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IN THE FLORIDA SUPREME COURT

CIVIL APPEAL
FROM THE FIFTH DISTRICT COURT OF APPEAL

No. 65,515
Fifth District Court of Appeal
No. 84-780

IN RE: THE MATTER OF THE ADOPTION OF: HYT., a minor,

DANIEL S. WALLACE, Attorney-Ad-Litem for HYT, a minor,

PETITIONERS,

v.

THE HONORABLE C. McFERRIN SMITH, III, etc., et al.,

RESPONDENTS.

RESPONDENTS" BRIEF
ALVA AND WANDA RAMEY

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AUTHORITIES

RESPONDENTS' ANSWER BRIEF

Respondents', ALVA AND WANDA RAMEY, accept Petitioner's Statement of the Case and Statement of the Facts as set forth in Petitioner's Brief.

Respondents' disagree with the statement in Petitioners' Argument Summary that this is an adoption proceeding. It is an adoption proceeding consolidated with a prior adoption proceeding and guardianship proceeding alleging fraud on the part of the guardian.

By order, dated September 1, 1982, the Honorable John Upchurch, Circuit Court Judge, consolidated this captioned cause with Case No.74-716-02-F (Guardianship) and Case No.74-3659-01-E (the Miller-Ramey adoption proceedings). [R.106-107] The record which has been prepared for this Honorable Court contains the documents filed in the 1977 adoption proceeding but does not include the records of the other cases consolidated herein/as numbered above.

Respondents agree with the public policy which provides that adoptions shall be confidential but would limit that policy to cases where identity of the parties must be secret in order to protect the best-interest of the child or the parents, natural and/or adoptive. Fla. Stat.63.162 may constitute "a recognition of the need for privacy in adoptions" and it may provide" a reasonable method of protecting a person's constitutional right of privacy" as attorney ad litem argues, but that protection therein is overbroad and the overbreadth of it violates the constitutional privilege of free speech and free press. The unconstitutionality does not lie in what the statute says so much as in what it fails to say. It makes no exceptions. It protects those whose identity should be protected but it goes too far in offering the same but unnecessary protection to those for

whom identity need be no secret. Respondents agree that the instant cause does have a "new dimension" but that very "new dimension" takes it beyond the framework and legislative intent of the statute.

The media does not enjoy "a broad freedom of access" to information about adoptions under the statute. The media has no access to the sealed records. The media has no access to closed hearings. In fact, the only access to any information must come from the parties if they choose to answer any questions Respondents, the Rameys, are not suggesting that all adoption proceedings be open to the public and to the press. They are suggesting to the Legislature that the statute should be made constitutionally whole by adding a provision for the recognition of exceptions to the need for privacy in certain adoptions and particularly in adoptions consolidated with other causes. Where is it written that a custody battle between natural and known maternal and paternal grandparents would best serve the interests of the child by being a secret proceeding, held behind doors closed to the press and to the public?

ARGUMENT

THE LEGISLATIVE MANDATE OF CONFIDENTIALITY IN ADOPTION PROCEEDINGS CONTAINED IN SECTION 63.162 (1), FLORIDA STATUTES, DOES VIOLATE THE CONSTITUTIONAL RIGHT OF FREE SPEECH.

Petitioner continues to emphasize that "this is an adoption case". This is a proceeding to determine custody of a minor child, either by guardianship or by adoption. This is a proceeding to determine whether there should be an adoption at all and, if there should be, who should be the adoptive parents. This is a proceeding to determine whether the

present guardian, Peter Thomas, should be removed as guardian by reason of fraud and wrongdoing, and whether the Rameys should be the guardians of the minor child as recommended by the Department of Health and Rehabilitative Services in the course of an earlier adoption proceeding involving the same minor child.

A jury trial has been demanded in this consolidated cause and the motion was granted by the Hon. John Upchurch on October 19, 1982 (R.118, 119) but that order was over-ruled by the Hon. C. McFERRIN SMITH, III on May 29, 1984 at the same time his earlier order regarding confidentiality was overruled. (R.386-387) That issue is on petition for writ of mandamus to the Fifth D.C.A.

