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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 70,922

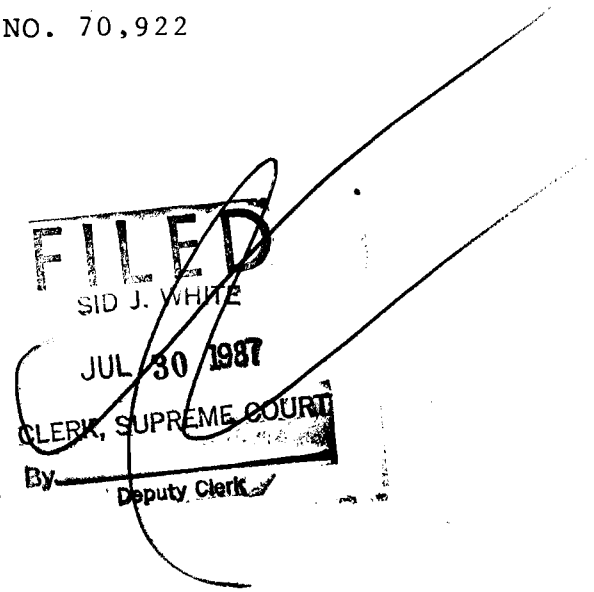
MELYANA KLUKEWICH,

Plaintiff/Petitioner,

vs.

JOHN B. HOWENSTINE,

Defendant/Respondent.
_____/



PETITIONER'S JURISDICTIONAL BRIEF FOR

DISCRETIONARY REVIEW BY THE SUPREME COURT OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

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 traveled 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.

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 the State. The Defendant was personally served with the Emergency Complaint on August 13, 1986, in Harris County, Texas.

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.

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.

The mother submitted a Memorandum of Law in opposition to Defendant's Motion to Dismiss and Quash.

On January 15, 1987, the Circuit Court Judge (David L. Levy) entered an Order of Dismissal. The Court granted the Defendant's Motion to Dismiss and Quash. It is this Order the mother appealed to the Third District Court of Appeal.

The District Court noted in its decision that there was a direct and express conflict with decisions of other District Courts of Appeal on the question of law raised in this case. The District Court nevertheless held that neither a non-resident's act of sexual intercourse within the State of Florida which results in the conception of a child; nor the failure to support a child born out of wedlock are tortious acts which confer jurisdiction under Section 48.193(1)(b) of the Florida Long Arm Statute. Additionally, the District Court held that Section 48.193(1)(e) of the Florida Long Arm Statute would not confer jurisdiction over the non-resident putative father, when there was no allegation that the non-resident putative father resided in Florida.

The District Court's opinion was filed on June 2, 1987. Petitioner timely filed a motion for rehearing and alternative motion to certify the issue as being one of great public importance. Both motions were denied by the District Court on June 30, 1987. The Petitioner timely filed a notice to invoke discretionary jurisdiction with this Court.

JURISDICTIONAL ISSUE AND ARGUMENT

WHETHER THE FLORIDA SUPREME COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE THIRD DISTRICT COURT OF APPEAL WHICH FOLLOWED A DECISION OF THE SECOND DISTRICT COURT OF APPEAL WHERE BOTH DECISIONS EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THE FIRST DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER THE FLORIDA LONG ARM STATUTE MAY BE USED TO OBTAIN JURISDICTION OF A NON-RESIDENT IN A PATERNITY ACTION.

The Florida Long Arm Statute, 48.193(1)(b) permits courts to exercise jurisdiction over non-residents who commit tortious acts within the State of Florida.

The Third District Court of Appeal, in Klukewich v. Howenstine, 12 FLW 1379 (Fla. 3rd DCA, June 2, 1986) Case No. 87-259, held that a non-resident putative father's failure to support an illegitimate child prior to a determination of paternity did not confer jurisdiction under Section 48.193(1)(b) of the Florida Long Arm Statute. Additionally, the Court held that sexual activity between consenting adults which results in the birth of a child is not a tortious act within the purview of Section 48.193(1)(b), Fla. Stat. (1985).

The Third District Court of Appeal additionally held that a non-resident putative father's failure to support an illegitimate child prior to the determination of paternity does not confer jurisdiction under 48.193(1)(e), Fla. Stat. (1985), absent an allegation that the non-resident putative father resided in Florida.

