IN THE SUPREME COURT OF FLORIDA

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

EMMA NERO,

Petitioner,

vs.

ALBERT McWHITE,

Respondent.

---/

CASE NO. 63,712

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

INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

REFERENCES

PREFACE

This is the Brief of EMMA NERO, Petitioner, the maternal grandmother of the young illegitimate child who is the subject of this litigation, filed in review of the opinion of the District Court of Appeals, which took her grandson from her and placed him with the putative father, pursuant to Rule 9.120(f) and Rule 9.210, Florida Rules of Appellate Procedure, and this court's order of November 2nd, 1982.

The Opinion of the Fourth District is in express, direct and embarrassing conflict with the prior decisions of this Court and all the 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 Appeals applied a new and conflicting test: The denial of award of custody to a putative father is only 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 in this Court or as follows:

DANDRICK ALBERT McWHITE: minor grandson
EMMA NERO: maternal grandmother, Mrs. Nero
ALBERT McWHITE: putative father, Mr. McWhite

*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).

The following symbols will be used:

(R) - Record on Appeal
(T_1)- Transcript, July 23, 1981
(T_2)- Transcript, July 24, 1981
(T_3)- Transcript, July 27, 1981

All emphasis is supplied unless otherwise indicated.

PROCEDURAL HISTORY AND STATEMENT OF FACTS*

"The trial judge found as a matter of fact and law as follows:

> THIS MATTER came on for Final Hearing on the consolidated cases as styled above. These cases were consolidated by stipulation of the parties. The parties to this cause are Mr. Albert McWhite, the putative father of the minor child and Emma Nero, the maternal grandmother of the minor child, DANDRICK ALBERT McWHITE. This cause was heard over a three day period, those days being July 23, 1981, July 24, 1981, and July 27, 1981. During this trial and open court, the Court heard testimony from the parties and numerous witnesses and received into evidence various documents, photographs and viewed additional physical evidence in the form of clothing and toys. The Court further heard extensive argument by counsel for the parties. After being duly advised in the premise, the Court finds as follows:
>
> 1. That the Stipulation of the parties to join the matter for Guardianship and Custody is hereby granted and further that the Stipulation that the cause be heard in this Division is also granted.
>
> 2. That the request for an in-home inspection by the Department of Health and Rehabilitation, Division of Family Services, is determined to be unnecessary. The Court having heard extensive witnesses regarding the family home of both the Petitioner and Counter-Petitioner and the witnesses having testified regarding the home of the Petitioner, Albert McWhite, and six witnesses having testified regarding the home of the Counter-Petitioner, Emma Nero, the Court further finds that such a study by the Division of Family Services would merely be surplus to the extensive testimony heard in open court.
>
> 3. The Court finds that although the Petitioner, Albert McWhite, the putative father is not unfit, the Petition must be denied. The Court appreciates the

*The District Court of Appeals, Fourth District, has made an attempt to camouflage the severity of its expressed conflict with the prior decisions by retrying the facts of the case below on a cold record as prohibited. See State ex rel Cartmel v. Aetna Casualty and Surety Company, 84 Fla. 123, 92 So. 871, 24 ALR, 1262 (1922) and Conner v. Conner, ___ So. 2nd. ____ 8 FLW, 405 (Fla. 1983).

> putative father's interest and legal rights to claim custody and guardianship pursuant to the United States Supreme Court case of Stanley v. Illinois, 405 U. S. 645, 92 S Ct 1208, 31 L.Ed. 2d 551 (1972). However, the Court finds the best interest of the minor child will be served by giving custody and guardianship of person and property to the maternal grandmother, Emma Nero.
>
> 4. The Court finds that the claim of Emma Nero for custody and guardianship should be granted. The Court, after hearing testimony of twelve witnesses and receiving many documents and exhibits into evidence, is of the opinion that the maturity of the grandmother must be taken into consideration in addition to the past care and extreme interest that the grandmother has placed in this child. The Court further finds that the grandmother, in conjunction with the deceased natural mother, has raised this child since birth and that the child has, in fact, resided in the Nero home for his entire life. It is clearly in this Court's opinion that the best interest of the minor child will be served by placing the minor child with the Counter-Petitioner/maternal grandmother, Emma Nero.

