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SUPREME COURT OF FLORIDA

CASE NUMBER: 78,792

CIRCUIT COURT CASE NO:

ELEVENTH JUDICIAL CIRCUIT
CASE NUMBER: 91-46672 CA (13)

LAWTON CHILES, as Governor of the State of Florida, JIM SMITH, Secretary of State, ROBERT BUTTERWORTH, Attorney General, GERALD LEWIS, Comptroller, TOM GALLAGHER, Treasurer, BOB CRAWFORD, Commissioner of Agriculture,

Appellants,

v.

CHILDREN A, B, C, D, E, and F by and through their next friend and Guardian Ad Litem MICHAEL ROSSMAN,

Appellees.

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BRIEF OF CHILDREN A, B, C, D, E and F

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I. STATEMENT OF THE CASE AND FACTS

Plaintiffs are six of Florida's more than 10,000 foster children[1]. Children A, B and C were adjudicated dependent in October, 1980 and have been in HRS' custody ever since. Children D, E and F were adjudicated dependent in December 1985, and have been in HRS' custody ever since.

The constitutional and statutory rights of the Children have been ignored by HRS throughout the last several years, resulting in damage to the Plaintiffs. The Children's civil damage action is pending in circuit court in Dade County.

Under Florida[2] and federal law[3], abused and neglected children adjudicated dependent are entitled to a court-appointed guardian ad litem to protect their constitutional rights[4].

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[1] The Plaintiffs are also the six named plaintiffs in a related, prospective class action in federal court (Case No. 90-2416-CIV-KEHOE) seeking injunctive relief under 42 U.S.C.A.§1983 for Florida's more than 10,000 abused and neglected foster children in state custody.

[2] See, e.g., Subsections 39.453(7) and 39.465(2)(a), Florida Statutes and Rule 8.590(b), Florida Rules of Juvenile Procedure.

[3] See, e.g., 42 U.S.C.A.§5103.

[4] See, e.g., Article I, sections 2 (basic rights), 9 (due proceed), 21 (access to courts), and 22 (trial by jury) Florida Constitution, and Amendment 14 to United States Constitution; and Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987).

In September, 1991, the Governor advised the Chief Justice and the executive agency heads of the Governor's intention to cut the budget of the Executive and Judicial Branches of government by approximately 5.4%, $622 million. The authority relied upon to justify this reduction was Section 216.221, Florida Statutes, notwithstanding that statute's conflict with the separation of powers spelled out in the Florida Constitution[5], and notwithstanding the fact that the Constitution vests the legislative power and the power to set appropriations in the legislative branch of government[6].

On October 7, the Children asked the federal court presiding over their federal civil rights case to enjoin the Governor from cutting the Judicial Branch budget, because the proposed reduction would impair the Children's access to courts and their right to a guardian ad litem. At an emergency hearing on October 11, the federal judge denied the motion to avoid federal intrusion on the state's sovereignty. (R.29). That afternoon, the Plaintiffs sued in state court, seeking declaratory and injunctive relief.

The state court complaint reflected the direct impact on the Children of the then-projected $8.4 million

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[5] Article II, section 3, Florida Constitution.

[6] Article III, sections 1 and 8, Florida Constitution.

Judicial Branch Administration Commission[7] budget reduction on the Judiciary's already underfunded budget. The Children asked that the Executive Branch budget reduction procedure be declared unconstitutional and the Executive Branch action be enjoined from further illegal action. The Children also asked that the statute transforming the Judiciary into a state agency be declared unconstitutional. (R.5).

The Children supported their complaint with an attached copy of the federal court order denying the injunctive relief requested in federal court (R.29), the 1987 opinion of the Attorney General pointing out the very questionable constitutionality of the Chapter 216 budget reduction process[8] (R.15-28) and the October 8, 1991 letter from the Chief Justice to Governor Chiles, detailing the devasting impact if more than $941,553 were to be cut from the Judicial Branch budget. (R.7-11).