The issues intertwined in this consolidated cause are not so clear-cut and simple as Petitioner describes.

If the Appellate court grants the Rameys' petition for writ of mandamus and mandates a trial by jury of all the issues of fact herein, then the rule of confidentiality in F.S.63.162 must be necessarily broken to allow the jurors to hear the entire cause in order to determine the triable issues of fact. One constitutional right will collide with a statutory right; the right to trial by jury vs. the right to privacy. These factors should not be disregarded in the determination of this petition. The arguments in support of trial by jury are in the record. (R.103-105, Vol. 1; R.217-223, Vol.2; R. 280-313, Vol.2)

The brief of the intervenor, the attorney general, submitted by Mark Menser, Assistant Attorney General, takes a different approach to the challenged statute and attacks the trial court's method of assessment of the statute's constitutionality.

The record shows that May 29, 1984 was not the first time the trial court had been confronted with this issue. On February 13, 1984, attorney-ad-litem for the minor child had moved for an order directing that all adoption documents and proceedings remain confidential. (R-266). Respondents Alva and Wanda Ramey filed a response to that motion. (R-273-276). They challenged the statute's constitutionality then (on February 23, 1984), citing U.S. ex rel Latimore v. Sielff, 561 F.2d.691, in which the high court stated:

> The propriety of the trial court's action in excluding spectators during trial depends on the circumstances of each case.

Fla. Stat. 63.162(1) makes no provision for exceptions to closed proceedings. This consolidated case is more than an adoption proceeding. It is also a guardianship action with a determination of fraud and other wrongful acts as cause for removal.

Fla. Stat. 63.162(1) is unconstitutional, as applied to this particular case and these particular circumstances, but it also unconstitutionally closes the door to any other similar cases.

The trial court did approach this issue with the presumption of the statute's validity. In fact he earlier ruled that the proceedings would be closed. That was not a neutral position.

However, on May 29, 1984, he reassessed the statute and the supporting facts and those facts, applied to this case, did not justify the statute standing alone. Had it contained a provision for exceptions such as that found in another section of the same statute, (63.162(4)(d), the outcome would have been different. The trial court was faced with the dilemma of two important rights pitted against each other, one constitutional right, one statutory, with no guidelines for a resolution of

the matter provided by the Legislature. He removed the weaker contender-the statutory right to privacy-by reason of its infirmity.

Justice Sundberg, speaking for the entire Supreme Court of Florida, in Petition of Post-Newsweek Stations,Fla. Inc. For Change in Code of Judicial Conduct, 370 So. 2d. 764 (Fla. 1979) stated:

> First, a judicial proceeding, subject to certain limited exceptions, is a public event which by its very nature denies certain aspects of privacy. Second, and more compelling, there is no constitutionally recognized right of privacy in the context of a legal proceeding.

The court went on to further state:

> Furthermore, there is no express guarantee of a right of privacy contained in the Constitution of Florida, nor has any such constitutionally guaranteed right yet been found to exist through implication. Laird v. State. Consequently, objections to amendment of Canon 3A(7) predicated upon violation of participant's privacy rights are unavailing.

The scope of privacy interests protected by the United States Constitution has been narrowly circumscribed by recent decisions of the United States Supreme Court to include only matters relating to marriage, procreation, contraception, family relationships, and child rearing and education

In Eisenstadt v. Baird, 405 U.S. 438, at 453, the United States Supreme Court stated:

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

The "intrusion" into privacy rights has been intrusion by government, not by the public or by the press, in the high court's decisions. In Roe v. Wade, 410 U.S. 113, Mr. Justice Blackman declared:

> These decisions make it clear that only personal rights that can be deemed "fundamental' or' implicit in the concept of ordered liberty', Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage [citation omitted]; procreation] [citation omitted]; contraception [citation omitted];family relationships and child rearing and education [citation omitted]". 410 U.S.at 152, 153, 93 S.Ct. 726. (Emphasis added.)