As the trial judge found the minor child, DANDRICK ALBERT McWHITE, lived with his mother and his grandmother his entire life.

Mr. McWhite testified that he took extensive care of the child. However, his own testimony shows that he was working evenings and going to school during the day, three days a week almost the entire life of the child (T_1-29-33).

The putative father testified that he had supported the child and helped the natural mother. All evidence submitted at trial was that his father, the adoptive grandfather of this child, was the one who made any payments (T_2-38-39). It is also interesting to note that although the putative father was claiming to pay massive amounts of support he was only able to put on evidence of paying $53.90 during the entire lifetime of this child (T_1-40).

The putative father also entered in evidence a Baptism Certificate attempting to show that it had been a family heirloom that had been kept since the baptism of the baby. It established on cross examination that the putative father had lost the original Baptism Certificate and had obtained one for the trial for purposes of evidence to the Judge (T_1-40).

The putative father also admitted that he had forced the child's mother to go on to welfare (T_1-41).

> Q Sir, you were paying the $15.37 to HRS?
> A Yes.
> Q Because the child's mother was forced to accept aid to families of dependent children?
> A That is correct.

The mother stayed on welfare only until she obtained employment and was able to support herself and her child was never relieved from welfare by the Appellant herein.

The putative father also admitted on cross examination to having beaten the child's mother (T_1-44).

Mr. McWhite's father testified regarding the child and the bottom line on that testimony was that it was not their son who would take of the grandchild when the grandchild happened to visit at their home, but he himself and his wife (T -56-57). These individuals were not seeking custody or guardianship of the child (T -60). They also admitted that it was he and not his son who had given the minimal support to the grandson (T_1-64). Mr. McWhite, Sr. also testified that his son dated quite heavily and went around with a lot of girls (T_1-67).

A number of witnesses testified that DANDRICK ALBERT McWHITE, lived with his mother and grandmother and would only visit the putative

father's home on occasion and further testified that no support was given whatsoever by the putative father or if any support was given it was minor at very best (T_2-5). They also testified to the violent temper of the putative father and his being inmature beating the child's mother (T_2-7). It was unanonymous agreed that either Vickie, the deceased mother, or the grandmother took care of the baby and not the putative father (T_2-15). The putative father even threatened to kill the natural mother (T_2-36). All the eyewitnesses to the instance following the mother's funeral collaborated the fact that the putative father had, in fact, kidnapped young DANDRICK ALBERT McWHITE from his grandmother's home and held him in seclusion there and would not let the grandmother, Mrs. Nero, or the child's aunts see the baby or furnish the baby medication that it needed.

The Court then, in a camera session, talked with the baby and received into evidence the clothing of the child, which was kept at the grandparents home, and a photographic album covering the entire life of the minor child (T_3-41), the putative father is conspicious by his absnece in that album.

Mrs. Nero, testified that her daughter received no support from the putative father and that she, herself, had to help both her daughter and grandson. She went on to testify that the putative father did not pay for the hospital bill (T_3-8) or the doctor bill. That her daughter was forced to go on welfare because the putative father refused to support the child (T_3-9-10). It was only after her daughter went to work that she was able to come off of welfare (T_3-10). It was observed that the putative father was in the habit of treating the

baby more like a toy than a child (T_3-12). Mrs. Nero testified that the putative father never purchased groceries for her household (T_3-19). She went on to testify that the putative father came to the funeral of the natural mother only on funds borrowed from her. That she had lent the funds to Mr. McWhite and then was shocked to have Mr. McWhite kidnap the child from her front yard and seclude him from her during the entire pendency of this trial.

As a result of the evidence heard by Judge Johnson, he determined that it was clearly in the child's best interest to remain in the home that he had lived in all of his life and placed the child with the maternal grandmother and granted her guardianship over the baby (R-312-314)

The District Court has in its Opinion retried the evidence that was presented to the trial judge, The Honorable Clayton Johnson, 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 het to the proceeds of a wrongful death claim made on the baby's mother.

