or sought by the appellants; (4) appellants are neither licensed physicians or attorneys nor have they been qualified to act as intermediaaries for the appellee-department; (5) the newspaper advertising placed and published at the behest of appellants states that a "young couple wishes to adopt Caucasian child, any age, Adoption Hot Line" followed by two telephone numbers. (Emphasis Supplied)

The allegations before the Circuit and the Appellate Courts are almost identical in the National case.

1. National and Gitelman did commence the process of placing a live child.

2. National and Gitelman are not licensed by HRS.

3. National and Gitelman are not licensed physicians or attorneys, nor are they qualified to act as intermediaries by the Department of Health and Rehabilitative Services.

4. Newspaper advertising placed and published by National and Gitelman states in part that a young white couple desires a baby followed by telephone number.

The Third District ibid 684, went to state that: That probable injury to the public is evident in the obvious and immediate potential for a black-market-baby-sale network. attendant with the improper and highly probably "unsuitable" placements of children, in violation of Florida law. (See Tamiami Trail Tours, Inc., v. Greyhound Lines, Inc., 212 So.2d 365 (Fla. 4th DCA 1976)

The exact same probable injury to the public is evident based upon the activities of National and Gitelman.

The Florida Administrative Code cited by the Third District is entitled, Minimum Standards for Child Placing Agencies.

10C-15.82 F.A.C. gives the definition of a child-placing agency:

> 10C-15.82 Definition. A child placing agency is defined as an organization maintained or operated to receive children for placement in family homes or assume responsibility for placing or arranging the placement of children in foster homes, free or paid, or in homes for the purpose of adoption.
> Specific Authority 409.165 FS. Law Implemented 409.145, 409.165, 409.175, 39.01, 63.022, 63.052 FS. History- New 1-1-77. (Emphasis Supplied)

The Third District, by going to Section 409.175, Florida Statutes (1979) would note that HRS was given the authority to set

minimum standards for dependent children in the care of child-placing agencies. The Legislature in 409.175(5), Florida Statutes (1979) displayed its intent as the child placing-agencies receiving children prior to being licensed by HRS by authorizing HRS to apply to Circuit Court having jurisdiction over the person, society, association or institution, and such Circuit Court shall have and determine the case and grant such relief, mandatory or injunctive, as the case may require. (Emphasis Supplied)

There was standing for HRS to obtain an injunction in 1979. In 1984 in Section 409.175, Florida Statutes, the Legislative intent to give HRS standing to maintain an injunctive lawsuit against an unlicensed child-placing agency is clear.

Section 409.175(2)(d), Florida Statutes (1984) defines child placing agency.

> "Child-placing agency" means any person, corporation, or agency, public or private, other than the parent or legal guardian of the child or an intermediary acting pursuant to Chapter 63, that receives a child for placement and places or arranges for the placement of a child in a family foster home, residential child-caring agency, or adoptive home. (Emphasis Supplied)

Section 409.175(3)(b), Florida Statutes (1984) requires:

> (b) A person or agency, other than a parent or legal guardian of the child or an intermediary as defined in s. 63.032, shall not place or arrange for the placement of a child in a family foster home, residential child-caring agency, or adoptive home unless such person or agency has first procured a license from the department to do so.

Section 409.175(9)(a), Florida Statutes (1984) mandates that,

> (9)(a) The department may institute injunctive proceedings in a court of competent jurisdiction to:
> (1) Enforce the provisions of this section or

any license requirement, rule, or order issued or entered into pursuant thereto.

Further, Section 409.175(10)(a), Florida Statute (1984) reads:

> (10)(a) The department is authorized to seek compliance with the licensing requirements of this section to the fullest extent possible by reliance on administrative sanctions and civil actions. (Emphasis Supplied)

The Adoption Hot Line case and the National case meet the conflict test enunciated in Williams v. Duggan, 153 So.2d 726 (Fla. 1963), the "two decisions are wholly irreconcilable."

The Adoption Hot Line case and the National case decisions collide so as "to create an inconsistency or conflict among the precedents". Kincaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963).

The National decision would overrule the Adoption Hot Line decision if both were rendered by the same Court. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958).

The Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960), and Florida Power and Light Co. v. Bell, 113 So.2d 697 (Fla. 1959) cases demonstrated the situation in which conflict is found between National and Adoption Hot Line, "(2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case..."

The Adoption Hot Line, Inc. v. State of Florida , 402 So.2d 1307 (1981) at 1308, the Third District discussed the preservation of the governmental interest expressed in Chapter 63 as to the issuance of an injunction sought by HRS. Clearly, the spirit and intent of the Legislature was and is to allow HRS standing to maintain suit

for injunction against unlicensed child-placing agencies and and referral services.

Ergo, the issue of HRS standing was raised in the second Adoption Hot Line case, and therefore, it is the duty of the Supreme Court to consider this entire case on the merits as though the decision was by direct appeal. Tyus v. Apalachiacola Northern Railroad Co., 130 So.2d 580 (Fla. 1961)

CONCLUSION

The decision of the District Court of Appeal, Fourth District, that the Petitioner, HRS, seeks to have reviewed is in direct conflict with the decision of the District Court of Appeal, Third District, in the cases of Adoption Hot Line, Inc. v. State of Florida, 385 So.2d 682 (Fla. 3d DCA 1980), and Adoption Hot Line, Inc. v. State of Florida, 402 So.2d 1307 (Fla. 3rd DCA 1981). Because of the reasons and authorities set forth in this brief, it is submitted that the decisions in the District Court of Appeal for the Third District are correct and should be approved by this Court as controlling law of this state.

The Petitioners, therefore, requests this Court to grant constitutional certiorari and to enter its order quashing the decision and order hereby sought to be reviewed, approving the conflicting decision of the District Court of Appeal of Florida, Third District, as the correct decision, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction of Petitioners, was mailed on this 21 day of January, 1986, to Arthur J. England, Jr., Esquire, Fine, Jacobson, Schwartz, Nash, Block, and England, P.A., 2401 Douglas Road, Miami, Florida 33134, and to James B. Boone, Esquire, Heston and Rotella, P.A., 9900 West Sample Road, Suite 400, Coral Springs, Florida 33065.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Corrected Table of Contents and Summary of Argument, was mailed on this 22 day of January, 1986, to Arthur J. England, Jr., Esquire, Fine, Jacobson, Schwartz, Nash, Block, and England, P.A., 2401 Douglas Road, Miami, Florida 33134; and to James B. Boone, Esquire, Heston and Rotella, P.A., 9900 West Sample Road, Suite 400, Coral Springs, Florida 33065.

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