This statement of the scope of the constitutional right to privacy remains the definitive statement of the law in this area, Laird v. State, 342 So. 2d. 962, 964.

Justice Sundberg, speaking for the majority of the Florida Supreme Court in Laird, supra, at page 965, stated:

> Thus, as indicated at pp. 963, 964, Justice Blackman's articulation in Roe v. Wade, of the limited scope of the right to privacy remains the current state of the law.

The intimacies of the marital relationship, procreation, contraception and other family matters are free from governmental intrusion as matters of privacy.

Fla. Stat. 63.162 (1) does not concern a constitutional right to privacy as stated by Petitioner. It involves merely a statutory right of confidentiality.

> What is called for is an articulated standard for the exercise of the presiding judge's discretion in determining whether it appropriate to prohibit electronic media coverage of a particular participant. Petition of Post-Newsweek

Stations, Florida, supra at pg.778-779.

The Court recognized that electronic media coverage of certain child custody proceedings could have a devastating impact on the welfare of the child participant.

> However, we deem it impudent to compile a laundry list or adopt an absolute rule to deal with these occurrences. Instead, the matter should be left to the sound discretion of the presiding judge to be exercised in accordance with the following standard: The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media. Post-Newsweek, at Pg. 779.

Fla. Stat. 63.162(1) does adopt an absolute rule and does not leave the matter to the sound discretion of the trial judge. Therefore , it violates the constitutional right of free speech by excluding both public and press from all adoption proceedings.

Trial courts, in appropriate proceedings in which organic rights are shown to be violated, may adjudicate that, in the process of its enactment or in its provisions or intendments or in its operation or effect, a legislative act conflicts with an expressed or fairly implied limitation of either the State or Federal Constitution and that as a consequence the enactment is inoperative either in whole or in part as applied to a particular case. 6 Fla. Jur., Constitutional Law, §45. The Court has an affirmative duty to support, protect and defend the Constitution even if a statute is held to be inoperative as a result.

The trial court found Fla. Stat. 63.162(1) "unconstitutional on its face as its applied to this fact situation". (R-360,l. 6 & 7). A statute may be declared unconstitutional by reason of its operation as well as its terms, and although a law may on its face be constitutional, its operation in a given case may render it unconstitutional. The rule is clearly established that it is the practical operation and effect, rather than the mere form of a statute which is the criterion by which to judge the constitutionality of an act. Sparkman v. State ex rel Scott, 58 So. 2d.431 (Fla. S. Ct. 1952)

The trial court herein apparently used that criterion and found the act unconstitutional.

In Snedeker v. Vermar, Ltd., 151 So.2d.439 (1963) the Supreme Court of Florida affirmed the unconstitutionality of a statute, which regulated masseurs, for failure to reasonably relate to public safety or welfare as applied to certain operators. The challenged statute herein, which regulates all adoption proceedings, does not reasonably relate to the privacy interests of the adoptee, and or the contending and adoptive parents in the instant consolidated causes.

> The decision in sum is that the definition of applicability contained in Sec. 480.01(1)(a) is stated in terms not susceptible of lawful limitation and is therefore void and unenforceable. Snedeker v. Vernmar, Ltd. supra.

Unconstitutional is unconstitutional no matter whether you approach it from behind or from in front.

Although the attorney for the News Journal advanced a theory which apparently corresponds to the Respondent State's "mootness" theory, there is no indication in the trial court's May 29th order, or in the transcript of the proceedings on May 29th, that the trial court based its

decision in regard to the statute's constitutionality on the prior publicity in the case as expounded by the State. That theory, however, does emphasize the fact that this is no ordinary adoption case such as the legislature probably had in mind when Fla. Stat. 63, 162 (1) was enacted.

