O/a 2-13-84

IN THE SUPREME COURT OF FLORIDA

IN RE: GUARDIANSHIP OF
D.A. McW., A Minor
Incompetent.

EMMA NERO,

Petitioner,

vs.

ALBERT McWHITE,

Respondent.

---/

FILED
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CASE NO. 63,712

DISTRICT COURT OF APPEAL
4th DISTRICT - No. 81-1568

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

REFERENCES

STATEMENT OF CASE

The mother of the child, Dandrick Albert McWhite, born out of wedlock, was killed in an automobile accident. The natural father, Albert McWhite, 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, 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.

Judge Johnson granted custody and guardianship to Emma Nero, the maternal grandmother.

Albert McWhite appealed to the Fourth District Court of Appeal, Case Number 81-1568. That Court reversed the lower Trial Judge granting the natural father, Albert McWhite custody of the child, Dandrick Albert McWhite. Guardianship of the property of the child was not contested by Albert McWhite.

Emma Nero brings this appeal to the Supreme Court of Florida.

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 maternal 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 $500.00 monthly plus the use of two major credit cards. He drove an automobile and a van belong-

* Facts as delineated from the records by the 4th District Court of Appeals, none of which is in conflict with the trial court's factual determination.

ing 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 thrity-nine years old and divorced. She lived with her two surviving daughters and worked at Motorola earing $266.00 to $358.00 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 to 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 the 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: These facts above are as stated in the opinion of the Fourth District in the instant case. A review of these facts can be made by a reading of the Statement of Facts from the Brief of Appellant in the Fourth District Court of Appeals Record, wherein extensive citation to the trial transcript is made. As a courtesy to this Court, a copy of the Statement of Facts from the Brief of Appellant from the Fourth District Court of Appeal record follows hereto.

STATEMENT OF FACTS

TRANSCRIPT OF JULY 23, 1981

Testimony of Albert McWhite, Appellant

During the testimony of Albert McWhite, it was agreed that the child, Dandrick Albert McWhite, was born out of wedlock (page 7). It was admitted that Vicki Nero was the mother of the child (page 1); and that she was deceased.

The first document entered into evidence was a birth certificate of the child, which showed that Albert McWhite was the father (page 11 through 14); also offered into evidence was an acknowledgement in writing, under oath, signed by Albert McWhite that he was the father of the child (page 26).

According to testimony, the child had been staying with the McWhites' since he was six (6) months old; that Vicki kept him half of the time and that Albert McWhite kept the child half of the time. The records show that the child was baptised at Albert's church, Mount Herman Church (page 24 through 25). Albert testified that he was keeping the child from Monday through Friday, and that Vicki, bacause she worked nights, would pick him up for Saturday, Sunday and Monday, until Monday afternoon. This was from the time she started Broward Community College when she brought the child to the McWhites' home at 10:00 A.M., on Monday (page 15 through 16). For the last six (6) months preceeding the Hearing, the child was at Albert's home five (5) days a week (page 54).

On the night Vicki was killed in an automobile accident, the baby was in Albert's room with him (page 16). That night Mrs. Nero's relatives came to the McWhite home and took the baby (page 16). After

the funeral, Albert took the baby and had the baby until the lower Court ruled (page 16).

Albert received a degree, high school diploma, in 1977. Thereafter, he enrolled in college, taking courses in Funeral Services Education. He completed all his course requirements and plans to enter into that profession (page 16). In order to finish his requirements, he worked at a funeral home. At the time of the hearing he was 21 years old.

At the time of the Hearing, Albert was engaged in an office maintenance business with his father. It is a family business. Albert receives at least $500.00 per month, plus has use of credit cards (page 17).

While Vicki was pregnant, he paid some expenses, having his father write checks or by giving Vicki cash (page 17 through 23). Every week Albert bought groceries for his house for the child and for Vicki's house for the child (page 22). While he and Vicki were students and not working at the beginning of Vicki's pregnancy, they applied to H.R.S. for A.F.D.C. benefits (page 23). Albert made payments ro H.R.S. of $15.30 per week (page 23, 41 and 42). As Albert started making more money, he paid Vicki directly in cash and she stopped getting A.F.D.C. payments (page 42), which was after a period of five (5) months. While a student, Albert worked as a security guard (page 65). Albert went shopping with Vicki whenever she asked (page 46).

