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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 87-259

MELYANA KLUKEWICH,

Appellant

vs.

JOHN B. HOWENSTINE,

Appellee.

_____/

DADE CIRCUIT COURT

CASE NO. 86-33473 FC (09)

(Judge Levy)

INITIAL BRIEF OF APPELLANT

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PREFACE

The Appellant is the Plaintiff/Mother below and the Appellee is the Defendant below. The parties will be referred to as the Mother and the Defendant. (This is a paternity action and the paternity of the child has not been determined as of this Appeal).

The following will be used:

R - Record on Appeal. *

* As of the date of filing this Brief, the Record on Appeal has not been compiled. Upon receipt of the Record on Appeal, the Appellant will file a revised Brief stating the correct references to the pages in the Record on Appeal.

STATEMENT OF THE CASE AND OF THE FACTS

On or about August 1, 1986, the Mother filed her Emergency Verified Complaint to Determine Paternity of child, support, attorney's fees and Motion to Enjoin Removal of Assets from state. (R._____). The Defendant was served with the Emergency Verified Complaint on August 13, 1986 in Harris County, Texas. (R. 1-2).

On or about September 2, 1986, the Defendant filed a Motion to Dismiss and Quash the Emergency Verified Complaint based on the following grounds:

1. Lack of Jurisdiction over the Defendant; and/or
2. Insufficiency of process; and/or
3. Insufficiency of service of process.

(R. 3-4)

After a hearing on October 9, 1986, on the Defendant's Motion to Dismiss and Quash, the Court entered an Order on October 16, 1986, requiring the parties to respond to the Court in writing (R. 15).

The Mother submitted a Memorandum of Law in opposition to Defendant's Motion to Dismiss and Quash. (R 7-14).

On January 15, 1987, the Circuit Court Judge (David L. Levy) entered an Order of Dismissal. (R. 17-18) The Court granted the Defendant's Motion to Dismiss and Quash. It is from this Order that the Mother appeals.

The facts in this case are not in conflict. Melyana Klukewich is now, and was at all material times a resident of Dade County, Florida. Melyana is an unmarried woman. In January, 1986, Melyana and the Defendant (John B. Howenstine) met each other and began to date each other.

The Defendant is a businessman who presently resides in Houston, Texas. In January, 1986, and at all times both before and after January, 1986, the Defendant frequently travelled to Miami, Dade County, Florida.

After meeting each other in January, 1986, the parties engaged in sexual intercourse with each other in Miami, Dade County, Florida. The parties engaged in sexual intercourse on several occasions including but not limited to the weekend of April 5, 1986. A child was conceived by the mother on or about April 5, 1986 in Miami, Dade County, Florida. The child (Daria Anne Klukewich) was born on January 7, 1987 in Miami, Dade County, Florida.

As alleged in the Emergency Verified Complaint, the mother had no sexual relations with any men other than the Defendant during the material times herein. The mother is without funds to support the parties' minor child and is in need of child support and expenses incurred in the delivery of the child. The expenses were incurred in Miami, Dade County, Florida. The child resides with the mother in Dade County, Florida.

The Defendant has business and personal contacts in the State of Florida. Additionally, the act of conceiving the child (sexual intercourse) was done within the State of Florida. There are sufficient minimum contacts within the State of Florida to permit the State of Florida to exercise its jurisdiction in this case.

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED BY ENTERING AN ORDER OF DISMISSAL GRANTING THE DEFENDANT'S MOTION TO DISMISS AND QUASH WHERE THE DEFENDANT COMMITTED A TORTIOUS ACT WITHIN THE STATE BY HAVING SEXUAL INTERCOURSE WITHIN THE STATE AND FAILING TO FULFILL HIS DUTY OF PAYING CHILD SUPPORT TO THE MOTHER.

SUMMARY OF THE ARGUMENT

In a paternity case, the alleged failure of a putative father to fulfill the duty of support is alone sufficient to constitute a tortious act within the meaning of the Florida Long-Arm Statute, Section 48.193(1)(b), Florida Statutes. Bell v. Tuffnell (infra).

The issue of paternity and child support are properly raised in this suit. Estanislao (infra). It is not necessary to first determine paternity and then proceed on the support issue in an ancillary proceeding.

The act of siring a child within the State of Florida is sufficient to subject the putative father to the jurisdiction of the Florida Courts. The Defendant has sufficient minimum contacts with the State of Florida to subject him to the Court's jurisdiction. International Shoe (infra).

The parties met in Florida. The parties dated each other in the State of Florida. The parties engaged in sexual intercourse in the State of Florida. The child was conceived in the State of Florida. The child was born in and resides in the State of Florida. The child will seek assistance from the State of Florida in pursuing her rights against the putative father.

The trial court erred by entering an Order of Dismissal granting the Defendant's Motion to Dismiss and Quash.

ARGUMENT

THE TRIAL COURT ERRED BY ENTERING AN ORDER OF DISMISSAL, GRANTING THE DEFENDANT'S MOTION TO DISMISS AND QUASH, WHERE THE DEFENDANT COMMITTED A TORTIOUS ACT WITHIN THE STATE BY HAVING SEXUAL INTERCOURSE WITHIN THE STATE AND FAILING TO FULFILL HIS DUTY OF PAYING CHILD SUPPORT TO THE MOTHER.

