IN THE SUPREME COURT OF FLORIDA

IN RE: GUARDIANSHIP OF:

D. A. McW., a minor

CASE NO. 63,712

_____/

NERO, EMMA

v.

McWHITE, ALBERT

PETITIONER'S BRIEF

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I N D E X

R E F E R E N C E S

PREFACE

This is the Brief of EMMA NERO, Petitioner, the maternal grandmother of the young child who is the subject of this litigation, filed in support of her Petition for Discretionary Review of the Order of the District Court of Appeals, which took her grandson from her and placed him with the putative father, pursuant to Rule 0.030(2) and Rule 9.120(b) Florida Rules of Appellate Procedure.

This Petition is brought from an Opinion of the District Court of Appeals, Fourth District, filed February 2, 1983 and rendered April 20, 1983 by the denial of the Petition for Re-hearing.

That Opinion of the Fourth District is in express, direct and embarrassing conflict with the prior decisions of this Court and other District Courts of Appeals on the same question of law: The test to be applied in granting custody of illegitimate minor children. The Opinion directly and expressly conflicts with the body of law which holds that the welfare and best interest of a minor child is the pole star consideration in granting custody, even against the wishes, desires and relationships of the party seeking custody.* The Fourth District Court of Appeal applied a new and conflicting test: The denial of award of custody to a putative father is only

*See Green v. Green, 137 Fla. 359, 188 So. 355 (1939), Mehaffey v. Mehaffey, 143 Fla. 157, 196 So. 416 (1940), Pittman v. Pittman, 153 Fla. 434, 14 So. 2nd. 671 (1943), Brust v. Brust, 266 So. 2nd. 400 (Fla. App. 1st DCA, 1972), Bargeon v. Bargeon, 153 So. 2nd. 10 (Fla. App. 2nd DCA, 1963), Silvestri v. Silvestri, 309 So. 2nd. (Fla. App. 3rd DCA, 1975).

proper when it "would be determental to the welfare of the child", see page seven of the Opinion.

The parties will be referred to as they stand before this Court.

The following symbols will be used:

A - Appendix - Record before District Court of Appeal, Fourth District

R - Record

Emphasis is supplied.

PROCEDURAL HISTORY AND STATEMENT OF FACTS*

The District Court has in its Opinion retried the evidence that was presented to the trial judge, The Honorable Clayton Johnson, Circuit Judge, Seventieth Judicial Circuit, throughout the first three pages of that Opinion and neglected the findings of the trial judge on that evidence.

The Court of Appeals, in attempting to camouflage its expressed conflicts with prior decisions, found that the Respondent, Albert McWhite, was, the father of the child.**

The Fourth District Court of Appeals also accepted the testimony of Mr. McWhite and his witnesses regarding his ascertains that he (McWhite) supported and cared for the child, with overwhelming testimony of the maternal grandmother and witness was he did not until he thought he might get to the proceeds of a wrongful death claim made on the baby's mother. He did not support the child no more than a total of $50 odd dollars, most of which came from his

*The District Court of Appeals, Fourth District, has made an attempt to camouflage the severity of its expressed conflict with the prior decisions regarding the test to be applied on the granting of custody of the minor child, by retrying the facts of the case below on a cold record, in direct, express and embarrassing conflict with prior decisions prohibiting such a retrying of the facts. See State ex rel Cartmel v. Aetna Casualty and Surety Company, 84 Fla. 123, 92 So. 871, 24 ALR, 1262 (1922).

**The Court ignored the fact that no Declaratory Relief action had ever been filed by Mr. McWhite to determine that he was the father of this child as required by Florida Law. The District Court ruled this way in spite of the fact that it recognized that the only method for determining whether or not a person is the father has been set forth by this Court in Kendrick v. Everheart, 390 So. 2nd. 53 (Fla. 1980). In that case, this Court held that unwed fathers may not bring a paternity action under Chapter 742, but must file a Declaratory Relief action under Chapter 86, Fla. St.

father. The evidence is clear, he merely wanted to benefit from the baby's mother's death.