He had told Mrs. Nero that if they took his child from him they would have to kill him first (page 45).

He does not believe that Mrs. Nero is a fit person, because since having been raped she is not mentally fit (page 52). She works eight (8) hours a day and would be away from the child (page 51);

and has a boyfriend who is at the home often (page 52). Mrs. Nero has two daughters who have boyfriends and do not care about the child (page 51).

Albert testified that he does not care about the money coming from the lawsuit resulting from Vicki's death (page 53). In fact, he testified that if Mrs. Nero wanted the money she could have all of it. He stated he only wants his son (page 53).

Testimony of Mr. McWhite, Father of Albert McWhite

Mr. McWhite, Albert's father, testified that he adopted Albert when he was ten years old. Albert has been working with him since he was five or six. That Albert has been paid in the last three years and gets roughly $500.00 per month (page 55). Mr. McWhite is self-employed, cleaning offices, earning $1,600.00 to $2,000.00 per month (page 57).

His home, where Albert and the baby resided, has two bedrooms; one for Albert and the baby; one for himself and his wife (page 57). He and his wife have been members of the Firts Baptists Church since 1938.

The baby has been living on and off with the McWhites' household since the baby was in diapers (page 56). Albert has often bought cases of diapers and kept him in the house. For the months preceeding the Hearing, the child had been staying with the McWhites' most of the week. (page 56).

They observed Albert and the child's relationship. They have a "beautiful relationship" (page 59). "Albert takes the child to the park, bathes him and does a lot for the child" (page 59). Mr. McWhite found it unusual that a person Albert's age would change the baby. He stated that the presence of the child has no conflicts in the house whatsoever; and that the baby has added a lot to their

home; that he is willing to aid and support him in his education as he has already done (page 59 through 60). Mr. McWhite stated that he would help the child whether Albert had custody of the child or not (page 66).

Mrs. McWhite, Albert's mother, testified that she is a nurses aid, has been so for 16 years, with an income of approximately $360.00 per week (page 71). She also testified that the child stayed at the house most of the week and Vicki picked the child up on the weekends (page 70 through 72). This was after May of 1980, after Albert finsihed his schooling (page 75).

The family purchased a high-chair and a potty for the child. From time to time she would give Vicki money to buy things for the child, including money to buy toys (page 73).

In commenting about the relationship of the child with Albert she stated that the child does not want to be with anyone else but his father (page 73).

Testimony of Pamela Pugh

Pamela Pugh is an employee of Burdines. She testified that at one time Albert came to the store and purchased $300.00 of clothing for the baby and then came back and purchased more clothing (page 80 through 82).

Testimony of Carolyn Jones

Mrs. Jones is a neighbor of the McWhites'. She testified that in observing the relationship between Albert and the child she could see that they were very close; that they were together all of the time. She also testified that the baby was always running around and playing with Albert (page 88 through 89). She also testified that she saw Mrs. Nero come over and drop off clothes for the child (page 90).

Testimony of Savoy Allen Lee

Mr Lee has been in the McWhites' house often in 1981. Since then he has seen the child in the McWhite's household "quite a bit", at least once a day (page 96 through 97). Often Albert was playing with the child or would be with him. Sometimes they would go out for rides (page 97). He stated that Albert and the baby care for each other very much from what he has seen; that Albert listens to everything the baby says and that the two of them, Albert and the child, love each other very much. He has seen Albert take the child to buy clothes and has seen Albert go home early to put the baby to bed; that Albert takes the child everywhere he goes; that they have a loving relationship (page 96 through 99).

TRANSCRIPT OF JULY 24, 1981

Testimony of Linda McFadden

Mrs. McFadden, a relative of Mrs. Nero, testified that as a child she lived with Mrs. Nero for one year while her parents were not getting along (page 5 through 18). She also testified that Albert McWhite and Vicki got into an altercation precipitated by Vicki wherein he slapped her (page 7). She saw Vicki and Mrs. Nero buy food for the child (page 50). She saw Albert drive in a reckless fashion (page 15). She stated that the McWhite's house was nice(page 21). She also stated that she saw Albert help out (page 28).

