IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,471

LAUREL D. SCHUTZ,

Petitioner,

vs.

RICHARD R. SCHUTZ,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

In the District Court of Appeal, Third District, the Petitioner, LAUREL D. SCHUTZ, was the Appellant and the Respondent, RICHARD R. SCHUTZ, was the Appellee.

In this brief, the Petitioner shall be referred to as "the Wife" and the Respondent shall be referred to as "the Husband" and the symbol "App" shall be utilized to refer to the Appendix. All emphasis is supplied unless otherwise noted.

SUMMARY OF ARGUMENT

The Petitioner/Wife, respectfully submits that this Court should exercise its discretionary jurisdiction to review this case both because the opinion of the District Court expressly construes a provision of the Constitution of the United States and because the District Court's opinion directly conflicts with this Court's decision in Coca-Cola Company, Food Division, Polk County v. State, 406 So.2d 1079 (Fla. 1982).

In its decision herein, the District Court opined that a trial court may compel a parent to express opinions and make statements about the other parent even where such opinions are not held by the parent to whom the order is directed. The District Court expressly found no First Amendment impediment to such an order.

The Petitioner submits that, in view of the foregoing, this Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure, but, in addition, the Petitioner believes that the District Court's opinion expressly and directly conflicts with the decision of this Court in Coca-Cola, supra., in which this Court held:

> **[T]he state may never force one to adopt or express a particular opinion (Id. at 1087).**

Such conflict gives rise to this Court's jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

The events leading up to the decision sought to be reviewed herein commenced in 1985 with a series of post-dissolution of marriage motions filed on behalf of both the Husband and Wife. The Husband sought to have the Wife held in contempt of court, sought a modification of child custody and sought to have his liability for past-due child support payments determined by the court. The Wife sought to have the Husband held in contempt of court for his failure to pay of child support over a period of many years and sought a modification of visitation.

At issue in all of these motions was the subject of visitation between the Husband and the children. The Husband had not visited with the children for many years and, at the time of the hearing before the trial court, the children expressed great hostility towards him. In essence, then, the underlying issues were whether the Wife was at fault for the fact that the Husband had not visited with the children and, if so, was that fault sufficient to permit a discharge of the child support owed and unpaid or, was it the Husband who failed to visit with his children, failed to pay child support and contributed to his children's dislike of him by his own actions?

The trial court found that the children's hostility toward the Husband was the result of the Wife's actions. Based upon this finding of fact, the trial court held that there were no legally existing child support arrearages. The trial court also held as follows:

> It shall be the obligation of the Mother [Wife] to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the Father [Husband]. It shall be the Mother's obligation to convince the children that it is the Mother's desire that they see their Father and love their Father. Breach of this paragraph either in words, actions, demeanor, implication or otherwise, will call for the severest penalities this Court can impose, including Contempt, Imprisonment, Loss of residential custody or any combination thereof. (App. 19-20)

The Wife appealed from this judgment to the District Court of Appeal, Third District, which affirmed the trial court's order in a two-to-one decision rendered February 9, 1988. Rehearing was denied on April 25, 1988.

The majority opinion held that the First Amendment of the United States Constitution did not prohibit the type of order issued herein because "the mere fact that speech or associational activities are involved does not render words or conduct inviolate from governmental control in the name of the first amendment". The majority concluded:

> If it is wrong falsely to shout fire in a crowded theater . . . it is just as wrong for the [Wife] to refuse affirmatively to encourage the relationship between these children and this parent. (App. 12)

The dissent disagreed, finding the trial court's order violative of the Wife's First Amendment rights of freedom of speech and expression:

> By this order, the trial judge had sought to compel the Wife to lessen the hostility she instilled in the children toward their father. The order, however, produces an impermissible result in that it compels the Wife to exceed the legal duty to encourage visitation which she, as a custodial parent, owes the non-custodial parent. The language in the order

> requires the wife to express opinions she does not hold. This is an infringement on the wife's first amendment rights of freedom of speech and expression. (App. 14)

Notice of the invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal, Third District, was filed on May 20, 1988.

ARGUMENT

I.

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY CONSTRUES A PROVISION OF THE CONSTITUTION OF THE UNITED STATES

The Wife herein, in her appeal to the District Court of Appeal, Third District, contended that the trial court's order constituted a "denial of [her] first amendment rights of freedom of speech and expression". She further argued that the order itself was "overbroad, vague, arbitrary, inflexible and impossible of enforcement".