**The District 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. (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.

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.

POINTS ON REVIEW

POINT I.

DID THE DISTRICT COURT OF APPEALS ERR IN CREATING A NEW TEST TO BE APPLIED IN CUSTODY OF ILLEGITIMATE CHILDREN, AND NOT APPLYING THE POLE STAR TEST OF BEST INTEREST OF THE CHILD.

POINT II.

DID THE DISTRICT COURT OF APPEALS ERR IN ELEVATING THE STATUS OF MERE PUTATIVE (REPUTED) FATHERS TO LEVEL OF NATURAL FATHERS WITHOUT A DECLARATION OF PATERNITY AS REQUIRED BY KENDRICK V. EVERHEART, 390 SO. 2D 53 (FLA. 1980).

POINTS ON REVIEW

POINT I.

DID THE DISTRICT COURT OF APPEALS ERR IN CREATING A NEW TEST TO BE APPLIED IN CUSTODY OF ILLEGITIMATE CHILDREN, AND NOT APPLYING THE POLE STAR TEST OF BEST INTEREST OF THE CHILD.

The test of the welfare and best inerest 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.

The Florida Legislature in Section 744.301 Florida Statutes sets forth the preference for natural guardians giving the highest preference to the mother and then goes on to give other preferences regarding parents. It is interesting to note, in that section, the lowest order of preference is given to putative fathers. The highest

preference, of course, given to mothers or to parents that are married. The second lowest preferences are to father after a divorce. The lowest preference of all is to the fathers of illegitimate children. Clearly, a putative father is the lowest level of preference and should not be considered any higher than other direct kin such as the Appellee, MRS. NERO.

The Florida Supreme Court has repeatedly given guidance to the bench and bar regarding consideration on awards of custody and guardianship of minor children. In Myers v. Stewart, 117 Fla. 173, 157 So. 499 (1934), the Court held that the best interest of the child is the primary consi-eration in guardianship proceedings, even more so than in divorce.

The Court reaffirmed this position in State ex rel Bonsachi v. Campbell, 134 Fla. 809, 184 So. 332 (1938). In that case, the Supreme Court held that in guardianship proceedings, the Court is not bound by the "ties of nature", but are to be governed by the "child's welfare". See also for the same result, Dourn v. Hinsey, 134 Fla. 404, 183 So. 614 (1938), and State ex rel Bullard v. Clark, 134 Fla. 684, 179, So. 658 (1938).

Section 744.31 also allows the testimony desires of the natural guardian to be considered. In this case, the evidence is abundant that Vickie Nero would prefer to have her mother and sisters continue to raise her baby.

This Court in the famous case of Pittman v. Pittman, 153 Fla. 434, 14 So. 2d, 671 (1943) held that even where the parent may be a fit person, a non-parent may be more fit and thus custody can be granted to a non-parent without an adjudication of unfitness on the part of the parents. In that case, a young child such as in this case,

was awarded to a non-parent. This Court has also held that in such situations, a grandparent would be a proper person. See Randolph v. Randolph, 146 Fla. 491, 1 So. 2nd. 480; Cone v. Cone, 62 So. 2nd. 907 Fla. 1953 and 26 Fla. Jur. 2nd. "Family Law", § § 525-526, page 117.

Over the years this Court has spoken regarding the test to be applied in custody cases where an illegitimate child is involved, that test has always been "the best interest of the child"; the pole star to guide the trial court, the very test applied by the trial judge in this case, not the new test with a perference to the putative father announced by the District Court.

Beginning last century, this Court in Jones v. Harman, 27 Fla. 238, 9 So. 245 (1891) held that the test for custody of little Lottie Morgan should be her best interest, a test followed until the District Court decided to change it in this case.

Mr. Jas. Roberts brings us to more modern times in Arnd't v. Prose, 94 So. 2nd. 818 (Fla. 1957); applying the test of the best welfare of the child custody was awarded to the paternal Aunt and Uncle of young Orville Junior Moseley.

In explaining equal protection under the law problems of Chapter 742 Fla. St. this Court continued to apply the "best test" in Brown v. Bray, 300 So. 2nd. 668 (Fla. 1974).