Testimony of Byron McKeaton

Byron McKeaton testified that Vicki and he were co-workers (page 33); they saw each other socially (page 34). He described his meeting with Albert, wherein Albert introduced himself as the father of Vicki's child and asked him to stop seeing Vicki (page 35). About seven or eight months later, the two men met again, with a

little voice raising. Albert explained that they had hurt him very badly by dating and if they did it again there would be trouble (page 36). Mr. McKeaton stated that Albert said he was hurt emotionally, very badly by Mr. McKeaton's dating Vicki (page 46 through 49).

Mr. McKeaton stated that he knew full well that Albert was the father of Vicki's child (page 47 & 35).

Testimony of Charlene Nero

Charlene Nero, Mrs. Nero's daughter, who is 18 years old, testified that she has seen an altercation between Albert and Vicki (page 55 through 56). She has seen both Vicki and Albert bring food into the house. She stated that she saw both Vicki and Albert bring food into the house for the baby (page 57 & 58).

She stated that Albert is not a good driver, although she has never seen him drive in a reckless fashion with the baby in the car (page 58); further that he was stopped for speeding on the way to Vicki's funeral in South Carolina and was arrested.

She stated that the baby stayed at the McWhite's house sometimes and much of the time at her house (page 58); and further stated that both she and Mrs. Nero love the baby (page 60).

In describing their home, Charlene states that there are two bedrooms, with Mrs. Nero occupying one bedroom by herself; and Charlene, Lorraine and Vicki, the deceased mother of the child, and the baby, Dandrick, living in the other bedroom, (page 63). She testified, similar to others, that Vicki dropped the baby off at the McWhite household, because she worked from 4:00 P.M. to 12:00 A.M. (page 64). Further she stated that she once say Albert grab the baby, but in cross-examination, she stated that he did not deliberately try to hurt the baby on that one occasion; but that he was just a

little too rough (page 68 & 69). Further she states that Vicki anticipated buying a house with her mother (page 72).

Testimony of Dorothy McFadden

The last witness testified that Albert drives recklessly, but she has never seen the baby with him when he was driving poorly (page 88); and she has observed that Albert is somewhat immature (page 88). In addition, she observed him slap Vicki once in the 2½ years that she knew him, but did not know what started the altercation (page 91). She stated that no one was hurt seriously, just a little crying on Vicki's part (page 91). She testified that the baby stayed at the McWhite's home (page 93).

TRANSCRIPT OF JULY 27, 1981

Testimony of Emma Nero

Emma Nero, the appelle, stated that Mr. McWhite did not support the child (page 8, 10,& 11), that Vicki was the one who supported the child (page 11 & 19); but she admits that Albert bought food for the house (page 19) and bought the baby clothes (page 19 & 57). She stated further that Albert had once slapped Vicki (page 11). She stated that Albert had squealed his tires on numerous occasions (page 12).

Albert broke in, during this testimony, and stated that these were lies (page 15).

Mrs. Nero denies that the baby spent more than two nights a week with Albert(page 27 & 28).

While calling Albert, the father, repeatedly (page 28), she says she was not sure if Albert is the father, though she does not know of anyone else who claims to be the father (page 41); but when applying for Social Security benefits, she gave Albert's name as the father of the baby (page 45), and states that Albert

has always maintained that he is the father of the child. She stated she wanted to be the legal guardian of the child (page 34), has applied for Letters of Administration to Vicki's estate (page 45); and has collected $40,000.00 in death benefits from Vicki's life insurance.

She further stated she never had seen Albert change the baby's diapers or feed him. She complains that there was a bad odor near the McWhite's home, because of a sanitation plant (page 30), but admits that her car has been stolen from her home, her house burglarized, and that she was raped while the baby was in bed with her (page 52 & 56).

She is employed at Motorola, earns $266.00 per week, receives support of $25.00 per week for her daughter Lorraine Nero, and receives $130.00 to $300.00 a month in bonuses. In addition, she states that she has purchased a crib, high-chair, clothing, toy chest, toys and kept a scrap book (page 9 and 39) for the baby.