The District Court of Appeals, Fourth District, in its desire to have a trial de novo ignored the overwhelming testimony at trial level on the best interest of the child, to-wit: The child staying in the home that he had lived in his entire life. The Fourth District discarded the test of the best interest of the child, a test long applied by this Court to all minor children and found that test should not apply to this particular child. Then in express conflict with these decisions, the District Court ruled that the test be applied would be whether it would be determental to this child to be placed with Mr. McWhite, an individual who is legally a stranger to the child until a Declaratory Relief action can be filed pursuant to Chapter 86, Fla. St. The conflict is not only expressed but embarrassing in Florida Law. The decision of the District Court of Appeals, Fourth District, the case of In the Guardianship of D. A. McW. a minor incompetent, is in direct, embarrassing and express conflict with those decisions of this Court and the various other district courts of appeal regarding the test to be applied on the placement of a child, to-wit: Whether the placement is in the best interest of the child's welfare or is merely the placement determental to the child.

POINT ON JURISDICTION

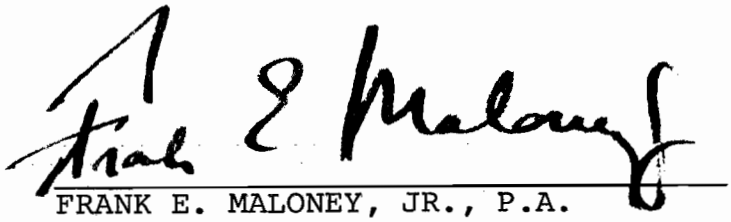
THE DECISION OF THE DISTRICT COURT OF APPEALS, FOURTH DISTRICT, IN THIS CASE IS IN DIRECT AND EMBARRASSING CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT REGARDING CUSTODY OF MINOR CHILDREN.

The Fourth District Court of Appeals not only tried to camouflage its conflict by retrying the facts of this case, but also attempts to raise the status of a mere putative father to that of a natural father married to the mother of the child, by referring repeatedly to the putative father is "a natural father". Then the Fourth District Court of Appeals attempts to lower the maternal grandmother (who happened to raise this child) to the status of a stranger, such as the Florida Department of Health and Rehabilitative Service. Applying a test that would be used to take a child away from a natural parent for placement with foster parents. In its attempt to cloud the issue, the District Court of Appeals did cite to this Court's decision in Kendrick v. Everheart, 390 So. 2nd. 53 (Fla. 1980) but ignored the fact that Mr. McWhite never did follow the procedure set forth by Chief Justice Sunberg. This Court held that the only method for a putative father to become a legal natural father was through the vehicle of Declaratory Relief and without which the putative father has no rights in the child. Therefore, in this case the standing of the maternal grandmother is made superior to the putative father.

The test of the welfare and best interest of the child pronounced by this Court and the various District Courts, Green v. Green, 137 Fla. 359, 188 So. 355 (1939), Mehaffey v. Mehaffey, 143 Fla. 157, 196 So. 416 (1940), Pittman v. Pittman, 153 Fla. 434, 14 So. 2nd. 671 (1943), Brust v. Brust, 266 So. 2nd. 400 (Fla. App. 1st DCA, 1972), Bargeon v. Bargeon, 153 So. 2nd. 10 (Fla. App. 2nd DCA, 1963), Silvestri v. Silvestri, 309 So. 2nd. (Fla. App. 3rd DCA, 1975), has been expressly ignored by the District Court of Appeals, Fourth District, in this decision. The test applied by the District Court of Appeals, to-wit: "determental to the welfare of the child" would be a hideous standard to place upon the young children of the State of Florida. It would require the Courts to ignore what is in the best interest and welfare of the child, rule what is merely not determental to the child. This Opinion not only conflicts with the well established Laws of the State, but is a terrible step in reverse regard our state's youth. It should be quashed.

CONCLUSION

It is respectfully suggested that the decision of the District Court of Appeals, Fourth District, is in express conflict with Green v. Green, 137 Fla. 359, 188 So. 355 (1939) Mehaffey v. Mehaffey, 143 Fla. 157, 196 So. 416 (1940), Pittman v. Pittman, 153 Fla. 434, 14 So. 2nd. 671 (1943), Brust v. Brust, 266 So. 2nd. 400 (Fla. App. 1st DCA, 1972), Bargeon v. Bargeon, 153 So. 2nd. 10 (Fla. App. 2nd DCA, 1963), Silvestri v. Silvestri, 309 So. 2nd. 29 (Fla. App. 3rd DCA, 1975) and Sneadaker v. Sneadaker, 327 So. 2nd. 72 (Fla. 1st DCA, 1976). This Court should take jurisdiction and quash the decision of the District Court of Appeals, Fourth District, and reinstate the judgment of the trial court below.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief was furnished to MITCHELL B. LUBER, P.A., 524 South Andrews Avenue, Suite 204, Ft. Lauderdale, Florida 33301, by U. S. Mail, this 27th day of May, 1983.

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