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.

PETITIONER'S BRIEF

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PRELIMINARY STATEMENT

References to the appendix of this brief will be by use of the letter "A" followed by the page in the appendix.

QUESTION PRESENTED

Whether the legislative mandate [Fla. Stat. §63.162(1)] of confidentiality in adoption proceedings violates the constitutional right of free speech?

STATEMENT OF THE CASE

Before trial, petitioner moved the trial court to protect the confidentiality of this adoption proceeding pursuant to Fla. Stat. §§63.022(j) and 63.162. (A-1) The trial court granted petitioner's motion and on February 27, 1984 entered an Order protecting the confidentiality of the court documents and proceedings. (A-2)

On May 29, 1984, this cause came before the court for trial. The petitioner requested enforcement of the February 27, 1984 Order. After giving notice to the media, the trial court held a hearing. (A-3-20) Subsequently, the trial court entered an Order opening the proceedings to the press and public. (A-21-22)

It appearing to the trial court that the issue of the constitutionality of Fla. Stat. §63.162(1) was one of first impression, petitioner's request for a temporary stay of the trial was granted for the balance of the day of May 29, 1984 in order to allow petitioner time to seek review by the Fifth District Court of Appeal. (A-16-19)

By Order dated May 30, 1984 (A-23), the Fifth District Court of Appeal granted petitioner's Motion to Expedite Consideration of Cause (A-36-38) and Emergency Petition for Stay Writ. (A-39-42) Simultaneously, said

Court issued an order for the respondents to show cause why petitioner's Petition for Writ of Certiorari/Mandamus (A-43-47) should not be granted. (A-23)

On June 26, 1984, after receiving the briefs of parties, the Fifth District Court of Appeal certified the issue of the constitutionality of Fla. Stat. §63.162 to the Supreme Court of Florida. (A-24-25)

By Order of July 2, 1984, this Honorable Court accepted jurisdiction, set oral argument and established an expedited briefing schedule.

STATEMENT OF THE FACTS

This matter arose at the commencement of a trial involving two sets of grandparents, both seeking the adoption of a minor, HYT, whose parents had been killed in an aircraft accident approximately ten years ago.

One newspaper, the Respondent, News-Journal Corporation, had written nine major stories about the pre-trial events, all of which were accepted for identification by the trial court. (A-26-35)

As the trial was about to commence, petitioner, as attorney-ad-litem for HYT, requested enforcement of the trial court's previous 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 trial court, the Honorable C. McFerrin Smith, III, presiding, allowed members of the media to be heard on the subject of closure. (A-3-20) The News-Journal Corporation objected to the closure, and both sets of grandparents agreed in open court to permit the press to have access to the trial proceedings. (A-11-13)

After having considered argument of counsel, the trial court 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. (A-21-22)

ARGUMENT SUMMARY

Since this is an adoption proceeding, the entire purpose of this action is to promote the child's best interests. The public policy of our State, as determined by our legislature, provides that adoption actions shall be confidential. Fla. Stat. §63.162 constitutes a recognition of the need for privacy in adoptions and provides a reasonable method of protecting a person's constitutional "right of privacy."

Adoptions fall within a well-recognized exception to the general principle that no person has any rights to privacy in a judicial proceeding. This is why the instant case has a "new dimension" that takes it beyond the guidelines established for the closure of criminal proceedings. Those authorities are concerned only with balancing the right of the press to know against an individual's right to a fair trial. Our State's statutory recognition and perservation of a person's right to privacy in an adoption proceeding removes the instant case from that body of law.

There are still certain precious rights to privacy, albeit few, that a person may enjoy when involved in certain judicial proceedings. An adoption is such a proceeding. This is our State's way of encouraging

adoptions because adoptions promote the well-being of children. It is also our State's way of protecting innocent participants from being victimized by public scrutiny.

The media enjoys a broad freedom of access to information about adoptions under our statute. There is no proscription against the media publishing anything except matters contained in the court record. As evidenced in the instant case, the media has already published copious gobs of "news." The media has lost no freedom. Our legislature has said, however, there should be some limit; that the right to know is not absolute; and that this innocent child has a right to privacy, since preserving this right to privacy is necessary to protect her well-being.

The principles of statutory construction clothe Fla. Stat. §63.162(1) with the presumption of constitutionality. The closure of adoption trials is absolutely necessary to protect a persons' right to privacy. Making adoption trials public would render the balance of Fla. Stat. 63.162 meaningless. It would do no good to attempt to make the court records confidential if the public could attend the trial.