Rebuttal of Albert McWhite, Appellant

On rebuttal, Albert testified and refuted Mrs. Nero's testimony and says as follows (page 70 through 73):

> He would go with Vicki to buy groceries and if he did not go with her he would give her money (page 70). That she would usually ask for $20.00 to $25.00 per week and he would give it to her. He has done so since the baby was born.
>
> He stated that sometimes he and Vicki would argue and she would grab him. He would never hit her with his fists, but did once slap her to get her to stop fighting.
>
> He stated that he might drive fast, but never with the child with him. On one occasion there was an accident with the baby with him, but that another car had hit him while running away from a hit and and run accident (page 71).
>
> He testified that for the last six (6) months of Vicki's life, Vicki brought the baby to the house

on Mondays and picked the baby up on Saturdays, in order to work all those nights (page 72).

He also stated that he plans to enter the profession of funeral director(page 73).

POINTS ON REVIEW

POINT I

WHETHER WHEN THE CUSTODY DETERMINATION IS BETWEEN A PARENT AND SOMEONE ELSE, THE RIGHTS OF THE PARENT AS WELL AS THE WELFARE OF THE CHILD MUST BE CONSIDERED

AND

WHETHER IN SUCH CASES THE PARENT'S NATURAL RIGHT TO CUSTODY MUST GIVE WAY ONLY WHEN THE CHILD'S WELFARE REQUIRED IT OR THE PARENT IS IN SOME WAY DISABLED.

The issue of this case as delineated by the Fourth District Court of Appeal is as follows:

> "We must decide on appeal the legal standard to be applied for determining when custody of a child born out of wedlock may be denied to the natural parent".

The holding by the Fourth District Court of Appeal was as follows at 429 So. 2d at 702:

> "In the usual custody case, when the contest is between two parents, both of whom are fit persons and have equal rights to custody, then the polestar test of "best interest of the child" is clearly controlling. Snedaker v. Snedaker, 327 So. 2d 72 (Fla. 1st DCA 1976). In other words, all other things being equal the best interests of the child should control. However, when the contest is between a parent and someone else, the rights of the parent as well as the welfare of the child must be considered. State ex rel. Sparks v. Reeves, 97 So. 2d 18 (Fla. 1957). In such cases, the parents' natural right to custody must give way only when the child's welfare requires it or the parent is in some way disabled."

In Reeves, supra, for instance, the Supreme Court of Florida approved the temporary grant of custody to the grandparents based upon the father's temporary inability to care for the children after the mother's death, but cautioned that the father would be entitled to custody once the disability was removed.

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

Citing State ex rel. Sparks v. Reeves, 97 So.2d at 20, the 4th District Court of Appeal quoted this Supreme Court wherein pertinent part it has said at 429 So. 2d at 702:

> "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 had 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. 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)".

Further concerning Reeves, supra, the Fourth District said at 429 So. 2d at 702:

> "Implicit in the holding in Sparks v. Reeves is a determination that custody cannot be denied to a natural parent, absent some disability on his part. In a case involving circumstances remarkably similar to those at hand, albeit the father was the legal parent, the Court declared:"
>
> "We are not immune or unsympathetic to the appealing position of the appellee-grandparents. Implicit in the attitudes expressed in the cold record we detect the often-

> occuring and perhaps perfectly natural attitudes of the parents of a deceased mother who envision themselves as the only persons competent and qualified to bestow upon their daughter's children the love and affection which would have come to them if their mother had lived. This is not an uncommon situation especially when the father of the children remarries. Nevertheless, it must not be lost from mind, by them, and the Court, that the custody given them, and the care and devotion which they lovingly and willingly bestow upon the children, rests upon a temporary foundation, namely, the inability of the father at the time to care for them. It can and should continue only so long as such disability on his part continues and the welfare of the children requires".

97 So. 2d at 20.

The rationale for the Fourth District Court's opinion in the instant case is based upon the cases cited above as well as the history of the rights under the law in Florida * of mothers and fathers of, as well as illigitimate children which have over the years sustained greater protection for each of those parties with every passing year.

Florida law is relied upon by the Fourth District Court of Appeal, which cited the following as justification of its opinion, at 429 So. 2d at 702, 703.