The trial court set the matter for hearing on October 17, 1991, on the Children's complaint for declaratory relief and emergency motion for restraining order. The Children submitted an affidavit from Guardian

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[7] Section 14.04, Florida Statutes establishes the Administration Commission, consisting of the Governor and the six Cabinet members. Chapter 216, Florida Statutes purports to transfer budget-reduction authority to the Executive Branch "Administration Commission".

[8] Op. Atty. Gen. 87-57

ad litem Michael Rossman and a memorandum supporting their request for relief (R.31-38) Defendants submitted a combined motion to dismiss and memorandum of law. (R.84-129).

After listening to argument, and having considered the documents submitted and authorities cited, the trial court procedurally found venue to be proper in Dade County where the Children's constitutional rights were jeopardized, and further found the threat to the Children to be real, and that judicial action was warranted pursuant to Chapter 86, Florida Statutes. (R.75-77).

On the merits, the trial court found sections 216.221 and 216.011(1)(11), Florida Statutes unconstitutional and prohibiting the Administration Commission from cutting the budget or taking any other action pursuant to the Chapter 216 budget reduction procedure. (R. 75-77).

The Governor and five of the Cabinet members[9] appealed the October 18, 1991 judgment. On October 21, 1991, the district court of appeal certified the matter directly to this Court pursuant to Article V, section 3(b)(5), Florida Constitution, finding that the judgment under review requires immediate resolution by this Court and involves a question of great public importance

[9] All of the Cabinet except Commissioner Castor.

concerning Florida's finances. On October 21, this Court accepted judisdiction pursuant to Article V, section 3(b)(5) of the Constitution of Florida.

On October 22, 1991 under the aegis of the automatic stay of Rule 9.310, Florida Rules of Appellate Procedure, a majority of the appellants[10] voted to reduce the budget of Florida's "state agencies". The reductions adopted included a $5.2 million reduction in the Judicial Branch budget.

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[10] All of the Appellants except Secretary Smith.

II. SUMMARY OF ARGUMENT

The Executive Branch has no constitutional budgetary authority other than the "Executive Approval and Veto" powers in Article III, section 8 of the Florida Constitution. In their Constitution, the people of Florida expressly require a separation of the three, co-equal branches of Florida's government, and prohibit a person within one branch from exercising constitutional power expressly belonging to another branch.

Section 216.221, Florida Statutes impermissibly directs the Executive Branch to perform budget reductions which may constitutionally be made only by the Legislative Branch. Section 216.011(1)(11), Florida Statutes impermissibly transforms Florida's Article V Judiciary into Executive Branch "state agency" status. Both statutes are unconstitutional.

Because the Executive Branch's unconstitutional budget reductions directly hurt the Children, the Children have standing to challenge the two statutes and the related Executive Branch action. Because the Children are Dade County residents and because the Children's rights will be impacted in Dade County by the Executive Branch's "sword-wielders", the Children properly filed suit in Dade County. The Children have no other remedy available to protect their endangered rights. The Administration Commission's October 22, 1991 budget reductions should be vacated, and the October 18, 1991 judgment should be affirmed.

III. ARGUMENT

A. The Chapter 216 Executive Branch Budget-Reduction Process is Unconstitutional Because Section 216.221, Florida Statutes is an Unconconstitutional Delegation of Legislative Power

In section 216.221, Florida Statutes, the Legislature has impermissibly attempted to delegate its constitutional law-making responsibility. Op. Atty. Gen. 87-57. See, also, In re Advisory Opinion to the Governor, 509 So.2d 292, 311 (Fla. 1987); Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1979); and Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1976). To act consistently with the constitution to resolve a budget deficit, the Governor's only option is to issue a proclamation for the convening of the legislature. See, Article III, section 3(c), Florida Constitution, and Op. Atty. Gen. 87-57; see, also, State ex rel. Kurz v. Lee,163 So.859, 868 (Fla. 1935).

Article VII section 1(d), Florida Constitution requires a provision be made by law for raising sufficient state revenues. It is the Legislature's duty to appropriate funds sufficent to meet the state's expenses.