Pursuant to the Florida Long-Arm Statute, Section 48.193 (1)(b) (Florida Statutes, 1985) the Defendant is subject to the Florida Court's jurisdiction. The applicable portion of the statute provides:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
>
> (b) commits a tortious act within this state.

In Bell v. Tuffnell, 418 So. 2d 422 (Fla. 1st DCA 1982), the Court held that although the Appellant (father) was a resident of Tennessee, his act of siring the child occurred in Florida and thus subjected him to the jurisdiction of the Florida courts.

The Court stated that "the alleged failure by a putative father to fulfill the duty of support is alone sufficient to constitute a tortious act within the meaning of (the) Long-Arm Statute." Bell at 423.

The Appellant in Bell argued that liability for support is not the primary issue in a paternity suit but merely a secondary step in a paternity determination. The court in Bell referred to Estanislao v. State, Dept. of HRS, 368 So.2d 677 (Fla. 1st DCA 1979) to reject that contention. In Estanislao, the court ruled that the suit was one to establish both paternity and support and is an "independent action for support of dependants..." Although Estanislao was based upon a different section of the Florida Long-Arm Statute (48.193 (1)(e); the Court in Bell was following the same Section of the Long-Arm Statute which the mother in this case is following §48.193 (1)(b).

Other courts have also ruled in favor of subjecting putative fathers to the court's jurisdiction based on Long-Arm Statutes, where the putative father's only connection with the State was the act of having sexual intercourse within the state.

In Larsen v. Scholl, 296 N.W. 2d 785, 789 (Iowa 1980), the Iowa Supreme Court took an overview of other paternity case decisions from other states which disclosed that the "majority support the concept of jurisdiction over the non-resident putative father, either on the basis that the conduct was tortious or that the (Long-Arm) Statute or rule was broad enough to include in-state conduct as constitutionally adequate contact."

The facts in Larsen revealed that the putative father entered the state "at various times" during a two month period

and engaged in sexual intercourse with the Plaintiff, resulting in her pregnancy.

> The nature and quality of these contacts, involving the siring of a child, are obvious, as is the nexus between these acts of intercourse and this action to establish paternity and provide support for the resulting child. Larsen at 790.

The Court went on to state that:

> A direct, foreseeable cause and effect relationship exists between Defendant's Iowa contacts involving sexual intercourse and the resulting child born in Iowa to an Iowa mother. See McKenna v. Bennett, 558 P.2d at 1283) ("The birth of the child in Oregon for whom the parent would have a legal obligation of support is a foreseeable consequence of an act of sexual intercourse in Orgeon"). He should reasonably anticipate being haled into an Iowa Court. See World-Wide Volkswagon, 444 U.S. at 297, 100 S.Ct. at 567, 62 L.Ed. 2d at 501... We hold that maintenance of the action in Iowa does not offend "traditional notions of fair play and substantial justice." See International Shoe, 326 U.S. at 316, 66 S.Ct. at 158, 90 L.Ed2d at 1026.

The Court in Larsen went through a two-step process in reviewing the case: (1) whether a statute or rule exists authorizing exercise of jurisdiction and (2) whether such exercise of jurisdiction would offend the due process principles embodied in the United States Constitution.

In the second-step due process inquiry the Court examined whether the assertion of in personam jurisdiction over the non-resident defendant satisfies the requirement of fair play and substantial justice. International Shoe Co. v.

Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945). The "minimum contacts" test of International Shoe

> is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable." (Citations omitted)

The Larsen Court reviewed five factors in rendering their decision:

(1) The quantity of the contacts;

(2) the nature and quality of the contacts;

(3) the source and connection of the cause of action with those contacts;

(4) the interest of the forum state; and

(5) the convenience of the parties.

As in Larsen, the Defendant came to Florida "at various times" during a several month period and engaged in sexual intercourse with the mother, resulting in her pregnancy. Thus, several contacts in Florida were involved. The nature and quality of these contacts, involving the siring of a child, are obvious, as is the nexus between these acts of intercourse and this action to establish paternity and provide support for the resulting child. [1]

Furthermore, the State of Florida obviously has a significant interest in this matter. Florida Statutes Chapter 742 - Determination of Paternity, directly address

1. The minor child, DARIA ANNE KLUKEWICH was born on January 7, 1987 in Miami, Dade County, Florida.

the states concern in paternity matters. This Statute provides a statutory procedure for determining paternity and compelling support.

Finally, the Court reviewed the fifth factor which was convenience of the parties. The mother and child reside in Dade County, Florida. Although the Defendant does not reside in Florida, he frequently comes to Florida on either business or pleasure. The Defendant has already retained counsel in Florida to represent him in these proceedings. Potential witnesses who could describe the parties relationship reside in Florida. Therefore, as in Larsen, a review of the above factors shows that the statutory and constitutional provisions would best be served by allowing the Florida Courts to exercise jurisdiction in this case.

