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IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,515

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.

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CERTIFIED ISSUE OF GREAT PUBLIC
IMPORTANCE FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

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# ANSWER BRIEF OF RESPONDENT NEWS-JOURNAL CORPORATION

DAVID A. MONACO of
COBB & COLE, P.A.
Post Office Box 191
444 Seabreeze Boulevard
Suite 900
Daytona Beach, FL 32015
(904) 255-8171
ATTORNEYS FOR NEWS-JOURNAL
CORPORATION

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## QUESTION PRESENTED

WHETHER THAT PART OF SECTION 63.162, FLORIDA STATUTES, REQUIRING THE MANDATORY EXCLUSION OF THE PRESS AND PUBLIC FROM ALL HEARINGS IN ADOPTION MATTERS VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 4 OF THE FLORIDA CONSTITUTION, BOTH OF WHICH PROTECT THE FREEDOM OF THE PRESS.

## STATEMENT OF THE CASE AND OF THE FACTS

In this brief the Petitioner, Daniel S. Wallace as attorney-ad-litem for the minor, will be referred to as the "Attorney-Ad-Litem"; the respondents, Peter B. Thomas, Alice M. Thomas, Alva Ramey and Wanda L. Ramsey, will be referenced either by surname or collectively as the "Grandparents", and the respondent, News-Journal Corporation, will be referred to as "News-Journal". In addition, the following symbols are adopted for references:

"R" for "Original Record on Appeal";

"T" for "Transcript of Proceedings of May 29, 1984";

"A" for "Appendix to Petitioner's Brief".

The Statement of the Case articulated by Petitioner in its Initial Brief is accepted. The Statement of Facts is essentially the same as the statement prepared by News-Journal in its brief to the District Court of Appeal for the Fifth District with the certain deletions. In view of the brevity of the statement, and in order to preserve its continuity, News-Journal chooses to restate the facts as follows:

This matter arose at the commencement of a trial involving two sets of Grandparents, both seeking the adoption of a minor, Hope Yvonne Thomas, whose parents had been killed in an aircraft accident approximately ten years ago. Because of the unusual nature of this proceeding in which the competing Grandparents were seeking to adopt, and because of a prior appellate decision by the

Fifth District Court of Appeal involving the same parties (Ramey v. Thomas, 382 So.2d 78 (Fla. 5th DCA 1980)), the local news media had devoted substantial press coverage to the proceedings. One newspaper, the Respondent, News-Journal, had written nine major stories about the pretrial events, all of which were accepted for identification by the trial court. (A-9, 26-35)(T-7)(R-372-377).

As the trial was about to commence the Attorney-Ad-Litem for the adoptee moved the lower tribunal for an order closing the proceedings to the press and public pursuant to Florida Statutes, Section 63.162(1). That statute reads in pertinent part:

> "Notwithstanding any other law concerning public hearings and records:
> (1) All hearings held in proceedings under this act shall be held in closed court without admittance of any person other than essential officers of the court, the parties, witnesses, counsel, persons who have not consented to the adoption and are required to consent, and representatives of the agencies who are present to perform their official duties."

The lower tribunal, the Honorable C. McFerrin Smith, III, presiding allowed members of the media to be heard on the subject of closure. (A-3)(T-1). The News-Journal objected to the closure, and both sets of Grandparents agreed in open court to permit the press to have access to the trial proceedings. (T-9-11)(A-11-13). The lower tribunal, after having considered argument of counsel, held that Section 63.162(1) was unconstitutional essentially because of overbreadth, in that there were no exceptions permitted and no methodology set out in the statute which would enable the

trial judge to balance the policies sought to be protected by the statute, and the constitutional right of Freedom of the Press. (R-378)(A-21).

The Attorney-Ad-Litem sought certiorari and mandamus relief before the Fifth District Court of Appeal pursuant to Rule 9.100, Fla. R. App. P., and a stay of these proceedings. (A-39, 43). Although the District Court of Appeal entered a rule to show cause and a stay pending the outcome of the extraordinary writ proceedings, it later certified the issue of the constitutionality of Section 63.162, Florida Statutes, to the Supreme Court of Florida as an issue of great public importance, pursuant to Article 5, Section 3(b)(5) of the Constitution of Florida. (A-24-25). By Order of July 2, 1984, this Honorable Court accepted jurisdiction.