Florida embraces the non-delegation doctrine. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1979). Article II section 3 of the Florida Constitution prohibits

the delegation of power between branches unless expressly mandated by the Constitution.

There is no other constitutional mandate relating to the budget authorizing appropriations or reappropriations of the Executive Branch. Consequently, the exclusive power of deciding how, when and for what purpose the public funds shall be applied in carrying on the government rests with the Legislature. Kurz at 868.

The purpose of a constitutional provision requiring an appropriation made by law as the authority to withdraw money is to prevent government spending without the consent of the public. Kurz, at 868. The Legislature retains the constitutional power to reduce, or even abolish its optional appropriations to any state office, institution or agency that may have been created by statute. Kurz at 869.

Section 216.221, Florida Statutes vests the Executive Branch Administration Commission with unrelated, unfettered, arbitrary discretion to balance the budget. In enacting Section 216.211, Florida Statutes the Legislature unconstitutionally transferred budgetary power with the Executive Branch.

The Executive Branch budget reductions are contrary to constitution. There are none of the necessary adequate guidelines or ascertainable minimal criteria this Court

found necessary to avoid inappropriate unbridled discretion of the Executive Branch. See, Orr v. Trask, 464 So.2d 131 (Fla. 1985).

The result is an amended budget created without the consent of the people, which bears no relation to the budget properly adopted by the Legislature. As the trial court in this case stated, Florida's citizens have the constitutional right to enact a budget through their elected representatives. See, Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). Section 216.221, Florida Statutes destroys this constitutional right.

Attorney General Butterworth addressed the constitutionality of Section 216.221, Florida Statutes in his September 28, 1987 opinion letter to then Governor Martinez. The Attorney General admitted that it is the Legislature's responsibility to provide a balanced budget. Any unbalanced budget that occurs must be addressed by the Legislature even if a special session is required. Op. Atty. Gen. 87-57.

The trial court properly found Section 216.221, Florida Statutes unconstitutional as an impermissiable delegation of legislative authority. (R.76).

B. Section 216.011(1)(11), Florida Statutes Impermissibly Transforms Florida's Judiciary Into Nothing More Than an Executive Branch Agency

Article II, section 3, Florida Constitution clearly delineates Florida's three equal, separate branches of government. The constitutional parameters of the powers and duties of each branch are set forth in the next three articles: Article III, the Legislature; Article IV, the Executive; and Article V, the Judiciary. The peculiarly expansive Section 216.011(1)(11) definition of "state agency" or "agency" to include the Judicial Branch[11] is clearly violative of the separation of powers provision. It is this definition relied upon by the Governor in directing the reduction of the Judiciary's budget under the Administration Commission procedure.

Simply stated, the Governor has no constitutional authority over the Judicial Branch budget, other than to use his executive

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[11] The fact that a deficit is projected does not justify ignoring the Constitution. Indeed, as the Kurz court noted in a similar situation:

> Indeed for aught that appears to the contrary in the respondent's return, such contingent deficiency may never occur in fact if available resources are conservatively marshaled.

Id. at 872.

approval or veto power when the budget is presented to him. [12] As this Court has previously recognized:

> The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts, Such a provision secures to the Legislature (except where the Constitution controls to the contrary) the exclusive power of deciding how, when and for what purpose the public funds shall be applied in carrying on the government. Lainhart v. Catts, 73 Fla. 735, 75 So. 47 (Fla. 1917).

Kurz at 868.

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[12] Article III, section 8, Florida Constitution; State ex rel Boyd v. Deal, 4 So. 899, 906 (Fla. 1888).

C. FLORIDA'S FOSTER CHILDREN HAVE RIGHTS

1. The Children Have Constitutionally Protected Rights which the Governor and Cabinet are Improperly Ignoring

Under Florida's Constitution, all natural persons - even foster children - are equal before the law. Article I, section 2, Florida Constitution. As Floridians, the Children are entitled to the full protection of Florida's Constitution, including the Declaration of Rights in Article I of the Florida Consitution.

