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IN THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA  
THIRD DISTRICT  
CASE NO. 87-259

DADE COUNTY CIRCUIT COURT  
CASE NO. 86-33473 FC (09)

FILED  
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JUL 20 1987

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MELYANA KLUKEWICH,  
Appellant,  
vs.  
JOHN B. HOWENSTINE,  
Appellee.

On Appeal from the Eleventh Judicial Circuit  
of Florida, in and for Dade County, Florida

MELYANA KLUKEWICH'S REPLY BRIEF

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THE ASSERTION OF IN PERSONAM JURISDICTION OVER A NONRESIDENT PUTATIVE FATHER IS FORESEEABLE AND DOES NOT OFFEND THE CONSTITUTIONAL DUE PROCESS GUARANTEES FOUND IN THE STATE AND FEDERAL CONSTITUTIONS WHERE THE NONRESIDENT PUTATIVE FATHER'S CONTACT WITH THE FORUM STATE IS BASED UPON CONSENSUAL SEXUAL INTERCOURSE WITH AN ADULT.

In his brief, Appellee argues that the Supreme Court's holding in Burger King Corp. v. Rudzewicz, 471 US 462 (1985) would prevent a State Court from exercising in personam jurisdiction pursuant to 48.193(1)(b), Fla. Stat. (1985). Appellee contends that the "act of consensual sexual intercourse with an adult is not a sufficient contact, tie or relation with the State so as to enable the constitutional exercise of jurisdiction over a putative father to adjudicate paternity and child support claims" (Appellee Brief at 12).

Appellant agrees that neither Bell v. Tuffnell, 418 So.2d. 422 (Fla. 1st Dist. 1982), rev. denied, 427 So.2d 736 (1983), nor State of Florida, Department of Health and Rehabilitative Services, Office of Child Support Enforcement ex rel. Luke v. Wright, 489 So.2d 1148 (Fla. 2nd Dist. 1985), rev. pending (Fla. Case No. 69.050)<sup>1</sup> expressly addressed the constitutionality of 48.193(1)(b) as it applies to a nonresident putative father whose contact with the State is through consensual sexual intercourse with an adult in the State of Florida. However, Appellant contends that it is reasonably foreseeable that a

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<sup>1</sup>The Florida Supreme Court has granted oral argument in the Luke case which will be heard on June 29, 1987.

single act of consensual sexual intercourse could result in the illegitimate birth of a child, which creates a duty on the part of the nonresident putative father to support the illegitimate child. Moreover, it is reasonably foreseeable that the nonresident putative father could be haled into the court of the state in which the act occurred pursuant to the State's long arm statute to litigate the issue of the nonresident putative father's duty to support the illegitimate child when the father has indeed failed to support the child. International Shoe Co. v. Washington, 326 U.S. 310 (1945), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), Burger King Corp. v. Rudzewicz, 471 U.S. 462.

In Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), the Supreme Court held that the exercise of in personam jurisdiction over the franchisee, pursuant to 48.193(1)(g), did not violate the due process clause of the Fourteenth Amendment because the franchisee established a substantial and continuing relationship with the plaintiff's headquarters in the forum state and received fair notice from the contract documents and the course of dealing that he might be subject to suit in the forum state and failed to demonstrate how jurisdiction in that forum would be fundamentally unfair.

According to Appellee, under Burger King Corp., an isolated contact such as the one of consensual sexual intercourse in the state which allegedly results in the birth of a child is an insufficient contact (Appellee's Brief at 14). In the case cited by Appellee, the courts held that they had in personam jurisdiction because the nonresident putative father had sexual

intercourse with the child's mother in their respective states. The creation of the illegitimate child created a duty to support the child under the respective state paternity statutes. Moreover, the nonresident putative father committed a tortious act by failing to provide for his child's continuing support and therefore he was subject to the respective states' long arm statutes. See In Re Custody of Miller, 548 P.2d 542 (Wash. 1976); Gentry.v. Davis, 512 S.W.2d 4 (Tenn. 1974); State ex rel. Nelson v. Nelson, 216 N.W.2d 140 (Minn. 1974); Black v. Rasile, 318 N.W.2d 475 (Mich. App. 1980); Neill v. Ridner, 286 N.E.2d 427 (Ind. App. 1972).

Appellant submits that even under Burger King Corp. analyses, the courts in the previously cited cases would still find that they had in personam jurisdiction over the nonresident putative father. The Court could find that the nonresident putative father's contact was sufficient where he engages in consensual sexual intercourse with a resident of the forum state in the forum state. The birth of a child which resulted from the father's action created a duty to support the child. The father's failure to provide continuing support for the child is a sufficient minimum contact to exercise in personam jurisdiction over the nonresident putative father.

International Shoe Co. v. Washington, 326 U.S. 310 (1945).

In conclusion, whereas pregnancy is the natural and probable consequence of an act of sexual intercourse, it is reasonably foreseeable that a nonresident putative father would find himself haled into the courts of the state in which the act was committed when he fails to provide for the continuing support of the illegitimate child. Moreover, the court's

exercise of in personam jurisdiction over the nonresident putative father, pursuant to the state's long arm statute, does not offend traditional notions of fair play and substantial justice as required by the due process clause of the Fourteenth Amendment to the Constitution. International Shoe Co. v. Washington, 326 U.S. 310 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 15th day of April 1987, to GLEN RAFKIN, ESQ., Young, Stern & Tannebaum, P.A., 17071 West Dixie Highway, North Miami Beach, Florida 33160.

By BRIAN R. HERSH, Esq.

