

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,922

District Court Case No. 87-259
Circuit Court Case No. 86-33473 ~~EC-400~~

AUG 17 1987

GLEN RAFFIN, CLERK

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MELYANA KLUKEWICH, :
Petitioner, :
vs. :
JOHN B. HOWENSTINE, :
Respondent. :

On Petition for Discretionary Review From the
District Court of Appeal, Third District

RESPONDENT'S JURISDICTIONAL BRIEF

By: GLEN RAFKIN, ESQ.
Young, Stern & Tannenbaum, P.A.
17071 West Dixie Highway
North Miami Beach, Florida 33160
Telephone Number: (305) 945-1851
Attorneys for Respondent

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TABLE OF CITATIONS

CASES

Bell v. Tuffnell,
418 So.2d 422 (Fla. 1st DCA 1982),
rev. denied, 427 So.2d 736 (Fla. 1983)3

Reaves v. State,
485 So.2d 829 (Fla. 1986)1

State, Department of Health and Rehabilitative Services, Office
Office of Child Support Enforcement ex. rel. Luke v. Wright,
489 So.2d 1148 (Fla. 2d DCA 1986),
rev. granted, (Fla. Case No. 69,050 December 8, 1986) 3, 4

OTHER AUTHORITIES

Section 48.193(1)(b), Fla. Stat. (1983)1

Section 48.193(1)(e), Fla. Stat. (1983)1

Section 48.193(1)(b), Fla. Stat. (1981)3

Section 742.011 et seq., Fla. Stat. (1985)1

INTRODUCTORY STATEMENT

Petitioner/Appellant/Plaintiff MELYANA KLUKEWICH will be referred to on review as "Ms. Klukewich." Respondent/Appellee/Defendant JOHN B. HOWENSTINE will be referred to as "Mr. Howenstine."

The use of Petitioner's appendix will be denoted by the symbol (A. __). All emphasis is ours unless otherwise indicated.

STATEMENT OF THE CASE AND JURISDICTIONAL FACTS

Petitioner's statement of the case and jurisdictional facts is overbroad in that it includes assertions not "expressly" and "directly" contained within the four corners of the decision reached below. This violates Reaves v. State, 485 So.2d 829, 830 n. 3 (Fla. 1986). Respondent also submits that the legally improper "record proper" facts are in part inaccurate. The following is therefore presented as the relevant statement of the case and facts on the threshold jurisdictional issue to be determined.

Ms. Klukewich instituted this action by filing a paternity and child support action based upon Section 742.011 et seq., Fla. Stat. (1985) on July 30, 1986. (A. 4). The complaint alleged that Mr. Howenstine was the father of Ms. Klukewich's child born out of wedlock, that the child was conceived and born in Florida, and that Mr. Howenstine did not reside in Florida. (A. 4-5). Respondent as a resident of Texas moved to dismiss arguing that the courts of this state lacked long-arm jurisdiction to adjudicate the statutory cause of action alleged. (A. 6). The trial court dismissed the action and the district court affirmed holding that personal jurisdiction could not be asserted:

There is no basis to conclude that consensual sex amounts to tortious activity. Accordingly, we hold that no tortious act has been committed which would confer jurisdiction under §48.193(1)(b), Fla. Stat. (1983), nor was there an allegation that the Defendant ever resided in Florida which would confer jurisdiction under §48.193(1)(e), Fla. Stat. (1983). The order of the trial court dismissing the action is affirmed.

(A. 1-2). Rehearing was denied and Ms. Klukewich filed a Notice to Invoke Discretionary Jurisdiction of this Court.

SUMMARY OF ARGUMENT

Respondent concedes that the decision of the district court below "expressly" and "directly" conflicts with a decision of another district court of appeal on the same question of law.

The conflict issue is, however, already before the Court for resolution in another matter. Mr. Howenstine therefore requests that this appeal be abated pending the decision in such matter.

ARGUMENT

I.

RESPONDENT CONCEDES THAT THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL "EXPRESSLY" AND "DIRECTLY" CONFLICTS WITH THE DECISION IN BELL V. TUFFNELL, 418 SO.2D 422 (FLA. 1ST DCA 1982), REV. DENIED, 427 SO.2D 736 (FLA. 1983).

The Second District Court of Appeal in Bell v. Tuffnell, 418 So.2d 422 (Fla. 1st DCA 1982), rev. denied, 427 So.2d 736 (Fla. 1983), held that a non-resident putative father commits a "tortious act" within the meaning of Section 48.193(1)(b), Fla. Stat. (1981) by failing to support an illegitimate child prior to a determination of paternity. The Third District Court of Appeal in the decision below rejected this holding and reached the opposite conclusion.¹

Accordingly, the Respondent in good faith, cannot dispute the existence of discretionary conflict jurisdiction to review the decision of the district court.

II.

THIS CASE SHOULD BE ABATED PENDING RESOLUTION OF THE CONFLICT ISSUE BY THIS COURT IN STATE, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT EX. REL. LUKE V. WRIGHT, 489 SO.2D 1148 (FLA. 2D DCA 1986), REV. GRANTED, (FLA. CASE NO. 69,050 DECEMBER 8, 1986).

This Court presently has under consideration in Case No. 69,050 the precise issue which is the asserted conflict issue raised by Ms. Klukewich. Oral argument in that case was heard on June 29, 1987.

¹ The district court specifically made reference to subsection (1)(b) of the 1983 statute. There have been no substantive changes in this section of the long-arm statute since 1981 and the 1985 statute contains the same language addressed by the conflicting decisions.

Petitioner agrees in her brief that State, Department of Health and Rehabilitative Services, Office of Child Support Enforcement ex. rel. Luke v. Wright, 489 So.2d 1148 (Fla. 2d DCA 1986), rev. granted, (Fla. Case No. 69,050 December 8, 1986), will control the jurisdictional outcome of this case. If Luke is affirmed, there will be no jurisdiction to hear this case. Mr. Howenstine submits that it would be a duplication of effort and a waste of judicial time to proceed with this matter while a case is already before the Court on the same question. Thus, the Respondent requests that this matter be abated pending a final decision in Case No. 69,050.

CONCLUSION

For the foregoing reasons, this case should be abated pending a final decision in Case No. 69,050.

Respectfully submitted,

YOUNG, STERN & TANNENBAUM, P.A.
Attorneys for Respondent
17071 West Dixie Highway
North Miami Beach, Florida 33160
Telephone Number: (305) 945-1851

By  _____
GLEN RAFKIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of August, 1987 to: BRIAN R. HERSH, ESQ., Law Offices of Brian R. Hersh, Attorneys for Petitioner, Suite 602, Biscayne Building, 19 West Flagler Street, Miami, Florida 33130.

By 
GLEN RAFKIN