Thus, the statute is constitutional because the rights of media to know (and the related rights of the grandparents to speak) have only been minimally abridged to the extent necessary to protect the bests interests of the child. This, after all, is the whole purpose of an adoption proceeding.

THE LEGISLATIVE MANDATE OF CONFIDENTIALITY IN ADOPTION PROCEEDINGS CONTAINED IN SECTION 63.162(1), FLORIDA STATUTES, DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT OF FREE SPEECH.

A. The Purpose Of Adoption Proceedings

In Ramey v. Thomas, 382 So.2d 78, 80 (Fla. 5th DCA 1980), the Honorable Judge Sharp noted that:

> [t]his case is a classic example of parties warring over a child to such an extent that the primary issue--the welfare and best interest of the child--got lost in the gunsmoke.

The war has escalated. Now there are more guns, the amount of smoke has increased and this child's interests are becoming more obscured.

The instant case involves the analysis and application of freedoms we all hold dear. This situation presents us with a complicated interplay of the rights of a free press, the rights to a fair trial, and the rights of privacy. Before rushing headlong into a discussion of these cherished ideals, it seems appropriate to attempt to emphasize that this is an adoption case. As such, the central focus of this entire proceeding is to determine and adjudicate the best interests of this child. Fla. Stat. §63.022. The welfare of this child is the paramount concern

of the entire case. Pugh v. Barwick, 56 So.2d 124 (Fla. 1952). Thus, the smoke should be blown away and be prevented from returning until a clear picture of how to serve this child's best interests emerges.

By enacting the Florida Adoption Act (Chapter 63), our legislature has stated that adoption is a good thing under appropriate circumstances. The express purpose of Florida's Adoption Act is "...to provide to all children who can benefit by...[adoption]... a permanent family life." Fla. Stat. §63.022(1). Thus, the focus of the entire action is always directed to the interests of the child.

The very nature of an adoption demands that the child's interests are to be paramount. The legal effect of an adoption is to terminate all relationships between the adopted person and his biological relatives to the extent "...that the adopted person is thereafter... a stranger to his former relatives for all purposes." Fla. Stat. §63.172(b). In essence, then, our legislature has stated that in an adoption proceeding the interests of the child are so important that the law will create a new family for the child and terminate the relationship of the natural mother, natural father and all other biological relationships, if so doing would serve the child's best

interests. Clearly then, the interests of the child are our first concern.

B. A New Dimension

Since the purpose of this litigation is to determine the child's best interests, all aspects of the instant review must be viewed with an eye toward the goal of promoting her well-being. In this context, it is interesting to note that the requirement to give HYT's interest our paramount concern takes us beyond the general guidelines established for the closure of court proceedings. Those guidelines attempt only to balance the right of a free press (1st AMEND. U.S. CONST. and §4, ART. I FLA. CONST.) with the right to a fair trial (6th AMEND. U.S. CONST. and §16 ART. I FLA. CONST.).

The cases establishing these guidelines begin with the premise that the right of a free press is not an absolute right. Globe Newspaper Co. v. Superior Court, 547 U.S. 596 (1982). 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. State Ex Rail Gore Newspaper Co. v. Tyson, 313 So.2d 777 (Fla. 4th DCA 1975). Thus, the courts have developed "balancing tests" in an effort to

resolve the conflicts that can arise between certain constitutional rights, to-wit: the rights of a free press and the rights to a fair trial.

As the instant case appears to be a case of first impression, there is no prior decision dealing directly with the constitutionality of the adoption statute sub judice. Indeed, most of the prior decisions in the closure area discuss the balancing of these constitutional rights in the context of a criminal proceeding. The public, of course, has an interest in seeing criminal codes being enforced in a way that is fundamentally fair. Subjecting criminal trials to public scrutiny helps insure against the miscarriage of justice. Sheppard v. Maxwell, 384 U.S. 333 (1966).

The very nature of a civil adoption proceeding, however, reveals that an adoption is not analagous to a criminal proceeding when attempting to balance the constitutional rights of a free press against rights to a fair trial. The reason is that an adoption, upon completion, employs the legal fiction that there never was a relationship between the adoptee and the adoptee's biological relatives. Since the law "pretends" that the biological relatives of the adoptee are strangers, it also

seeks to keep the identity of these relatives confidential. Fla. Stat. §63.022(j) and 63.162. There is no analagous consideration in a criminal proceeding.

