IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,712

IN RE: THE GUARDIANSHIP OF:

D. A. McW., a minor

_____/

NERO, EMMA

v.

McWHITE, ALBERT

ON PETITION FOR DISCRETIONARY REVIEW TO
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF RESPONDENT

ALBERT McWHITE

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I N D E X

R E F E R E N C E S

STATEMENT OF CASE

Albert McWhite, the natural father of the child, filed a Petition for Appointment of Guardian entitled; In Re: The Guardianship of Dandrick Albert McWhite, Case Number 81-3562, Judge Johnson. Emma Nero, the maternal grandmother of the child, filed a Counterpetition for Appointment of Guardian.

Emma Nero filed a Petition for Custody, Case Number 81-13468, Judge King, entitled; In Re: The Matter of Dandrick Albert McWhite, a minor.

The two cases were consolidated in front of Judge Johnson by Stipulation between counsel.

At conclusion of trial Emma Nero was granted guardianship and custody of the minor child.

Appellant, Albert McWhite, took an appeal from the final judgment denying his petition for the guardianship and custody of his natural child, and awarding custody to appellee, Emma Nero, the maternal grandmother.

Petitioner, Emma Nero, took an appeal to the Florida Supreme Court from the ruling of the Fourth District Court of Appeals granting custody of the minor child to Albert McWhite, the natural father of the child.

STATEMENT OF FACTS

The child was born on February 5, 1979, to Vicky Ann Nero and McWhite who, although they were never legally married, had a longstanding relationship. Albert McWhite's name appears on the birth certificate, the baptismal certificate, an acknowledgement filed by McWhite at the hospital when the child was born, and on records of the Florida Department of Health and Rehabilitative Services and the United States Social Security Administration. Vicky Nero died in an automobile accident on June 25, 1981, and on July 13, 1981, McWhite filed a petition for appointment as custodian and guardian of the child. Emma Nero, the material grandmother, counterpetitioned.

McWhite maintained that, from the time the child was three months old, the child stayed with him from Monday to Friday while the mother attended college and he cared for the child's needs. McWhite claimed that he and Vicky Nero planned to marry after she helped her mother to buy a new house. McWhite also claimed to have contributed to the child's medical expenses and to have provided food and clothing. He testified that he paid $15.37 per week to H.R.S. for five months so that Vicky and the child could receive federal welfare benefits while she and he were both in school. At the time of the final hearing McWhite was twenty-one years old. He lived with his parents in a two-bedroom house with an enclosed porch and a backyard. His mother is a nurse's aide. He was employed in his father's office cleaning business earning approximately $500 monthly plus the use of two major credit cards. He drove an automobile and a van belonging to the business. He had completed the

course requirements for funeral director and planned to enter that business after taking the state examination. McWhite further testified that he had no objection to Mrs. Nero acting as guardian for any recovery due the child for Vicky's wrongful death; he stated that he only wanted custody of his son.

At the time of the hearing Mrs. Nero was thirty-nine years old and divorced. She lived with her two surviving daughters and worked at Motorola earning $266 to $358 per week plus overtime. She testified that she would take a year's leave of absence if granted custody. Although she refused to stipulate that McWhite is the father of her grandson, Mrs. Nero acknowledged that he always claimed to be, that no one else did, and that she herself gave his name as the child's father in applying for social security benefits. Mrs. Nero also contradicted the testimony of her own witness, Byron McKeaton, that Vicky wanted to have a permanent relationship with McWhite. Mrs. Nero contended that the child had resided in her home with his mother since birth, although she admitted that the child spent "one or two nights" weekly with McWhite. She also insisted that she or Vicky had bought all the food, clothing and toys for the child. She declared that McWhite's failure to furnish support forced her daughter to go on welfare.

Mrs. Nero attempted to demonstrate McWhite's unsuitability as a guardian or custodian through testimony that he handled the boy roughly; that he had once slapped Vicky; and that he was a reckless driver; and that Mrs. McWhite, the paternal grandmother, was an alcoholic. For his part, McWhite was also critical of Mrs. Nero. He asserted that she was mentally unfit; that while she

works the child is left with her two daughters who are busy with their boyfriends; that the child would have to share a room with two aunts; and that the house lacks a tub. The trial court found that both McWhite and the grandmother were fit persons to care for the child. However, on the grounds that the interests of the child would be better served, the trial court awarded custody and guardianship to the grandmother with liberal rights of visitation to the father.

NOTE: THE FACTS ABOVE ARE THE FACTS TAKEN FROM THE FOURTH DISTRICT COURT OF APPEALS OPINION IN THE INSTANT CASE.

ARGUMENT

ISSUE I

THERE IS NO DIRECT CONFLICT WITH ESTABLISHED FLORIDA LAW WHERE THE CONTEST FOR CUSTODY IS BETWEEN A NATURAL PARENT AND A NON-PARENT.