## ARGUMENT

SECTION 63.162(1), FLORIDA STATUTES, WHICH REQUIRES THE MANDATORY EXCLUSION OF THE PRESS AND PUBLIC FROM ALL HEARINGS IN ADOPTION MATTERS, IS UNCONSTITUTIONAL AS BEING VIOLATIVE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 4 OF THE FLORIDA CONSTITUTION.

The right of Freedom of the Press is a concept that hardly needs reiteration. It is protected by the First Amendment to the United States Constitution and by Article I, Section 4 of the Florida Constitution. Peculiarly, the application of this right to insure that the news media have access to judicial proceedings has only recently gained "Black Letter" status. It is perhaps for this reason that there are still substantial bodies of statutory law that have not been tested in the constitutional crucible. The present case embodies one of those instances.

Trials are public events. Miami Herald Publ. Co. v. McIntosh, 340 So.2d 904 (Fla. 1977). It has long been recognized that the free discussion of the problems of society is an important principal of American government. The reporting of trials by the news media guarantees that there will be public scrutiny of the administration of justice. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). It is for this reason that any abridgement of the Freedom of the Press in the trial forum must be looked upon with serious skepticism.

The United States Supreme Court has only in the last few years acknowledged that the First Amendment grants a right of access to the

press and public to judicial proceedings. Not until Richmond Newspapers, Inc v. Virginia, 448 U.S. 368 (1980), in fact, was the right of the press and the general public to attend criminal trials clearly recognized as having constitutional status. That privilege has since been reemphasized, however, in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

Even more recently the United States Court of Appeals for the Third Circuit in Publicker Industries, Inc. v. Cohen, 52 U.S.L.W. 2641 (Case No. 83-1022, Third Cir. 5-22-84), has held specifically that the First Amendment to the United States Constitution embraces a right of access to civil trials. The Third Circuit's opinion was premised on its determination that there is a presumption of openness which inheres in civil trials as in criminal trials. It went on to note that public access enhances the quality and safeguards the integrity of the factfinding process, fosters an appearance of fairness, and heightens respect for the judicial process.

The Florida Supreme Court has long recognized that all judicial proceedings in this State are presumptively open, and that the press and public has a fundamental right to attend both civil and criminal trials. In Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 908 (Fla. 1977), this Court noted, for example, that:

> ". . . the public and press have a right to know what goes on in a courtroom whether the proceeding be criminal or civil . . . the public and press have a fundamental right of access to all judicial proceedings."

This right, as with most constitutional rights, is not absolute, but the circumstances under which the press and public can be barred are limited. Generally, the government must show that the denial of the right of access is necessitated by a compelling governmental interest, and any statutes seeking to abridge the right must be narrowly tailored to serve that interest. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). Indeed, the U.S. Court of Appeals for the Third Circuit indicated in Publicker Industries, Inc. v. Cohen, supra, that a closing of a civil trial could only occur if there was no less restrictive alternative available.

In Florida, recognition of these concepts has been given form in the "Three Part Closure Test." In Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), the test enunciated by the Supreme Court to determine whether a trial court could close a pre-trial suppression hearing t the press and public was as follows:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice.
>
> 2. No alternatives are available other than a change of venue, which would protect a defendant's right to a fair trial, and
>
> 3. Closure would be effective in protecting the rights of the accused without being broader than necessary to accomplish this purpose.

Civil closure cases have generally also recognized that only rarely should the press be excluded from the trial process. In Miami Herald Publishing Co. v. Collazo, 329 So.2d 333 (Fla. 3d DCA 1976), for example, the First District determined that closure could only exist when the trial court finds "cogent reasons" for exclusion.

This balancing or accommodation is important because it reflects the manner in which courts traditionally deal with competing constitutional forces when one of them is the First Amendment. Typically, the courts have found it to be contrary to the Constitution to bar absolutely the press from trial proceedings under all circumstances. Rather, the prohibition has only been allowed with the policies and interests protected by the opposing constitutional force has outweighed the right of the press. In criminal closure cases, for example, the press must give way when there is danger of violating the right of the accused to a fair trial. Similarly, from the civil side of the U.S. Court of Appeals for the Third Circuit has held that the party seeking closure must show that the information that would be disclosed is of the kind that courts will protect, and that there is good cause for the closure. Publicker Industries, Inc. v. Cohen, 52 U.S.L.W. 2641 (Case No. 83-1022, Third Cir. 5-22-84). Good cause was defined by the court as only that which would produce a clearly defined and serious injury if disclosed.