The District Court addressed these issues by construing the First Amendment as allowing the entry of an order compelling the expression of certain opinions where the "best interest" of children might require that they hear such opinions:

> The only properly considered issue in this case concerns the best interests of the children. Our knowledge of the parent-child relationship reveals, and therefore our law says, that children are entitled to a warm and loving affinity with both their parents. Because of this fact, a custodian such as the [Wife] has an "affirmative obligation" to encourage and nurture the relationship between the children and the non-custodial parent.
>
> * * *
>
> The order in question - particularly that aspect to which the [Wife] most objects - the requirement that she attempt to raise her daughters' opinion of their father to one she herself does not hold - is in entire accordance with these principles and is therefore plainly substantively correct.
>
> Nor, it should be unnecessary to say, is the [Wife] "protected" by the first amendment from a requirement that she fulfill her legal obligation to undo the harm she had already caused and to vindicate the

> interests with which she should be most concerned - those of her daughters rather than her own personal ones. It is axiomatic that the mere fact that speech or associational activities are involved does not render words or conduct inviolate from governmental control in the name of the first amendment. Such rights are not "subject to analysis in terms of absolute[;] . . . all basic rights of free speech are subject to reasonable regulation".
>
> * * *
>
> As one might expect, since the welfare of children is the concern which the law places perhaps the greatest emphasis of all, this principle has been widely applied to bar reliance upon the first amendment by a parent whose otherwise protectable conduct runs counter to the best interest of his or her child. (App. 9-12)

In brief, the District Court's opinion herein holds that the First Amendment permits the state to order an individual to express opinions which he or she may not hold if the state deems that the individual's so doing will be in the "best interest" of a child. Although the Wife strongly opposes such an interpretation of the First Amendment, it is nevertheless clear that the District Court did expressly construe this provision of the Constitution and, therefore, this Court has jurisdiction to review this case.[1]

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[1]By her disagreement with the District Court's interpretation of the First Amendment the Wife does not intend to demean in any way the importance of protecting the "best interest" of children. It is a fact, however, that a good many of the wrongs in the world are perpetrated under lofty banners and in the name of noble purposes.

ARGUMENT

II.

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN COCA-COLA COMPANY, FOOD DIVISION, POLK COUNTY V. STATE, 406 So.2d 1079 (Fla. 1982).

In Coca-Cola Company, Food Division, Polk County v. State, 406 So.2d 1079 (Fla. 1982), the Coca-Cola Company contended that a requirement that certain citrus products bear a specific label violated their First Amendment rights. The Coca-Cola Company contended that, "the state may not tell anyone what to say or think". This Court, although finding that the labeling rule in question did not violate free speech, did agree that:

> [T]he state may never force one to adopt or express a particular opinion. (Id. at 1087, emphasis supplied).

In so finding, this Court relied upon the decision of the Supreme Court of the United States in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943), and quoted the following language:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. (Id. at 1087)

In the instant case, the District Court of Appeal affirmed a judgment of the trial court which, contrary to the admonition in Coca-Cola, requires the Wife to "express a particular opinion".

The Wife must, on pain of "contempt, imprisonment, loss of residential custody or any combination thereof", do "everything in her power" to "convince" the children of certain things whether she believes them to be true or not.

The majority opinion of the District Court of Appeal affirmed this order upon the basis of a series of cases holding that derogatory speech may be prohibited where the welfare of children is involved. This case, however, did not and does not concern an order that certain things not be said but, rather, concerns an order requiring that certain things must be said and certain opinions must be expressed. The Wife is not being enjoined from disparaging someone; she is being mandated to speak well of someone. This is a crucial distinction noted by the dissent herein:

> I believe the quoted language in the portion of the opinion in question has the effect of prescribing what opinion the wife must hold and express with regard to her former husband. This language infringes on the wife's freedom of speech and expression as guaranteed by the First Amendment... (App. 14)

There is not a single authority within the state of Florida which permits the judiciary to instruct the citizenry of this state as to what they must say in particular circumstances. The only authority on this subject is this Court's opinion in Coca-Cola which holds that the state may "never force one to adopt or express a particular opinion." As such, the decision herein expressly and directly conflicts with the Coca-Cola decision and

this Court should exercise its discretionary jurisdiction to review the District Court's Opinion.

CONCLUSION

Upon the foregoing argument and authority, the Petitioner requests that this Court grant discretionary review in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Brief on Jurisdiction was mailed to Andrew Leinoff, Esquire at Marks, Aronovitz & Leinoff, 9200 South Dadeland Blvd., Suite 100, Miami, Florida 33156 this 31st day of May, 1988.

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