The State recognizes "exceptions" in regard to public access to courtrooms and admits that "the extent of cloture may vary" and "may be achieved by different legal procedures" and that "there is no right of public access to every courtroom proceeding". The other side of that coin is that there is no right to closure, of every case, including adoptions.

The State's reliance on State ex rel. Gore Newspapers v. Tyson, 313 So. 2d. 777 (Fla. 4th DCA 1975) is misplaced because the appellate court therein held that the trial court's exclusion of the public and the press constituted an act in excess of its power where parties to a dissolution action presented no reasons cogent or otherwise for requesting that their proceedings be conducted behind closed doors. The court went on to say that, even though litigants may prefer to have their dissolution action conducted in private away from prying eyes of the public and the glare of the media, these desires cannot serve as a predicate upon which to exclude the public and press completely. This cited case stands for the principle that the public and the press have a fundamental right of access to all judicial proceedings, contrary to the State's theory to the contrary.

Saviano v. Luciano, 92 So. 2d. 817 (Fla. S. Ct. 1957) cited in the State's brief as support for exclusion of public and press, holds that justification for all confidential and privileged communications lies not in the fact of communication but in the interest of the persons concerned that the subject matter should not become public. When a party himself ceases

to treat a matter as confidential, it loses its confidential character. So much for the State's "mootness" theory!

Adoption is a statutory proceeding which ordinarily creates "the legal fiction of familial membership". Familial membership already exists in the instant cause. No creation of such is necessary, only a shifting of already established relationships perhaps. No secrecy has existed or needs to exist in regard to the identity of the parties.

For ten years this cause has been shuttled back and forth between the various levels of the judicial system in Volusia County and the State of Florida. Those numerous proceedings have been secret proceedings without the presence of the press or the public.

> History past and present has poignantly demonstrated the destructive effect of secrecy on our society-sowing seeds of suspicion and distrust between government and the governed. It would seem somewhat paradoxical for the institution which has fostered a recognition of government in the sunshine and whose pronouncements are concerned with the administration of justice to take a backward step by enshrouding its/own proceedings in secrecy solely to accommodate litigants. (State ex rel Gore Newspaper Co. v. Tyson, supra at 313 So.2d.787.

However, in spite of the past exclusion of both public and press in the cause now before this court, the press obtained the facts and published those facts. Undoubtedly the same situation will occur again if the press is again shut out of the courtroom. The purported purpose of the legislation of Fla. Stat. 63.162(1) will be circumvented. The First Amendment challengers will take the long way around and perhaps be unable to note what actually happens during the proceedings and why it happens. They will rely on hearsay. The public will know the result but

not as the consequence of objective reporting. The child's best interests may well suffer in the long run.

This cause also involves grandparents' rights in the State of Florida. That is an uncharted area of law with only skeletal statutory provisions along the way. There are thousands of senior citizens in Florida, probably more than in any other state of the United States, who are grandparents and may someday face a situation such as the one which brought the cause herein to this court. That reflects a great public concern and a great public interest in the procedures as well as in the outcome of this particular case.

Those other grandparents have a right to know what to expect from their legal system and a right to know how such decisions are made. They may have no access to law books which report such decisions. They may not be able to afford the services of an attorney in order to obtain such information. But most of them can and do read newspapers and depend upon them as inexpensive and timely sources of information about their world.

That they have a constitutional right to know is undisputed.

In Cason v. Baskin, 20 So.2d.243, 251 (cited by both Petitioner and the State), the Supreme Court of Florida stated:

> But the right of privacy has its limitations. Society also has its rights. The right of the general public to the dissemination of news and information must be protected and conserved. Freedom of speech and of the press must be protected. Section 13 of our Declaration of Rights reads in part as follows:
>
> > Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press. (Now, Section 4)

One such law was passed: Fla. Stat. 63.162(1).

In Firstamenica Development Corporation v. Daytona Beach News Journal, 196 So. 2d. 97,99 (cited by the State) this very Court stated:

> Freedom of the press is a people's personal right rather than a property right of publishers of newspapers.