Florida through this Court has applied the same test as the majority of states have accepted. The editors of American Law Reports Annotated have had a continuing annotation of this subject since ALR first series, see 51 ALR 1502 superseded by 37 ALR 2nd 882 superseded 45 ALR 3rd 216 "Rights of Putative Father to Custody of Illegitimate child". Those continuing annotations teach us the test is "the best interest of the child", not is it determental to force the child to live with a man who would not marry his mother.

> The cardinal principle that the welfare of a child should determine its custody is applicable to illegitimate as well as legitimate children. See 10 Am Jur. 2d "Bastards" § 60 p. 889; Pierce vs. Jeffries 103 W. Va. 410, 137 SE 651 (W. Va. 1927) 51 ALR 1502.

Looking to our sister states geographically we see they all apply the best interest test. First to Georgia:

In Day v. Halton, 83 SE 2d 6 (Ga. 1954) the Georgia Supreme Court held the best interest test was the "Pole Star" for counts to be guided in custody of illegitimate children.

And, in Turner v. Head, 224 SE 2d 360 (Ga. 1976), the Georgia Court in applying the best interest of the child test awarded custody to the maternal grandmother over the natural mother of an illegitimate child.

Alabama has also consistently applied the best interest test, see Wambles v. Coopage, 333 So. 2nd 824 (Ala.)

As well as Louisiana, see Neal v. White, 362 So. 2nd, 1148 (La.).

Our sister state of Texas has been most proflict in this area (apparently both in children and case law). In prefering a stranger over the putative father, the Texas Appellate Court held the "best interest test" must apply, see Benarvidev v. Vargas, 299 SW 2d 404 (Tex. Civ. App. 1957), reaffirming Cleaver v. Johnson, 212 SW 2d 197 (Tex. Civ. App. 1948) where the unwed father tried to argue he had a special status because he was (might be) the biological father. An argument consistently rejected by the Texas Courts (the majority view). The Texas Supreme Court laid the whole matter to rest (as this

court should) in Home of Holy Infancy v. Kaska, 397, SW 2d 208 (Tex 1965), the test is the best interest of the child, the test applied by the trial judge in this case.

After the United States Supreme Court's opinion in Stanley v. Illinois, 405 U.S. 645, 31 L. Ed. 2d. 551, 92 S. Ct. 2d 1208 (1972), the Texas Court, just as the Florida Court in Brown v. Bray, Supra, had to decide if equal protection was being denied putative fathers, the Texas Court said "NO" in In Interest of K, 535 SW 2d 168 (Tex. 1976), which held the Texas Legislature could discriminate against unwed fathers, and that Stanley Supra never intended to give full parental rights to men who left their unwanted pregancy across the faces of our country as Mr. McWhite is prone to do, this being the first in a series of at least two; the K Court denied custody to the illegitimate father.

Moving from the geographically South to the nation as a whole, we find that the majority of the Courts also rejects the special preference to the mere putative father in favor of the best interest test:

> The father's rights to custody of an illegitimate child depends, however, upon his suitability to have the same, and is subordinate to the best interest of the child, see 10 Am Jur. 2d "Bastards" § 62 Rights of Fahter, p. 891.*

*Schwart v. Kopf. 149 Neb 460, 31 NW 2d 294 (Neb 1948); Hayes v. Strauss, 151 Va. 136, 144 S.E. 432 (Va. 1928); State ex rel Smith v. Superior Court, 23 Wash 2d 357, 161 P 2d 188, 37 ALR 886 (Wash. 1945); McCalester v. Hillcrest Services, 232 V. W. 2d 1 (Iowa 1975).

Hawaii has discussed this area in detail in In Re Doe 478 P 2d 844 (Hawaii 1970), where the Hawaiian Supreme Court held the best interst test is the paramount consideration in any custody case, and that it was wrong for the children of Hawaii to give any preference to the unwed fathers, see also 45 ALR 3rd 216 Anno § 2(a).