The improper budget reduction approved at the October 22 meeting has placed these Children's constitutional rights on the "endangered list". The constitutional rights of Florida's foster children, including these Children, are and will continue to be directly and irreparably harmed if the October 22 Executive Branch action is not vacated. Children already languish in Florida's foster system far longer than the legal limit of 18 months, in large part because the case workers have an average of 2 to 3 times the legal limit of 15 children per worker.

There are more than 10,000 children in foster care in Florida alone who will lose their access to the courts and their guardians ad litem because of the Executive Branch's unconstitutional cutting of the Judicial Branch budget by the $5.2 million insisted upon by Appellant

Chiles.[13] Without guardians ad litem to monitor their care and progress, Florida's foster children are at increased risk of being sexually abused in foster care,[14] and being permanently deprived of their constitutionally protected rights to liberty, due process, access to courts without delay and their rights to trial by jury.

Children A,B,C,D,E and F have a constitutional due process entitlement to the benefits provided under the state and federal[15] statutes relating to programs for foster care, and abused and neglected children. See, e.g., Taylor v. Ledbetter, 818 F.2d 791, 795-797 (11th Cir. 1987) (en banc) (foster children have constitutionally protected due process rights); see, also Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981) (foster children have a right to judicial review as mandated by legislature).

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[13] The reduction of the Judicial Branch budget by more than 3% also improperly ignores the higher percentage of the Judicial Branch budget needed to comply with constitutionally mandated programs.

[14] HRS' February 1991 study of the risk of foster children being sexually abused or assaulted while in foster care is part of the record. (R.39-66).

[15] See, Chapters 39 and 409, Florida Statutes and 42 U.S.C.A.§5103.

The record in the case at bar reflects without contradiction that any reduction of more than the $941,553 detailed in the October 8, 1991 letter to Governor Chiles will improperly curtail critical court programs essential to the protection of the Children's rights. It is clear that the now actual $5.2 million reduction will inexcusably eliminate these Children's guardian and impair their access to the state's courts.

C. 2. The Children Have Standing

The Administration Commission's actions threaten the Children's constitutional rights and entitlements. Those rights and entitlements include the right to jury trials[16] and for prompt access to courts[17].

The Commission's action also threatens the due process entitlements of these Children to their guardian ad litem. Sections 39.453(7)(c) and 39.465, Florida Statutes, 42 U.S.C.A.§5103, and Rule 8.590 Florida Rules of Juvenile Procedure guarantee these Children the right to a guardian ad litem.

The Commission's action affects these Children's legal rights and entitlements. Declaratory relief is appropriate. Section 86.021, Florida Statutes. The Children are harmed and have standing. See, Pingree v. Quiantance, 394 So.2d 161 (Fla. 1st DCA 1981). (The fact that a controversy may not have fully matured is not always essential for declaratory relief. See, Platt v. General Development Corporation, 122 So.2d 48 (Fla. 2d DCA 1960).) The trial court correctly found these children have standing.

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[16] Seventh Amendment of the United States Constitution and Article I, section 22, Florida Constitution

[17] Article I, sections 21 and 22 Florida Constitution.

C.3 The Children Properly Filed Suit in Dade County

The trial court correctly found venue proper in Dade County. Generally, in actions against state officials or government agencies, venue is proper in the county where the headquarters are located. See, Carlile v. Game and Fresh Water Commission, 354 So.2d 362, (Fla. 1978).

However Appellant Chiles' "saber-rattling" as he and the other Appellants finalize their unconstitutional attack on the valid, legislatively adopted budget for fiscal year 1991-1992 is clearly within the "sword-wielder" exception to the general rule that actions against state officials and government agencies should be in the county where the headquarters are located. Under the "sword-wielder" exception, where agency or official action presents a genuine threat to or infringement upon a plaintiff's constitutional rights, venue is proper in the county where the constitutional rights are endangered or infringed. See, e.g., Board of Medical Examiners v. Kadivar, 482 So.2d 501, 502, (Fla. 4th DCA 1986), citing Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 363 (Fla. 1985); Department of Revenue v. First Federal Savings & Loan Association of Fort Myers, 256 So. 2d 524 (Fla. 2d DCA 1971); see, also, Department of Transportation v. Morehouse, 350 So.2d 529 (Fla. 3d DCA 1977).