The Court prefaced that statement:

> Freedom of the press was never intended to be a special privilege extended to its publishers. On the contrary, it was conceived by the writers of the constitution and of the Bill of Rights to be a right of the people in a democracy to unrestricted information and presentation of views on government for which the press was a tailor-made medium of dissemination.

The United States Supreme Court, in Katz v. U.S., 389 U.S. 347,350, stated:

> The protection of a person's general right to privacy is left largely to the States.

The Declaration of Rights in the Constitution of Florida, Section 23, guarantees:

> RIGHT OF PRIVACY-Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access to public records and meetings as provided by law. (Emphasis added.)

Fla. Stat. 63.162(1) collides with both Sections 4 (formerly Section 13) and Section 23 of the Florida Declaration of Rights in the Constitution of Florida if applied as the petitioner requests.

The newspapers involved herein have agreed with the attorney for the paternal grandparents herein to refrain from disclosing their financial status or "any specifics" thereof, or reporting "the specific financial

matters that could jeopardize the welfare of the child and their own individual welfares". (R-354, lines 23-25, Vol.2; R-355, lines 24-25, R-356 lines 11-23 Vol 2.11-23)

In Miami Herald Publishing Company v. Collozzo, 329 So.2d.333 (3rd DCA, 1976), the sealing of a settlement agreement at the parties' request was held to be error and an abuse of discretion. The fear of the possibility that public knowledge of the settlement terms might affect other pending litigation was not a cogent reason for sealing those terms from public knowledge. In the instant cause the inquiry into the guardian's handling of the child's trust account necessarily involves financial matters and is an issue in the case which is not entitled to privacy, either constitutionally nor statutorily. If this Court decides to open the trial proceedings below to the press and to the public, a restriction, such as that requested by the paternal grandparents, should not be included or allowed.

Judge Hendry, writing for this Court in Miami Herald v. Colloza, supra., stated:

> However, pragmatically it must be recognized that if the press is excluded from a judicial proceeding or denied access to the result of such a proceeding it is unable to print and disseminate information which it deems newsworthy. As stated in Annot., 49 A.L.R. 3rd. 1012 (1973) at page 1013, "... In a larger sense, freedom of the press loses some of its effectiveness when the press is denied information, and such a restriction should therefore be allowed only where other fundamental interests require it.---"

The trial in the subject case had been open to the press and the public from its inception and only the terms of the settlement agreement, i.e, the dollar amounts actually awarded, were sealed.

If a similar agreement is made part of an open trial herein, the public will be served only half a constitutional "loaf" which, although it may be better than none, is nonetheless constitutionally deficient.

If the adoptee's identity can be disclosed why should her, or her grandparents' financial matters be kept secret where such matters are an important issue in the case?

CONCLUSION

Florida Statute 63.162(1) is unconstitutional on its face. It violates Section 4 of the Declaration of Rights of the Constitution of the State of Florida. It is a law which was passed to restrain and abridge the liberty of speech and of the press.

It does not violate Section 23 of the Declaration of Rights of the Constitution of the State of Florida which section protects individual persons from governmental intrusion into their private lives, without limiting the public's right of access to public proceedings and without mention of intrusion by either public or press upon the individual's privacy.

The trial court's ruling should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Respondents' Answer Brief were mailed this 24th day of July, 1984, to the Honorable C. McFerrin Smith, III, Circuit Court Judge, Courthouse Annex, Room 202, 125 East Orange Avenue, Daytona Beach, Florida, 32014; to DAVID A. MONACO, Esq., 444 Seabreeze Blvd., Suite 900, Daytona Beach, Florida, 32014; to ISHAM ADAMS, Esq., 121 Broadway, Daytona Beach, Florida, 32018; to DANIEL S. WALLACE, Esq., 408 North Wild Olive Avenue, Daytona Beach, Florida, 32018; and to MARK MENSER, Asst. Attorney General, 125 North Ridgewood Avenue, Daytona Beach, Florida, 32014.

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