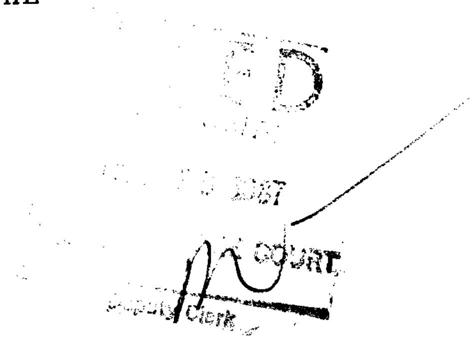
IN THE SUPREME COURT OF THE

STATE OF FLORIDA



LAMAR TARVER, Deceased
Employee, MAHALA TARVER,
a/k/a MAHALA BAKER and
VONTAROUS McCLENDON,

Appellants, CASE NO.: 71,273

v.

EVERGREEN SOD FARMS, INC.
and INSURANCE COMPANY OF
NORTH AMERICA,

Appellees.

________________________________/

BRIEF OF APPELLANTS

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## INTRODUCTION

Appellants, MAHALA TARVER and VONTAROUS McCLENDON, were the claimants in the workers' compensation proceeding which resulted in an award of dependency death benefits to VONTAROUS McCLENDON as a grandson of the deceased employee, LAMAR TARVER, after the application of the doctrine of "virtual adoption".

The Appellees, EVERGREEN SOD FARMS, INC., and INSURANCE COMPANY OF NORTH AMERICA, were the Employer/Carrier in the workers' compensation proceeding.

The symbol "T" will be used when referring to the transcript of the record on appeal.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

This is a case filed by the Appellant/Claimant, MAHALA TARVER (BAKER), for dependency death benefits for herself and her minor child, VONTAROUS McCLENDON. The claim resulted from the death of LAMAR TARVER.

The Deputy Commissioner denied the request on the behalf of MAHALA TARVER (BAKER), holding that she was the daughter of the deceased but not incapacitated at the time of his death and over the age of 18 years. The Deputy Commissioner granted the death benefits to VONTAROUS McCLENDON as the grandchild of LAMAR TARVER.

The only issue on appeal to the District Court of Appeals, First District, was whether the finding by the Deputy Commissioner that VONTAROUS McCLENDON was the grandson of LAMAR TARVER was in error.

MAHALA TARVER (BAKER), born February 1, 1962, lived with Mr. & Mrs. LAMAR TARVER for all of her life (T10, Line 19); her mother was Alice Tarver (T9, Line 12), who died in 1972; her father was LAMAR TARVER (T9, Line 16) who she lived with until his death on January 26, 1984 (T11, Line 8); and her son VONTAROUS G. McCLENDON was born on December 27, 1979 (T10, Line 6) who lived with LAMAR TARVER from birth until Mr. Tarver's death (T12, Line 7).

LAMAR TARVER provided the full support for MAHALA TARVER (BAKER) and VONTAROUS G. McCLENDON until his death on January 26, 1984, (T12, Line 1 to T13, Line 16).

On January 26, 1984 LAMAR TARVER was killed when the tractor he operated pinned him when it flipped over while he was working for EVERGREEN SOD FARMS, INC.

The Claimant filed a claim for death benefits for herself and her child on February 13, 1984 (T31). The Deputy Commissioner in his order denied the claim of MAHALA TARVER (BAKER) but found for VONTAROUS McCLENDON under the doctrine of "virtual adoption" (T108 - 117).

The Employer/Carrier then appealed the order. The District Court of Appeals, First District, reversed the Deputy Commissioner and ruled that:

> "virtual adoption does not create the legal relationship of parent and child within the meaning of "legal adoption as required in the workers' compensation statute;

but certified as a question of great public importance the following question to the Supreme Court:

> "May the Doctrine of "Virtual Adoption" be applied in a workers' compensation proceeding to support an award of death benefits where the defendant child's mother has not been formally adopted by Court Order under Chapter 63, Florida Statutes?"

The Claimants appealled the District Court's ruling based on the certified question.

## ISSUE ON APPEAL

MAY THE DOCTRINE OF "VIRTUAL ADOPTION" BE APPLIED IN A WORKERS' COMPENSATION PROCEEDING TO SUPPORT AN AWARD OF DEATH BENEFITS WHERE THE DEFENDANT CHILD'S MOTHER HAS NOT BEEN FORMALLY ADOPTED BY COURT ORDER UNDER CHAPTER 63, FLORIDA STATUTES?

## ARGUMENT

"MAY THE DOCTRINE OF "VIRTUAL ADOPTION" BE APPLIED IN A WORKERS' COMPENSATION PROCEEDING TO SUPPORT AN AWARD OF DEATH BENEFITS WHERE THE DEFENDANT CHILD'S MOTHER HAS NOT BEEN FORMALLY ADOPTED BY COURT ORDER UNDER CHAPTER 63, FLORIDA STATUTES?"