The Third District Court of Appeal in its opinion stated that there was a direct conflict among the District Courts of Appeal on this question, but went on to hold and follow the Second District Court of Appeal's decision in State Department of Health and Rehabilitative Service ex rel: Mary Lisa Luke v. Wright, 489 So.2d 1148 (Fla. 2nd DCA), rev. granted No. 69.050 (Fla. Dec. 8, 1986).

In Wright, the Second District stated:

> "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 confer jurisdiction under Section 48.198(1)(b) of the Florida Long Arm Statute." Id. at 1151.

Consequently, Florida courts do not have jurisdiction over a non-resident putative father through the Long Arm Statute.

The Court's holdings in Klukewich and Wright directly and expressly conflict with the First District Court of Appeals' holding in Bell v. Tuffnell, 418 So.2d 422 (Fla. 1st DCA 1982), rev. denied 427 So.2d 736 (Fla. 1983).

In Bell, the Court held in a paternity action that the alleged failure by a non-resident putative father to fulfill the duty of support is alone sufficient to constitute a tortious act within the meaning of Section 48.193(1)(b), Fla. Stat. 1985. Consequently, a non-resident putative father was subject to the jurisdiction of Florida Courts under the Long Arm Statute. Additionally, the Court specifically stated that the duty to support an alleged child is not an ancillary issue

in a paternity action, but is a primary and independent issue. This decision directly and expressly conflicts with the decision of the Third District in Klukewich and the decision of the Second District in Wright.

In Wright, the Court stated that "there is a split of authority among the States that have considered this issue in conjunction with its Long Arm Statutes." In Klukewich, the Third District Court of Appeal in its decision stated that there is a direct and express conflict between the decision of the First District Court of Appeal in Bell and the decision of the Second District Court of Appeal in Wright. However, the Third District Court of Appeal in Klukewich elected to follow the Second District's Decision in the Wright case.

The facts in Bell, Wright and Klukewich are essentially the same. Namely, a paternity action and action for support are brought by a resident mother against a non-resident putative father for siring a child within the state pursuant to Section 48.193(1)(b) of the Florida Long Arm Statute. The First District Court of Appeal in Bell, the Second District Court of Appeal in Wright, and now the Third District Court of Appeal in Klukewich have rendered different interpretations of Section 48.193(1)(b) of the Florida Long Arm Statute.

This Court granted review in the Wright case and heard oral argument on June 29, 1987. Accordingly, the Court should grant discretionary review and hear oral argument in Klukewich in order to resolve the conflict.

In conclusion, the conflict among the Districts over whether persons in this state can sue, pursuant to Long Arm Statutes, non-residents for a determination of paternity of a minor child, and therefore establish for the support of the child, is one of great importance and is ripe for review. Accordingly, the Court should exercise its discretionary jurisdiction and grant review in the Klukewich case.

CONCLUSION

This Honorable Court has jurisdiction to review the decision of the Third District Court of Appeal pursuant to Article V, Section 3(b)(3), Florida Constitution.

The Second and Third District Courts of Appeal addressed the issue of whether Section 48.193(1)(b), Florida Statutes, allows the courts of the state to obtain jurisdiction over a non-resident in a paternity action. The Third District Court of Appeal followed the Second District Court of Appeal's holding in State Department of Health and Rehabilitative Service v. Wright, 489 So.2d 148 (Fla. 2nd DCA), rev. granted No. 69.050 (Fla. Dec. 8, 1986), that jurisdiction could not be obtained in this manner. The Second District decision in Wright is presently before this Court.

The Second and Third District Courts of Appeal's decisions expressly and directly conflict with that of the First District Court of Appeal in the case of Bell v. Tuffnell, 418 So.2d 422 (Fla. 1st DCA 1982), rev. den. 427 So.2d 736 (Fla. 1983), which held that jurisdiction could be obtained pursuant to the Florida Long Arm Statute.

There is a clear need for this Court to resolve the issue raised by the previously set forth conflict.

WHEREFORE, Petitioner respectfully requests that this Honorable Court invoke its jurisdiction and resolve the conflict.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to Glen Rafkin, of Young Stern & Tannenbaum, P.A., 17071 W. Dixie Highway, North Miami Beach, Florida 33160, this 29th day of July 1987.

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