O/a 2-13-84

013

IN THE SUPREME COURT OF FLORIDA

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

EMMA NERO,

Petitioner,

vs.

ALBERT MCWHITE,

Respondent.

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CASE NO. 63,712

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

REPLY BRIEF

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REFERENCES

PREFACE

This is the Reply Brief of the Petitioner, EMMA NERO, the maternal grandmother of the minor child which the District Court of Appeals removed from her custody while first pronouncing the test that a putative father has the right of custody of his minor child if it is not determental to the child, a test that the District Court of Appeals not only created in a conflict with earlier decisions of this Court and the various District Courts of Appeals but also a test that the District Court failed to allow the trial court to consider in this case.

This Reply Brief is filed pursuant to Rule 9.120(f) and Rule 9.210, Florida Rules of Appellate Procedure.

STATEMENT OF THE FACTS

The Statement of the Facts as presented by the Respondent is at best wishful thinking. Mr. McWhite made many claims at time of trial but when it came time to substantiate them he had no evidence to substantiate them and his testimony was totally refuted by Mrs. Nero and the maternal aunts of the minor child. Testimony that the trial court apparently believed over that of Mr. McWhite. Again, Mr. McWhite is attempting to have a trial De Novo in this cause.

The Petitioner will rely on the Statement of the Facts as found in her Brief and Chief.

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 DISTIRCT 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. 2nd. 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 argument of the Respondent is that the Courts of the State of Florida should not consider the best interest of the child but should consider the personal feelings of a natural parent even if those feelings are contrary to the best interest of the child and is also asking that this Court elevate the standing of a mere putative father to that of a father married to the mother of a child and make those rights superior to a maternal grandmother who has helped raise the child and whose home the child has lived his entire life. The test never adopted by this state.

It should be noted that even step-parents have rights to custody over the natural parent when it is in the best interest of the minor child. See Golstein vs. Golstein, ___ So. 2nd. ___, 8 FLW 2835 wherein the District Court relied on this Court's decision in Cone vs. Cone, 62 So. 2nd., 907 (Fla. 1953) is clearly in the child's best interest that the child remain with the maternal grandmother where he had lived his entire life. The new test pronounced by the Fourth District Court of Appeals would be batently unfair to all minor children in the State of Florida.

The District Court, Fourth District, has ignored this Court's continuing advise to not retry family cases merely because it is

dissatisfied with the results reached by the trial judge, see Conner vs. Conner, __ So. 2nd. __ (Fla. 1983) 8 FLW 405 and Kuvin vs. Kuvin, __ So. 2nd. __ (Fla. 1983) 8 FLW 483, at page 484:

> "It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence."

The Decision should be quashed and the best interest test reinstated.

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. 2nd. 53 (Fla. 1980).

The putative father seems to forget that all he is is a putative father until his rights are declared as this Court pronounced in Kendrick vs. Everheart, 390 So. 2nd. 53 (Fla. 1980). He has no rights whatsoever in the minor child until he has met the requirements set forth in this Court under the Declaratory Judgment Statute, Section 742.011 Fla. St. The argument of Mr. McWhite at this point is purely superfluous and it is an attempt to have this Court exercise circuit court jurisdiction under the Declaratory Judgment Statute.

It is interesting to note that Mr. McWhite's lawyer now says that if he had prepared the Final Judgment he would have placed a finding of paternity for his client in that Final Judgment. A fact he could not do because there was never a claim for Declaratory Relief on behalf of Mr. McWhite. If he had so, it would have been reversable err.

It is respectfully suggested that the decision of the District Court of Appeals, Fourth District, be quashed and the Judgment of the trial court reinstated.

CONCLUSION

Based on the authorities and argument in this Reply Brief and the Brief and Chief, it is respectfully suggested that the District Court of Appeals is in direct and embarrassing conflict with this Court and that this decision should be quashed and the decision of the Circuit Court reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been furnished to MITCHELL B. LUBER, P.A., Davie Blvd., Professional Complex, Building C, 400 S. E. 12th Street, Ft. Lauderdale, Florida 33316, by U. S. Mail, this 4th day of January, 1984.

ATTORNEY