This case concerns the rarely addressed concept known as Virtual Adoption" and its application under Chapter 440 Florida Statutes. In reading a determination that the Claimant is entitled to the concept of "virtual adoption" then legally the child has been deemed legally adopted. Regardless of the Employer/Carrier's argument, the grandchild, who has been determined to be a grandchild has been so determined because of a finding by a Probate Court that his mother was the daughter and sole heir of the deceased employee, LAMAR TARVER (T035).

Virtual adoption is defined as a status arising from and created by contrast where one takes and agrees to legally adopt the child of another but fails to do so; Adoption of Persons, 2C.J.S. 449.

Generally, under a mere executory agreement to adopt, the child does not become an heir of the parties agreeing to adopt it, that is, the agreement is ineffective to give the child the status of an heir under the laws of inheritance. Under an agreement to adopt which also confers property rights, whatever rights are attained arise under the agreement and not by virtue

of inheritance statutes, and the interest in the estate of a decedent claimed by one who relies on an agreement to adopt made by decedent, rather than upon a decree of adoption regularly made is determined by the terms of the agreement to adopt, interpreted by equitable principles when necessary; 2 Corpus Juris Secundum quoted page 449 and 450.

The equitable policy also operates where parties voluntarily take a child into their home, and assume the status of parents; thereby obtaining child's companionship and services; said parties would be estopped to assert lack of statutory adoption; Taylor vs. Coberly, 38 SW. 2nd 1055 (Supreme Court of Missouri, 1931).

The U.S. Court of appeals, Fifth Circuit, even found in the case of Habecker vs. Young, 474 F2d 1229 (1973), that under Florida law the fact that the natural father and foster parents never used the word "adopt" in their agreement, the lack of the use of the word "adopt" was not fatal to the imposition of the equitable doctrine of "virtual adoption".

Under the principle that equity will consider that done which ought to have been done, the authorities very generally establish the proposition that a contract by a person to adopt the child of another as his own, accompanied by a virtual, although not a statutory, adoption, and acted upon by both parties during the obligor's life, may be enforced, upon the death of the obligor, by adjudging the child entitled to a

natural child's share in the property of the obligor who dies without disposing of his property by will, particularly where the agreement confers upon the child the rights to inherit as a natural child. Under such circumstances the child takes a child's share of the estate as fixed by the statutes of descent and distribution; 2 C.J.S. 451.

The Probate Court correctly found MAHALA TARVER BAKER to be the child of LAMAR TARVER by virtual adoption as accepted and indicated in the District Court's opinion.

A judgment or decree of finding in a prior action operates as an estopped as to matters or points in issue on the determination of which the earlier finding, verdict or decree was rendered, even in cases where the judgment would not be capable of being pleaded as res judicata, McEwen vs. Growers' Loan and Guaranty Co., 91 So2d 640 (1956).

In the instant case the Probate Court having determined that MAHALA TARVER was a child of LAMAR TARVER by virtual adoption (T-035), a finding and decree which became final and was not challenged by the heirs of LAMAR TARVER, then the Deputy Commissioner, The District Court of Appeals, as well as this Court is bound by said finding and decree.

Whether a grandchild is entitled to death benefits is determined by Sections 440.02(5) and 440.16(2), Florida Statutes.

Section 440.02(5), Florida Statutes provides:

"CHILD" includes a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him.

"GRANDCHILD" means a child as above defined.

"Child, grandchild......include only persons who at the time of the death of the deceased employees are under the age 18 years of age or under 22 years of age if a full-time student in an accredited educational institution."

Section 440.16(2), Florida Statutes provides that

"The dependence of a child, except a child physically or mentally incapacitated from earning a livelihood, shall terminate with the attainment of 18 years of age, with the attainment of 22 years of age if a full-time student in an accredited educational institution or upon marriage."

A child of a deceased employee who is dependent due to physical or mental incapacity at the time of the employee's death may be entitled to dependency benefits even though said child is over the age of 22 at the time of employee's death, Florida Medical Center vs. Grassi, 481 So2nd 505, 1st DCA (1985).

The concept of "virtual adoption" is when someone gives his or her natural child to another with an agreement that the other will adopt the child then the child will be deemed to have an enforceable contractual right; Sheffield vs. Barry, 14 So2d 417 (1943); Roberts vs. Caughell, 65 So2d 547 (1953); Laney vs. Roberts, 409 So2d 201 (1982); Habecker vs. Young, 474 F2d 1229 (1973); and Matter of Heirs of Hodge, 470 So2d 740.

If Sections 440.02(5) and 440.16(2) are read in pari materia it is apparent that there is no greater duty to support a child or grandchild (natural or adopted) when said child or grandchild is dependent upon the deceased employee for support. The concept of virtual adoption once regognized becomes a legal concept as it relates to the virtual adoptee's offspring.

The concept of "virtual adoption" is a legal concept that provides for the determination that one is deemed by law to have been adopted. In the instant case the Probate Court by order of determination of heirs ruled that MAHALA TARVER (BAKER) was the daughter of the deceased employee, LAMAR TARVER (T035). The deceased employee named MAHALA TARVER (BAKER) as his daughter in his tax returns, insurance applications and policies (T036 to 075). The child of MAHALA TARVER (BAKER) was VONTAROUS McCLENDON, and said child was named as a dependent by the deceased employee in income tax records (T036 to 039).