The Supreme Court of Tennessee in Gentry vs. David, 512 S.W. 2d 4 (Tenn. 1974) held that the Tennessee courts had jurisdiction over a Georgia resident where this mother's complaint alleged that:

> "during the time biologically certain to have been the instant of conception, your Petitioner had sexual intercourse with your Defendant in Roane County, Tennessee, and with no other person." Gentry at 5.

The Court stated that the above allegation, that the putative father committed an act in Tennessee which would render him liable for the support of their offspring, is sufficient to confer upon Tennessee courts personal jurisdiction of the putative father.

The Tennessee Supreme Court adopted the holding of the Supreme Court of Minnesota in State ex rel. Nelson v. Nelson, 298 Minn. 438, 216 N.W. 2d 140 (Minn. 1974). In Nelson the Court held that a paternity complaint which alleged the act of conception within the State alleged conduct of a tortious nature which involved sufficient minimum contacts with the forum state to allow the Long-Arm Statute to be constitutionally applied.

The Nelson Court stated that the thesis of the Defendant is that jurisdiction in paternity proceeds was not contemplated by the Long-Arm Statute. No such cause of action was recognized as a "tort" at common law. Furthermore, no "injury or property damage" was involved. The Court went on to state that the purpose of the Long-Arm Statute was to afford maximum protection to this State's residents injured by acts of non-residents.

By failing to perform his statutory duties of support, the Defendant, in this case, has caused foreseeable damages to the mother. The mother has indeed suffered injury, including the bearing of the child and the continuous trauma of rearing it alone. Additionally, the mother is faced with the financial burden of rearing the child, not to mention the costs incurred in having the child. For these reasons, the Nelson Court held that a tort did exist with their statutory interpretation and the Court could properly maintain the cause of action within the constitutional boundaries

In Poindexter v. Willis, 87 Ill. App. 2d 213, 231 N.E. 2d 1 (Ill. 5th DCA 1967), the court held that an Ohio resident was subject to the Illinois Court's jurisdiction by virtue of his having committed a tortious act within the state, namely, sexual intercourse. The Court stated that in interpreting the Long-Arm Statute and in particular, the word "tortious", the courts will read words in their ordinary and popularly understood sense. "We think the intent should be determined less from technicalities of definition than from considerations of general purpose and effect." Poindexter at 3.

The Mother recognizes the Second District Court of Appeals holding in State, Dept. of Health v. Wright, 489 So.2d 1148 (Fla. 2d DCA 1986) which states:

> We, accordingly, hold that neither a non-resident's act of sexual intercourse within the state of Florida resulting in conception of a child, nor the failure to support an illegitimate child prior to a determination of paternity, are tortious acts sufficient to enter jurisdiction under §48.193(1) (b) of the Florida Long-Arm Statute... Contra, Bell.

Furthermore, in Wright, the Court states that the Mother alternatively may litigate the matter in the state in which the nonresident putative father resides. The Supreme Court of Iowa in Larsen v. Schell, 296 N.W. 2d 785 (Iowa 1985), expressly rejected this concept of using alternative litigation to preclude the State from exercising jurisdiction in a paternity action over a nonresident putative father. In Larsen, the Court

stated that they were not convinced by the Defendant's argument that alternative litigation was available to the Mother. Similarly, in contradiction to the Wright case, this Court should not require the Mother to litigate the matter in the state in which the father resides (Texas), because this Court has jurisdiction over the person of the Defendant.

Although the Second District Court of Appeal would hold against the Mother in this case, the First District Court of Appeal would hold for the mother in this case. Unfortunately, the Third District Court of Appeal has not addressed this issue.

The mother submits that as there is a conflict between the District Courts of Appeal on this issue that this Court has the option of following either the First District Court of Appeal or the Second District Court of Appeal. As between District Courts of Appeal, sister district's opinion is merely persuasive. State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976). Furthermore, in Chapman v. Pinellas County, 423 So.2d 578 (Fla. 2nd DCA 1982), the Court stated the trial court is obliged to follow the precedents of other district courts of appeal where the appellate court in its own district has not decided the issue at hand.

The Mother submits that this Court should follow the First District Court of Appeals in Bell v. Tuffnell, 418 So. 2d 422 (Fla. 1st DCA 1982) which would subject the Defendant in this case to this Court's jurisdiction. The complaint in this case alleges that the Mother and the Father engaged in sexual intercourse in the State of Florida and, as a result, a child was born in Florida.

The Father has a duty to support the child who resides in the State of Florida. Thus, the complaint has alleged sufficient facts according to Bell to subject the Father to this Court's jurisdiction.

It is an undisputed fact that the best interest of the child must be considered in this case, as in all paternity and support cases. It will be in the child's best interest to allow this action to proceed in the State of Florida which is where the child resides.

CONCLUSION

It is respectuflly requested that the Order of Dismissal of the Trial Court be reversed and remanded with instructions to proceed with the case and determine the paternity of the child and award child support accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to BURTON YOUNG, Esquire, Young, Stern and Tannenbaum, P.A., 17071 West Dixie Highway, North Miami Beach, Florida, 33160, this 6th day of February 1987.

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