Since statutory enactment has declared adoption proceedings to be confidential, our public policy is that these matters are private. This so-called "right to privacy" is constitutionally grounded in the right to life, liberty and the pursuit of happiness. Cason v. Baskin, 20 So.2d 243 (Fla. 1944). It is the statutory acknowledgement (Fla. Stat. §63.162) of this child's constitutionally grounded right to privacy that adds a dimension to the instant case that sets it apart from our more accustomed closure case.

C. There Are Rights To Privacy In A Judicial Proceeding

It seems that the crucial issue of the instant review is whether or not a person involved in a judicial proceeding has any rights of privacy. Generally, there is no right of privacy in a judicial proceeding; however, this general principal is limited and exceptions are made in actions relating to "...marriage, procreation, contraception, family relationships, and child rearing and education." See, Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 779 (Fla. 1979). An adoption

is such a proceeding.

Further, it is established that the "...protection of a person's general right to privacy is left largely to the states." See, Shevin v. Sunbeam Television Corp., 351 So.2d 723, 727 (Fla. 1977). Fla. Stat. §§63.022 and 63.162 constitute our legislature's acknowledgement and protection of a person's right to privacy in an adoption proceeding.

Thus, in the instant case, this child has rights to privacy for two reasons:

1. the adoption action falls within those kinds of cases that constitute exceptions to the general rule that there are no rights to privacy in a judicial proceeding.

and 2. our legislature has declared that the best interests of the child are promoted by adoptions being private.

The prefatory language of Fla. Stat. §63.162(1) provides as follows:

> Notwithstanding any other law concerning public hearings and records: [Emphasis added.]

The prefatory language was apparently lifted verbatim from the Uniform Adoption Act which provides, in §16, as follows:

> Notwithstanding any other law concerning public hearings and records:

9 Uniform Laws Annotated, Uniform Adoption Act, §16, page 48.

In the commissioner's note to §16 of the Uniform Adoption Act we find the following reason for the use of this prefatory language:

> The opening phrase is designed to negate the impact of any "right to know" law or other statute making public records open to inspection as a matter of right by newspapers and other persons. It continues the policy of existing adoption acts making the proceedings confidential in nature. Id.

Generally, hearings in adoption are confidential and held in closed court. 2 Am. Jur. 2d, Adoption §58, page 908. Florida's Adoption Act and the Uniform Adoption Act embody the principle that adoption proceedings are private. Additionally, it is significant to note that when the Arkansas bar recently amended its Judicial Canons to allow the media to broadcast judicial proceedings, it did not allow the broadcast of adoption proceedings. The court reasoned as follows:

> ...these trials involve subjects that normally would be of no concern

> to the public and the broadcasting of which might result in harm to innocent people. Our primary concern in such cases is for the litigants, who are quite often before the Court contrary to their wishes. The parties, their relatives and friends are present because the law requires it. Children who are not even present may be affected by these proceedings and can be harmed or hurt by the publicity.

RE: Petition of Arkansas Bar, 609 S.W.2d 28, (Ark. 1980) Thus, Florida is not unique in seeking to provide confidentiality in adoption proceedings.

D. The Presumption Of Constitutionality

In analyzing Fla. Stat. §63.162(1), the instant Court is to favor the statute with a presumption of constitutionality. In Re Estate Of Caldwell, 247 So.2d 1 (Fla. 1971). This is because statutes are presumptively valid and constitutional. Peninsular Industrial Ins. Co. v. State, 55 S. 398 (Fla. 1911). If a constitutional interpretation of a statute is available, it must be adopted. Miami Dolphins v. Metro Dade County, 394 So.2d 981 (Fla. 1981). Any doubts as to the validity of a statute must be resolved in favor of its constitutionality. Hamilton v. State, 366 So.2d 8 (Fla. 1979).

Given these parameters of constitutional construction, it appears Fla. Stat.§63.162(1) is in fact

constitutional and valid. First of all, the State has a legitimate interest in providing for adoptions. The nature of the adoption proceedings and the legal effect of adoption itself necessitates privacy. The protection of rights of privacy being left to the states, it is proper exercise of legislative authority to provide that adoption proceedings be confidential.