> "At common law a child born out of wedlock was said to be filius nullius, the child of nobody, or filius populi, the child of the people. The putative father had neither rights nor obligations toward the child and was precluded from establishing his paternity of the child in a legal action. Ford v. Loeffler, 363 So. 2d 23, 24 (Fla. 3d DCA 1978). From a legal standpoint, such a child simply had no father or mother. 10 AM. JUR 2d § 8 at 848. But the common law has been abrogated by statute in most jurisdictions, affording rights both to the child and to the parents. Most jurisdictions now recognize that the

mother is the primary natural guardian of her child and the natural father's rights are secondary. 45 A.L.R. 3d 216, 220. Under Florida law the mother's legal right to the care, custody and control of the child is superior to the right of an unwed father unless she is proved to be unfit. Jones v. Smith, 278 So.2d 339 (Fla. 4th DCA 1973), cert. denied, 415 U.S. 958 (1974); see also § 744.301(1), Fla. Stat.(1981)".

Historically, apparently because of dissimilarities in their circumstances, policy considerations and problems of proof, the natural father has been denied the parental rights enjoyed by a natural mother or a married father. The landmark case acknowledging parental rights for unwed fathers is Stanley v. Illinois, 405 U.S. 645 (1972), in which the Supreme Court overturned an Illinois dependency statute that presumed the unfitness of unwed fathers by denying them a hearing to which all married parents, adoptive parents and unwed mothers were entitled. Stanley appeared to be the reflection of a trend that was developing in many states, including Florida".[1]

"In 1967 the First District held, in Mixon v. Mize, 198 So. 2d 373 (Fla. 1st DCA 1967), that an unwed father who acknowledges his relationship, manifests an interest and provides support should be granted visitation rights, unless detrimental to the child's welfare. The Mixon court also ordered that the natural father be given notice of any adoption proceedings, this some eight years prior to the promulgation of notice provisions in Section 63.062, Florida Statutes. In Brown v. Bray, 300 So. 2d 668 (Fla. 1974), the Supreme Court, in upholding the constitutionality of Chapter 742, found that the Florida paternity statute permits a Court to grant an unwed father rights similar to those afforded a married father in dissolution proceeding":

> "No doubt the court ordinarily would give precedence to the desire of the mother for custody of the child if the desire exists, but in a proper case and upon a proper showing by the father that he seeks custody and is the better fitted and suitable person for the role, the Court may in its sound judgment and discretion award the custody of the child to him".

300 So. 2d at 670. In 1980, the Supreme Court declared in Kendrick v. Everheart, 390 So. 2d 53 (Fla. 1980),

> that although an unwed father was precluded from bringing a paternity action under Section 742.011, Florida Statutes, he could nevertheless seek a declaratory judgment of paternity under Chapter 86. Florida'a Adoption Act provides that once a father has taken appropriate action to acknowledge his paternity, his consent, as well as the mother's is required before the child can be adopted. See § 63.062, Fla. Stat. and Wylie v. Botos, 416 So. 2d 1253 (Fla. 4th DCA 1982). The Florida dependency statute also provides that notice must be given to an unwed father who has acknowledged or has been adjudicated the natural father of a child. See § 39.41(3)(a)(2)(c-e), Fla. Stat.

"Today, most jurisdictions recognize that the natural father has, after the mother, a superior right to the child's custody as compared to others who might seek custody of the child. 45 A.L.R. 3d 216, 220. In Fierro v. Ljubicich, 5 Misc. 2d 202, 165 N.Y.S. 2d 290 (1957), it was held that no Court can, for any but the gravest reasons, transfer a child from its natural parent to any other person. Fierro declared that the right of a parent, under natural law, to establish a home and bring up children entitles a natural father to custody on death of the mother if he is a fit person. In re guardianship of C., 98 N.J. Super. 474, 237 A.2d 652 (1967), construed a statute requiring an unwed father to support and educate the child as also giving the father a right of custody second only to that of the mother. See also State in Interest of M., 25 Utah 2d 101, 476 P. 2d 1013, 45 A.L.R. 3d 206 (1970). In re Guardianship of Smith 42 Cal. 2d 91, 265 P. 2d 888 (1954) the Supreme Court of California found that a natural father of illigitimate children had priority in guardianship and custody proceedings. Also see State ex. rel. Lewis v. Lutheran Social Services, 47 Wis. 2d 240, 175 N.W. 2d 56 (1970). Under this view the child's welfare is presumed to be served by placing the child in the care and custody of his natural parent, and hence, the rule does not operate to subordinate the welfare of the child. See J. Traynor's concurrence in In re

Guardianship of Smith, 265 P. 2d at 891". At 429 So. 2d at 704, #4.