The lower court correctly found this case is within the "sword-wielder" exception. The Executive Branch has voted to cut the Judicial Branch budget resulting in the effective shutdown of the guardian ad litem program and civil court system. The Executive Branch's inappropriately wielded budget sword has severed the Children's access to the courts, and will deny the Children the access to the Guardian who serves as their lifeline.

These six Children have been held for more than five years (the three oldest more than 11 years!) in foster care limbo in Dade County, It is in Dade County that the Children will lose their long-time guardian. It is in Dade County that the Children's access to the courts will be impaired. It is in Dade County that the Children's day in court and their access to a jury trial will be denied. In short, the Appellants' ongoing, unconstitutional efforts to exercise improper control over the Judicial Branch, and to encroach on the Legislature's budget/law-making authority will strip the Children of their guardians and further trample their constitutional rights of access to the courts, and their liberty and due process rights.

C.4 The Children Have No Adequate Remedy At Law

No damage action can properly compensate the Children for the probable denial of their access to courts, nor for the loss of the court-appointed guardian to protect their constitutional rights, their safety and their other interests. The Appellants were asked to discontinue their planned October 22 action, without success. The only remedy that will properly protect these Children (and the rest of Florida's foster children) from having their constitutional rights improperly sacrificed is the vacating of the October 22 Executive Branch budget reduction and the affirming of the October 19, 1991 judgment. The statutes are clearly and simply unconstitutional as an impermissible separation of powers violation.

In Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981), the foster children were neglected and abused dependent children lost in Florida's foster care limbo more than ten years ago. The denial to those foster children of the mandatory periodic judicial reviews created "irreparable harm for which injunctive relief is particularly appropriate". Pingree at 162.

Florida's Executive Branch is still ignoring its foster children. Like the Pingree children, the Children here suffer irreparable harm for which injunctive relief is particularly appropriate.

The trial court correctly ruled that there is no adequate remedy at law to protect these Plaintiff Children's rights of access to the courts and their guardian.

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[12] As recognized long ago, to the extent that a legislative act violates the mandates of the Constitution, the act must fall. See, e.g., Amos v. Mathews, 126 So. 308 (Fla. 1930); Holley v. Adams, 238 So. 2d 401 (Fla. 1970).

IV. CONCLUSION

The statutory Executive Branch budget reduction process conflicts with the express separation of powers provision in Florida's Constitution. The statute transforming Florida's Judiciary into just another Executive Branch agency obliterates the express separation of powers provision in Florida's Constitution. The trial court properly found sections 216.221 and 216.011(1)(11), Florida statutes unconstitutional.

As already-victimized wards of the State, held illegally for far more years than permissible, and facing loss of their access to Florida's courts and the resulting further trampling of their constitutional rights, the Children have standing to challenge the constitutionally defective statutes. Further, the Executive Branch budget-reductions will definitely harm the Children in a way no available legal remedy can adequately compensate them. As Dade County residents and victims of the Executive Branch "sword-wielders", the Children properly filed suit in Dade County.

The October 22, 1991 Executive Branch budget cuts should be vacated as an impermissible Executive Branch exercise of Legislative Branch power, and the October 18, 1991 judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was federal expressed to: Peter Antonacci, Deputy Attorney General, Robert Butterworth, Attorney General, and Charles Finkel, Assistant Attorney General, all as attorneys for Defendant/Appellants Chiles, Butterworth, Lewis, Gallagher and Crawford; and to Syd McKenzie, General Counsel for Commissioner Betty Castor, General Counsel Commissioner of Education, and Phyllis Slater, General Counsel for Secretary Smith, all at The Capitol, Tallahassee, Florida.

KAREN GIEVERS