It is important to note that should Fla. Stat. §63.162(1) be striken as being unconstitutional, such a holding would render the entire statute meaningless. That is, if the media can attend adoption hearings, then it is not possible to protect the identity of the natural parents and provide the other shields of confidentiality contained in the balance of the statute. In Marston v. Gainesville Sun Pub Co., Inc., 341 So.2d 783 (Fla. 1st DCA 1976), the court was faced with a similar situation involving a statute regulating the confidentiality of a student's records. In Marston, the court reasoned that:

> [a]s in the case of proceedings for adoption, the beneficial policy promoted by the legislature in...[the statute providing for confidentiality of student records] ...would be entirely subverted if the curious public, denied access to the record of the Honor Court's consideration...should nevertheless

> have entry as of right to the meeting whose only purpose is formulation of that record. To put it another way, there is no benefit to the student of confidentiality in the documentary evidence and report of his infaction if the public may demand admittance to the meeting where that evidence is exhibited and the substance of that report discussed; and there is little purpose in preserving from public view a memorandum or transcript of a witness' testimony before the Honor Court if the public is there to hear the spoken word. Id. at 785.

Similarily, it is necessary to close adoption hearings to the public, via Fla. Stat. §63.162(1), in order to provide the confidentiality the legislature intended.

E. The Media And Grandparents Have Lost No Freedoms

This Honorable Court is urged not to be side-tracked by the assertions of the Respondents that since the press has already printed stories about this case that there is no longer any confidentiality or need for confidentiality. (A-7-9, 11-12) This innocent child has not waived her entitlement to confidentiality. "Waiver" is an intentional relinquishment of a known right. Thomas N. Carlton Estate v. Keller, 52 So.2d 131 (Fla. 1951). This child, of course, is a minor. She did not even have counsel when the bulk of

the newspaper articles were printed. Thus, she cannot conceivably be deemed to have waived any confidentiality. The News-Journal's assertion that since they've already reported on the case they should be allowed to attend and report the final adoption trial is nothing more than "bootstrapping."

Similarily, the grandparents contentions that there is no longer any confidentiality because the matter has already been reported should also be rejected. While it is true that the grandparents may release information not obtained from court records, it does not follow that their desire to talk to the media eliminates this child's rights of privacy. See, Jordan v. Pensacola News-Journal, Inc., 314 So.2d 222 (Fla. 1st DCA 1975). To the extent that her grandparents have caused information to be published that was obtained from court records, this child may have a cause of action against them for violating her rights of privacy. Such a cause of action would be beyond the scope of the duties of the attorney-ad-litem; however, such considerations would be relevant in the final adoption proceeding since they indicate that the grandparents may have placed their interests above the child's in making

this matter public.

Additonally, it is appropriate to note that upholding the constitutionality of Fla. Stat. §63.162(1) will not prohibit publication of information relating to this adoption proceeding. That is, as pointed out in Jordan, above, the adoption statute "...contains no proscription...regarding publication of information not obtained from Court records...". Id. at 223. The Jordan court further points out that "...[h]ad the legislature intended to prohibit all publication of information relating to an adoption proceeding, the statute could have been couched in such terms." Id. at 223. Indeed, had the legislature intended to be more restrictive, the adoption statute (Fla. Stat. §63.162) could have patterned after Fla. Stat. §39.411 which provides for the confidentiality of dependency proceedings relating to juveniles as follows:

> (f) All information obtained pursuant to this part in the discharge of official duty by any judge, employee of the court, authorized agent of the department, or law enforcement agent shall be confidential and shall not be disclosed to anyone other than the authorized personnel of the court, the department and its designees, law enforcement agents

> and others entitled under this chapter to receive that information except upon order of the court. [Emphasis added.]

Thus, the media will enjoy a great freedom to print what it considers "news" and the grandparents will enjoy a great freedom to speak to the media, should the constitutionality of this statute be upheld.

CONCLUSION

In short, Fla. Stat. §63.162(1) is constitutional becuase the right to freedom of speech is not an absolute right and confidentiality is necessary to promote the best interests and well-being of innocent children -- this being the whole purpose of adoption proceedings.

Accordingly, petitioner's Petition for Certiorari/ Mandamus should be granted and the cause should be remanded for further action not inconsistent with the opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 11th day of July, 1984 to the Honorable C. McFerrin Smith, Circuit Court Judge, Courthouse Annex, Room 202, 125 East Orange Avenue, Daytona Beach, Florida 32014; David A. Monaco, Esquire, 444 Seabreeze Boulevard, Suite 900, Daytona Beach, Florida 32015; Isham W. Adams, Esquire, 121 Boradway, Daytona Beach, Florida 32018; F. Daun Fowler, Attorney-at-Law, 841 South Ridgewood Avenue, Daytona Beach, Florida 32014 and Mark C. Menser, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014.

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