In the present case a slightly different situation exists. What is being balanced is a statutory policy against a constitutional right. More importantly, under the statute in question the constitutional right of free press and public access must give way every time without exception. There is no room left for the discretion of the trial court. The trial judge under this legislative scheme must exclude. Certainly, the statute is not constitutional and must, therefor, fall.

While research has not located a case specifically construing Section 63.162(1), other analogous statutes have received judicial scrutiny. In State v. Newman, 405 So.2d 971 (Fla. 1981), the Florida Supreme Court upheld the constitutionality of Section 893.135, Fla. Stat. That statute permitted in certain cases an in camera review of a motion to reduce or suspend the sentence of one convicted of drug trafficking. The Court noted that the Freedom of the Press was not violated because the statute made provision for the trial court to balance the competing constitutional interests in determining whether a closure is appropriate. Thus, it held that while "the presumption in favor of openness" of judicial proceedings in "powerful", where the safety valve of case-by-case judicial review was available, the statute could pass constitutional muster.

Of similar interest is Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). There, a Massachusetts statute required trial judges to exclude the press and public from trials during the

testimony of minor victims of certain sex offenses. No discretion was left to the trial judge. No safety valve was in place. The Supreme Court in overturning the statute said:

> "We agree with respondent that the first interest--safeguarding the physical and psychological well-being of a minor--is a compelling one. But as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. . . . In the case before us, for example, the names of the minor victims were already in the public record, and the record indicates that the victims may have been willing to testify despite the presence of the press. If the trial court has been permitted to exercise its discretion, closure might well have been deemed unnecessary."

The problem with mandatory closures is that they are overboard. They do not define the limitation on the Freedom of the Press as narrowly as possible. They do not allow for balancing. They do not allow for the selection of the least restrictive alternative. The present case is a classic example. Here, both sets of Grandparents have either indicated no objection to the presence of the press, or have actively sought to have the proceedings open. Here, the name of the adoptee, the names of the natural parents, the names of the adopting parents, the circumstances of the deaths of the natural parents, and the hostile feelings of the Grandparents towards each other are the subject of a prior published judicial opinion, and are matters that have been

repeatedly reported by the press. If the legislative intent was to keep this sort of information private, that intention can no longer possibly be implemented in this case. The information has been a matter of press coverage for years, and most of the pertinent facts of the case have actually been placed within the public's knowledge by previous judicial proceedings. Ramey v. Thomas, 382 So.2d 78 (Fla. 5th DCA 1980).

Under these circumstances, the statutory intention to promote the well-being of persons being adopted (Section 63.022(1), Fla. Stat.) simply could not be enhanced by a closure of the trial. More importantly, when balanced against the First Amendment rights of the Press, this statutory policy in this case must give way. The confidential nature of the proceedings has long been exposed. The balance must be tipped in favor of the Press.

In this regard the reliance of the Attorney-Ad-Litem on the case of Jordan v. Pensacola News-Journal, Inc., 314 So.2d 222 (Fla. 1st DCA 1975), is ill-placed. The Attorney-Ad-Litem cites Jordan for the proposition that the release of copious quantities of information in this case makes no difference to the legal issues because the minor may have a cause of action against the persons who released the information. The existance of such a cause of action is not relevent to the present case. Moreover, the District Court of Appeal noted in Jordan:

> "Had the legislature intended to prohibit all publication of information relating to an adoption proceeding, the statute could have

> been coached in such terms. We do not infer, however, that had the legislature so enlarged the statute, such enlargement would or would not be constitutional as that question is not before us."

Thus, the constitutional implications of the statute were not addressed by the court.

The only factor that could possibly militate in favor of closure of the instant trial is the psychological well-being of the child, and respondent does not mean to minimize the importance of this consideration. It must be recognized, however, that the facts of this case have long been a matter of public record. More importantly, as the United States Supreme Court noted in Globe Newspaper, "as compelling as that interest is, it does not justify a mandatory closure rule."

The principal position of the Attorney-ad-Litem articulated in his Initial Brief and to a large extent the position of the intervenor, the Attorney General, is that adoptions are matters that may be made private, and that a statute which makes them private is, therefore constitutional. News-Journal does not disagree that adoption matters can be the subject of closure. As noted above, the right of the press and public is clearly subject to reasonable limitations when conflicting interests appear. The objection to Section 63.162(1) is that it bars the press from all hearings in all adoption matters without any potential for balancing the competing interests involved.