Florida Courts subscribe to the theory that a parent has a natural right to enjoy the custody, fellowship and companionship of his offspring:

> While according to the trial Judge a broad judicial discretion in the matter we nevertheless cannot lose sight of the basic proposition that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring. State ex rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31. This is a rule older than the common law itself and one which has its inception when Adam and Eve gave birth to Cain in the Garden of Eden. Gen. 4:1. In cases such as this one the only limitation on this rule of parental privilege is that as between the parent and the child the ultimate welfare of the child itself must be controlling.

State ex rel. Sparks v. Reeves, 97 So.2d at 20. Also see In re Vermeulen's Petition, 104 So.2d 192 (Fla. 1st DCA 1959); In re Adoption of Noble, 349 So.2d 1215 (Fla. 4th DCA 1977); Behn v. Timmons, 345 So.2d 388 (Fla. 1st DCA 1977).

The rights of non-parents to custody of a child is secondary to the rights of the natural parents. It is established Florida law. See cases cited above.

In the instant case, the Fourth District Court of Appeal held that the status of non-parents to such custody is not at the same level as that of a natural parent but is lower.

Elevation of the rights of non-parents to the same status as that of natural parents is contrary to State ex rel. Reeves,

Supra, and Behn v. Timmons, Supra.

Taking this tenet of Florida law into consideration, it is obvious that the Fourth District Court of Appeal applied it properly to the instant case. An application of this tenet of law vis-a-vis the child's welfare, gives preference for custody to a fit natural father who is not disabled in some way from exercising custody rights, and where such custody is not detrimental to the child. The reason for this is the public policy to uphold the natural family unit, but it is a rule of law which is as old as the Bible itself.

The Fourth District Court of Appeals has adopted a preference and a more precise definition of what is in the "best interest of the child's welfare". The lower Court has not changed the rule of law adopted by Florida Courts previously. It has said that barring a disability to custody or custody which would be detrimental to the child, a fit natural parent has rights to custody superior to that of a non-parent. Nowhere is it said that the term "detrimental to the child" is not a euphemism for the term "best interests of the child". We would so argue.

Florida Judges can still grant custody of a child to a non-parent over the objection and rights of a natural parent if as in State ex rel. Reeves, Supra, the natural parent has some disability from exercising custody or if such custody is detrimental to the child or in other words not in the child's best interest.

What the Fourth District Court of Florida has said is that in most cases it would be in the child's best interest to live with his natural parent in factual patterns like this.

The Fourth District Court of Appeals has said that if it is not in the child's best interest, to wit: it is detrimental to the child, or the natural parent has a disability keeping him from exercising custody, then the trial Court does not have to follow the preference that the natural parent be given custody.

The only new tenet of law developed in the instant case is that rights of natural fathers are the same as married fathers and natural mothers. This rule is not in conflict with established Florida law and is a natural extension of the existing trend in the law. See 45 ALR 3rd 216, 220; Fierro v. Ljubicich, 5 Misc.2d 202, 165 N.Y.S.2d 290 (1957); In Re Guardianship of C., 98 N.J.Super, 474, 237 A.2d 652 (1967); State in Interest of M., 25 Utah 2d 101, 476 P.2d 1013; In Re Guardianship of Smith, 42 Cal.2d 91, 265 P.2d 888 (1954); State ex rel. Lewis v. Lutheran Social Services, 47 Wis.2d 240; 175 N.W.2d 56 (1970); In Re Guardianship of Smith, 265 P.2d at 891; Mixon v. Mize, 198 So.2d 373 (Fla. 1st DCA 1967); Brown v. Bray, 300 So.2d 668 (Fla. 1974); Kendrick v. Everheart, 390 So.2d 53 (Fla. 1980); See § 63.062, Fla. Stat.; See § 732.108(2), Fla. Stat.; See Wylie v. Botos, 416 So.2d 1253 (Fla. 4th DCA 1982).

The case of Scott v. Singleton, 378 So.2d 885 (Fla. 1st DCA 1979) would appear to be in conflict with the instant case. It is not. It is a misapplication of the law of Florida by the First District Court of Appeal and in conflict with the Fourth District Court of Appeal's own case of Behn v. Timmons, Supra. In Behn v. Timmons, the First District Court of Appeal cites the following and bases its holding upon the following proposition of law.

> We cannot and should not lose sight of the basic proposition that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring. This is a rule older than the common law itself. State ex rel. Sparks v. Reeves, 97 So.2d 18 (Fla. 1957). And except in cases of clear, convincing and compelling reasons to the contrary, a child's welfare is presumed to be best served by care and custody by the natural parent. In Re Vermeulen's Petition, 114 So.2d 192 (Fla. 1st DCA 1959).

So it is obvious that Scott v. Singleton, Supra, is out of step with the rest of Florida case law.

The instant case breaks no new ground in conflict with established tenets of Florida law concerning the contest for custody between a natural parent and a non-parent.

Wherefore, Respondent prays that this Court not grant discretionary conflict jurisdiction in this cause for the reasons enumerated above.

CONCLUSION

There is no conflict jurisdiction in this matter and this Court should not take jurisdiction of this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief was furnished to FRANK E. MALONEY, JR., P.A., 5 West Macclenny Avenue, Macclenny, Florida 32063, by U.S. Mail, this 16th day of June, 1983.

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