Even the most populas states have consistently adhered to the "best interest rule" as the pole star for the trial courts to apply in cases as this, see 10 Am Jur 2d,"Bastard" § 64*

Both of the most populas states have squarely faced this issue, and both have ruled there is no special test to be applied to a man who just might be the child's father, like Mr. McWhite in this case. It is "best interest of the child."

In California the Supreme Court in speaking on guardianship held that putative fathers had no special rights, see In Re Guardianship of Smith, 42 Cal. 2d 91, 265 P 2d 888, 37 ALR 2d 867 (Cal. 1954). The editors of American Jurisprudence summerized the Smith case as follows:

> *THE RIGHT OF A PUTATIVE FATHER TO BE APPOINTED GUARDIAN OF HIS BASTARD CHILD IS INFERIOR TO THE RIGHTS OF THE MOTHER, AND IT HAS BEEN HELD THAT UPON HER DEATH THE CHILD BECOMES AN ORPHAN, SO AS TO AUTHORIZE THE APPOINTMENT OF A GUARDIAN OF THE CHILD, ALTHOUGH THE PUTATIVE FATHER IS STILL LIVING. 10 Am Jur 2d Bastards § 65, Appointment of Guardian, 193.*

See Re Wright, 52 Ohio Misc. 4, 367 NE 2d 931 (Ohio 1977); State ex rel Oliver v. Foglio, 53 App. Div. 2d 594, 385 NYS 2d 78 (N.Y. App. 1976) (approving maternal aunt over unwed father); Harper v. Fuller, 142 Pa. Supra 98, 15 A 2d 518 (Pa. 1940); Hines v. Sullivan, 431 NYS 2d 868 (N.Y. App. 1980) and Moritz v. Garnhart, 7 Watts 302 (Pa.)

New York when faced with this issue regarding custody between an unwed father and the maternal grandmother after the untimely death of the natural mother held in favor of the maternal grandmother in Gomez v. Lozado, 40 NY 2d 839, 387 NYS 2d 834, 356 NE 2d 287 (NY 1976) applying the "best interest test".

The argument against grandparents as mere strangers is continuing to loose support throughout the United States, and the people of Florida have spoken loudly in favor of grandparents even in legitimate families by recognizing grandparents rights by enacting § 61.13(2)(b)(2)(c) Fla. St. (1982).

To apply the "test of" determental to the child as pronounced by the District Court of Appeals will do irreputable harm to our state, and take Florida from the mainstream of concern for our young and force those children to live in situations which are not in their best interest or their welfare as long as they are not determental. Such a test can allow an irresponsible man to indiscriminately spawn without regard to his responsibility until he might gain by the unwed mother's untimely death and thereby reap a bonanza at the expense of his child, precisely what Mr. McWhite has been allowed to do in this case.

The opinion of the District Court should be quashed and the Final Judgment of the trial judge reinstated.

POINT II.

DID THE DISTRICT COURT OF APPEALS ERR IN ELEVATING THE STATUS OR MERE PUTATIVE (REPUTED) FATHERS TO LEVEL OF NATURAL FATHERS WITHOUT A DECLARATION OF PATERNITY AS REQUIRED BY KENDRICK V. EVERHEART, 390 So. 2nd. 53 (Fla. 1980).

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 fahter 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 natrual 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 fahter has no rights in the child. Therefore, in this case the standing of the maternal grandmother is made superior to the putative father.

The District Court should be quashed and the Final Judgment should be reinstated.

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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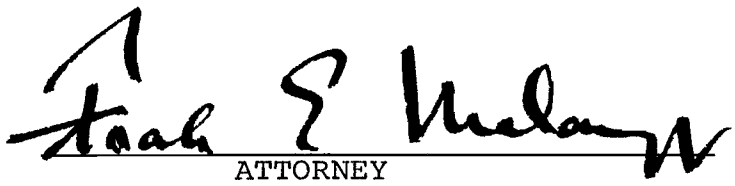
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished to MITCHELL B. LUBER, P.A., 524 South Andrews Avenue, Suite 204, Ft. Lauderdale, Florida 33301, by U. S. Mail, this 22nd day of November, 1983.



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