The present circumstances present a classic illustration of the point. Here, the facts of the case, the nature of the controversy, the identities of the parties, and virtually all other aspects of the dispute have been revealed to the press by the parties and by the courts. Here, both sets of potentially adopting parents are actively seeking the presence of the press at the trial. Yet, the statute flatly prohibits the trial judge from balancing the constitutional interests, and requires a closure. It is the mandatory nature of the statute which renders it infirm.

Interestingly, the following passage is found on page 12 of the Attorney-Ad-Litem's brief:

> "The inherent power of the courts to regulate their own proceedings to insure a fair trial provides the basis for the courts to restrict media access to judicial proceedings. (Citation omitted). Thus, the courts have developed 'balancing tests' in an effort to resolve the conflicts that can arise between certain constitutional rights, to-wit: the right of a free press and the rights to a fair trial." (Emphasis supplied).

We agree whole-heartedly. First, there ought to be a balancing of rights. Second, it is the courts who should do the balancing. As Section 63.162(1) permits neither; its unconstitutionality is patent.

Both the Attorney-Ad-Litem and the Attorney General have also discussed the presumption of constitutionality. While it is clear that statutes are presumed be constitutional, they are likewise subject to the controlling provisions of both the State and Federal

constitutions, Gray v. Moss, 115 Fla. 701, 156 So. 262 (1934), and it is the unquestioned duty of a court to strike down a statute which is found to be in positive conflict with a provision of the organic law, regardless of the wisdom of the legislation or the consequences of the determination. State ex rel. Davis v. Largo, 110 Fla. 21, 149 So. 420 (1933). The maxim of long standing is that courts in determining the constitutionality of a statute are to consider only the power of the legislature to enact the statute, and not the policy or wisdom of the enactment. State ex rel. Hosack v. Yocum, 136 Fla. 246, 186 So. 448 (1939); Messer v. Lang, 129 Fla. 546, 176 So. 548 (1937); State ex rel. Moodie v. Bryan, 50 Fla. 293, 39 So. 929 (1905).

News-Journal agrees that in many, perhaps most, adoption matters confidentiality is laudatory. We have no doubt that the legislature can fashion a procedure that will allow for the balancing of competing constitutional interests by courts in this regard. We say only that what the legislature did in Section 63.162(1) - mandatory closure under all circumstances - was beyond its power by virtue of the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution.

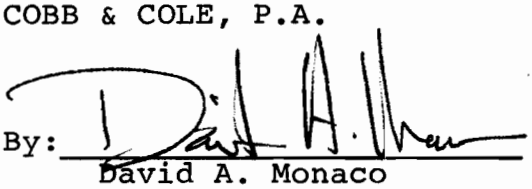
If the statute had allowed the trial court to exercise its discretion to close proceedings in appropriate circumstance, the statute could stand. Mandatory closure, however, makes it constitutionally infirm. The trial court recognized this fact and made the appropriate ruling.

## CONCLUSION

Section 63.162(1), Florida Statutes, is violative of both the state and federal constitutions, and the trial court's determination in this regard is eminently correct. Under the circumstances, therefore, the order of the trial court of May 29, 1984, holding the statute to be unconstitutional and declining to exclude the press and public from the trial of this cause should be affirmed in all respects.

Respectfully submitted,

COBB & COLE, P.A.

By: 

David A. Monaco
Post Office Box 191
444 Seabreeze Boulevard
Daytona Beach, FL 32015
(904) 255-8171
ATTORNEYS FOR NEWS-JOURNAL CORPORATION

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent has been furnished by Hand Delivery to ISHAM W. ADAMS, ESQUIRE, 121 Broadway, Daytona Beach, Florida, 32018, attorney for Mr. and Mrs. Peter B. Thomas; FLORA DAUN FOWLER, ESQUIRE, 219 Magnolia Avenue, Daytona Beach, Florida, 32014, attorney for Mr. and Mrs. Alva Ramey; DANIEL S. WALLACE, ESQUIRE, 408 North Wild Olive Avenue, Daytona Beach, Florida, 32018, attorney for Hope Yvonne Thomas, and JIM SMITH, Attorney General, c/o MARK C. MENSER, Assistant Attorney General, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida, 32014, this 25 day of July, 1984.

Attorney