There is no question that VONTAROUS McCLENDON was dependent upon LAMAR TARVER for support since all of the testimony of the Claimant went unrefuted. The issue is whether VONTAROUS is a "grandchild" of LAMAR TARVER.

Master McCLENDON'S mother being the daughter of LAMAR TARVER by virtual adoption would be the legal grandchild of LAMAR TARVER and entitled to the benefits under Chapter 440, Florida Statutes for death benefits.

In reaching this determination the Deputy Commissioner has not stretched the meaning of the statute. By law " common law marriages" were not recognized if the relationship started after January 1, 1968, but the equitable doctrine of "common law marriage" was incorporated into the meaning of "spouse" under Chapter 440. "Virtual adoption" is a similar doctrine that the court must support in light of the intent of the legislature.

The courts have construed the statutory language to provide benefits in cases that were not covered by the literal reading of the statutes. The following represents deviations from the strict interpretation of the law:

A. In the case of Floriland Farms Inc. vs. Peterman, 131 So2d 477 it was the finding that a stepmother was a dependent, so as to be entitled to compensation under Chapter 440 Florida Statutes.

B. In the case of Navarro vs. Navarro, 54 So2d 59, it was held that a common law wife was entitled to dependent death benefits under Chapter 440 Florida Statutes.

C. In the case of C.F. Wheeler Co. vs. Pullins, 11 So2d 303 it was the ruling of the court that a posthumous illegitimate child was entitled to benefits not withstanding the statutory language that required that the relationship of the deceased employee and illegitimate child must have existed at the time of accident except in the case of after-born children of the marriage existing at such time.

D. The validity of a common law marriage is recognized in the State of Florida. McClish vs. Rankin, 14 So2d 714 (1943); Thompson vs. Harris, 4 So2d 385; Edge vs. Rynearson, 145 So 1980; LeBlanc vs. Yawn, 126 So 789; and Daniel vs. Sams, 17 Fla 487. By statutory prohibition the State of Florida made void all common law marriages that were entered into after January 1, 1968, Florida Statutes 741.211, Chapter 440.

Therefore, it would appear from the history of the courts applications and interpretations of Chapter 440 and the doctrine of common law marriages that there is ample room to support the application and interpretation by the Deputy Commissioner that a child of a mother who has been deemed adopted under the concept of "virtual adoption" by the deceased employee is a grandchild of the deceased employee and entitled to death benefits under Chapter 440 Florida Statutes.

It is interesting that similar arguments were made in the case of Floriland Farms, Inc. vs. Peterman, 131 So2d 477 (1961), that the Courts must construe the literal reading of the workers' compensation statute to determine the meaning of a dependent. In the Peterman case the Court determined that a "stepmother" was a dependent and entitled to death benefits. This was true despite the fact that a strict reading of the statutes would have excluded the stepmother. This Court stated that workers' compensation cases must be determined by the facts of the particular case and the Supreme Court added as follows:

"Here we have the case," said the Court, "of a closely knit family of responsible citizens, all of whom were sensitive to family unity and the family ties." The Court continued:

"The deceased voluntarily contributed his weekly pay envelope to the family budget which was handled and distributed by the stepmother who looked after the family, kept the children together and gave them every attention that could be contributed by a mother as she knew it. She qualified under the term `good mother' and the deceased was a dutiful son. He was industrious and a boy of good moral fiber. The father was of the same type of citizen.

"Account of these and other like considerations, the Deputy Commissioner treated the family as a unit and permitted the contribution of deceased to be added to the earnings of the father in order that the standard of living be maintained as was its custom. The Deputy Commissioner had a right to do this and we think the circumstances warranted his doing so in this case. We do not think the cases relied on by petitioners to rebut this course and quoted herein are in point or in any other way succeed in their objective. By the evidence and circumstances this was a rare case and we can find no criticism of the manner in which it was conducted."

For the foregoing reasons, the certified question should be answered in the affirmative. The Appellants and the deceased employee resided together as a family unit (T-9 Line 7 to Line 15 Page 12); the deceased referred to MAHALA TARVER (BAKER) as his daughter (T-051), (T-065) and (T-037); made arrangements for insurance benefits to be left to her after his death (T-051) and (T-065); and claim her and her child as dependents on his income tax returns (T-037).

## CONCLUSION

For the above-cited reasons the Appellants respectfully submit that the certified question should be answered in the affirmative and opinion of the First District Court reversed accordingly.

Respectfully submitted,

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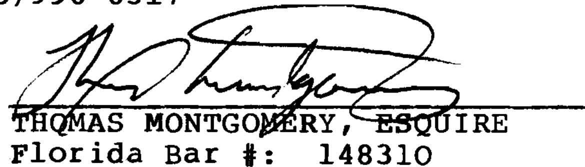

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