The Fourth District stated its rationale as follows:

> "Given the fundamental interest of natural parents in the care, custody and management of their children, and the strong public policy which exists in this State in favor of the natural family unit, we believe that a natural parent of a child born out of wedlock should be denied custody only where it is demonstrated that the parent is disabled from exercising custody or that such custody will, in fact, be detrimental to the welfare of the child. See Sparks v. Reeves; Santosky v. Kramer, 102 S. ct. at 1391, and Behn v. Timmons, 345 So. 2d at 389. In our view, such a rule comports both with natural law and the strong public policy of this State which favors the establishment and continuity of family units. To hold otherwise would be to elevate the rights of non-parents to the same status as that of parents contrary to the holding in Sparks v. Reeves and other decisions.[2] Giving preference to natural fathers who seek custody of their children should also encourage legitimation and thereby reduce the stigma attached to children who otherwise would have no family of their own".

The Fourth District made it's determination as follows:

> "In this case we find that McWhite has established himself to be the natural father. Accordingly, because the trial court found him fit and there is no evidence that the child's welfare will be endangered, we do not believe McWhite can be deprived of custody. We agree that stability and maturity are important factors in determining the best interests of the child. We acknowledge here, for example, that the trial court found that the grandmother was more mature than the natural father and that the child had lived all of his life with its natural mother at the residence of the maternal grandmother. However, we cannot overlook the fact that McWhite is the natural father and has been determined to be a fit person to have custody. In his custody the child can have not only a name but a natural and legal parent and share in the benefits and responsibilities that flow from such a relationship. Together the father and child constitute a family. These factors are not to be gainsaid in determining the child's welfare".

In his concurring opinion Justice Boyd in Kendrick v. Everheart, supra, stated as follows:

> "We must recognize that it will sometimes be the

> father, rather then the mother who has custody and is caring for the child".

390 So. 2d at 61.

Further, Justice Boyd went on to say:

> "Where the father of children born out of wedlock is supporting and caring for them, his personal liberty interests in his relationship with them are protected by the constitution to the same extent as are those of a mother or married parents. See Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972)".

390 So. 2d at 61.

This citation recognizes law as old as the Bible itself as quoted in Behn v. Timmons, 345 So. 2d 388, (Fla. 1st DCA. 1977), wherein it is said:

> "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. 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: Vermeaulen's Petition, 114 So.2d 192 (Fla. 1st DCA 1959)".

The rights of the child and of the parent are thus satisfied harmoniously and in the child's best interest. For the child's welfare is presumed to be best served by care and custody by the natural parent, In Re Vermeaulen's Petition, 114 So. 2d 192,(Fla. 1st DCA 1959) unless such care or custody is detrimental to the child. Fla. Statute § 61.13(2)(1982), to be compared with this instant decision.

The cases cited by Emma Nero can be distinquished on their facts or as outdated legal philosphy from the instant case. Green v. Green 188 So. 355 (Fla. 1939), is an anathema to modern American jurisprudence because it discriminates against the father based upon the mother's supposed inherent superior ability to raise children and her extreme wealth. See Florida Statute § 61.13(1)(b)(1) (1982).

The same applies to Brust v. Brust, 266 So. 2d 400, (Fla. 1st DCA 1972). Pittman v. Pittman, 14 So. 2d 671 (Fla. 1943) found both parents unfit. In the instant case Albert McWhite was found fit by the trial court. In Silvestri v. Silvestri 309 So. 2d (Fla. 3rd DCA, 1975), the custody determination was between two parents, each of whom would have equal dignity in custody under the instant ruling of the Fourth District Court of Appeal and under which the standard of best interest of the child would apply. See 429 So. 2d 699 at 702. The same would apply to Mehaffey v. Mehaffey 196 So. 2 416 (Fla. 1940) and Bargeon v. Bargeon 153 So. 2d 10 (Fla. 2d DCA 1963). Drake v. Drake 386 So. 2d 1307 (Fla. 4th DCA 1980) found the natural parent unfit, it does not apply herein.

As to Florida Statute § 744.301 (1), it is obviously unconstitutional under both the State and federal constitutions as it relates to natural father of children born out of wedlock. Stanley v. Illinois, supra.See Justice Boyd's concurring opinion in Kendrick v. Everheart, supra. The many citations to current Florida law surely override the judicial philosophy of cases from the 1920's and 30's and earlier. Though never expressly overturned the modern trend of Florida statutes and case law inherently rebuke those cases.

Albert McWhite takes great affront to the characterization of the facts as stated by Emma Nero. The reason the statement of the facts as quoted by the Fourth District Court of Appeal is set out along with the statement of facts originally submitted by Albert McWhite is to conclusively dispute Emma Nero's factual characterization.

A fit natural parent should never be subject to the loss of custody of his own flesh and blood as against the non-parent, unless there is clear, convincing and compelling reasons to the contrary. A case of denying custody to a natural parent would only be as the Fourth District has said:

> "only where it is demonstrated that the parent is disabled from exercising custody or that such custody will, in fact, be detrimental to the welfare of the child".

429 So. 2d 702

POINTS ON REVIEW

POINT II

WHETHER IT WOULD BE DUPLICITOUS TO REQUIRE ALBERT McWHITE TO BRING A DECLARATORY ACTION FOR HIM TO BE DECLARED THE NATURAL FATHER OF THE MINOR CHILD WHERE SUCH ISSUE HAS BEEN ALREADY TRIED INHERENTLY BY CONSENT.

Inherent in the trial court's Final Judgment is the proposition that Albert McWhite is the natural father of the minor in this cause, Dandrick McWhite. Otherwise the trial court never would have ruled that Albert McWhite was fit.

The record is replete with the factual basis for the Fourth District Court of Appeal to state as follows at 429 So. 2d at 701.

> "Albert McWhite's name appears on the birth certificate the baptismal certificate, an acknowledgment filed by McWhite at the hospital when the child was born, and on the records of the Florida Department of Health and Rehabilitative Services and the United States Social Security Administration".

The Court found that McWhite had established himself as to be Dandricks' natural father. 429 So. 2d at 704. Had counsel at trial for Albert McWhite prepared the final judgment, no doubt this fact would have been recited. The lack of this was obviously an oversight on everyones' part.

The law is not a fool and does not require that which has already been done to be needlessly and expensively repeated.

As the Fourth District said at 429 So. 2d at 701.

> "Although she refused to stipulate that McWhite is the father of her grandson, Mrs. Nero acknowledged that he always claimed to be, that on one else did and she gave his name as the child's father in applying for Social Security benefits".

Her own admission with the other facts sufficiently justifies the Fourth Districts' findings, none of which are in conflict with the ommission of this fact in the trial court's Final Judgment.

It is ridiculous to require a declaratory judgment action establishing his paternity based on the uniqueness of the facts of this particular case where such has already inherently been tried by consent.

CONCLUSION

Based upon the foregoing authorities and citations, and argument, Albert McWhite prays that this Court will affirm the opinion of the Fourth District Court of Appeal in this case.

FOOT NOTES

1. In Wilcox v. Jones, 346 So. 2d 1037 (Fla. 4th DCA 1977) cert. denied, 357 So. 2d 188 (Fla. 1978), this Court declared that the equal protection clauses of both state and federal constitutions mandate that an unwed father, like the mother, may maintain an action to recover damages for wrongful death of a child. The Florida Probate Code now provides that, for purposes of intestate secession, a child born out of wedlock may be the lineal descendant of his mother and also of his father, provided paternity is established either before or after the father's death. See § 732.108 (2), Fla. Stat. 429 So. 2d at 703.

2. This holding is also consistent with Florida's adoption statute which provides that the consent of the natural father or an excuse therefor must be secured before the father's parental rights may be terminated. Wylie v. Botos, 416 So. 2d 1253 (Fla. 4th DCA 1982). Here the father has formally acknowledged his paternity as provided for in the statute, and while the grant of custody in this case is not as severe a step as adoption, in our view the practical consequences would be virtually the same. 429 So. 2d at 704.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished to FRANK E. MALONEY, Jr., P.A., 5 West Macclenny Avenue, Macclenny, Florida 32063, by U.S. Mail, this 12th day of December, 1983.

MITCHELL B. LUBER, P.A.